EUROPEAN UNION TRAINING MISSIONS AND THE LAW OF INTERNATIONAL RESPONSIBILITY

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INTRODUCTION

Proxy war undermines international peace and security.[1] It typically increases the duration of armed conflict within states.[2] Its prosecution affects the nature of such conflict; crimes against humanity and other civilian harm are more probable.[3] Despite known risks,[4] proxy

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1 Brittany Benowitz & Tommy Ross, *Time to Get a Handle on America's Conduct of Proxy Warfare*, LAWFARE (Apr. 9, 2020, 11:21 AM), https://www.lawfareblog.com/time-get-handle-americas-conduct-proxy-warfare [https://perma.cc/W2BR-WF7C].

2 *Id.*

3 *See generally* JEREMY M. WEINSTEIN, INSIDE REBELLION: THE POLITICS OF INSURGENT VIOLENCE (2006) (setting forth a theory for rebel factions' different strategies in civil war). *See also* Benowitz & Ross, *supra* note 1 ("Armed groups with access to external resources . . . are less likely to need the support of local populations and may therefore be more likely to engage in atrocities.").

4 Empirical observations indicate that "negatives of proxy warfare occur with far greater frequency than the frequency with which state sponsors achieve their desired objectives." Benowitz & Ross, *supra* note 1. For a telling case study, see Mark Mazzetti, *C.I.A. Study of Covert Aid Fueled Skepticism About Helping Syrian Rebels*, N.Y. TIMES (Oct. 14, 2014), https://www.nytimes.com/2014/10/15/us/politics/cia-study-says-arming-rebels-seldom-

war is a part of the makeup of world politics, and the "obsolescence of major war" contributes to its invariance.[5]

A decline in the practice of territorial annexation and other forms of military aggression in international relations has led some theorists to suggest that a consensus against the threat or use of force has emerged, which profoundly constrains and reconfigures states' choices in political and military spheres of interaction.[6] Others believe that the realness of

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works.html [https://perma.cc/82P4-D6R8] (detailing how an intelligence report shaped President Barack Obama's reservations about a proxy operation). A perception of cost savings for sponsors usually accompanies policy positions favorable of proxy conflict in spite of the robust evidence that "proxies almost invariably act according to their own interests and impulses." *See* Daniel L. Byman, *Why engage in proxy war? A state's perspective*, BROOKINGS (May 21, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/ [https://perma.cc/8UR2-RG2A]. *See also* Assaf Moghadam & Michel Wyss, *Five Myths about Sponsor-Proxy Relationships*, LAWFARE (Dec. 16, 2018), https://www.lawfareblog.com/five-myths-about-sponsor-proxy-relationships [https://perma.cc/9LGP-PWZT] ("[H]ard power does not automatically translate into full control over proxies on the ground. . . . Cuba, for example, managed to persuade its Soviet sponsors to support its military adventures in Africa and manipulated Moscow into direct involvement in Angola. . . . [P]roxy relationships are not one-way streets. They are bidirectional arrangements of collaboration in which both sides have preferences and interests that they seek to advance."). Ultimately, "whatever their short-term benefits, proxies that disregard the rule of law will never bring long-term stability to the countries in which they operate." Benowitz & Ross, *supra* note 1. This inference holds true especially for self-governing and recalcitrant proxies that disclose a propensity for capriciousness. *Id.*

[5] *See* JOHN MUELLER, RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR 218–19 (Basic Books ed., 1989). Put simply, major wars are defined as "protracted struggles among the leading powers of the international system that tend to have significant geopolitical consequences." Karina Sangha, *The Obsolescence of Major War: An Examination of Contemporary War Trends*, 5 ON POL. 26, 26 (2011). In paradigmatic circles that embrace postulates of realism in the discipline of International Relations, major war is described in quasi-ahistorical terms and sometimes theorized as being "inevitable, albeit infrequent." *Id.* The modern idea of major war is perhaps most vividly expressed in the seminal writings of the late Robert Gilpin, particularly Gilpin's Hegemonic War Theory, a tour de force in classical Thucydidean thinking repurposed in structural realist leanings. *See generally* Robert Gilpin, *The Theory of Hegemonic War*, 18 J. INTERDISC. HIST. 591 (1988); ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS (Cambridge Univ. Press 1981) (establishing a framework in which to think about systemic war and international change). For insights on the legacy of Gilpin's analytical achievements in the study of international politics, see also JONATHAN KIRSHNER, *Gilpin approaches* War and Change*: a classical realist in structural drag*, *in* POWER, ORDER, AND CHANGE IN WORLD POLITICS, 131–61 (G. Ikenberry ed., 2014) (arguing that *War and Change* is "characterized by a discord between the structural apparatus of its theory and the classical instincts of its theorist").

[6] Dutifully crystallized in the Charter of the United Nations, the prohibition on the threat or use of force against a state and the norm of nonintervention in a state's internal politics are the starting point for *jus ad bellum* questions as a matter of customary international law. U.N. Charter art. 2 ¶ 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . ."); the meaning of Article 2(4) is notoriously replete with instability, *see, e.g.*, Patrick M. Butchard, *Back to San*

socially constructed facts (and the process-based optimism that tracks it)[7] cannot displace the fundamentality of egoism and boundless competition

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Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter, 23 J. CONFLICT & SEC. L. 229, 229 (2018); U.N. Charter art. 2 ¶ 7 (Generally, the United Nations is not authorized to "intervene in matters which are essentially within the domestic jurisdiction of any state. . . ."). These principles reflect the effervescence of territorial inviolability, a tenet of immeasurable persuasion. *See, e.g.*, Christian Marxsen, *The Concept of Territorial Integrity in International Law–What Are the Implications for Crimea?*, 75 HEIDELBERG J. INT'L L. 7, 7–9 (2015) (portraying how, since "the concept of territorial integrity emerged as a general principle of international law during the course of the 19th century," it has achieved "incorporat[ion] into a large number of UN resolutions and multi- as well as bi-lateral treaties"); Michael Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 713 (1999) ("The UN encouraged the acceptance of the norm of *sovereignty-as-territorial-integrity* through resolutions, monitoring devices, [and] commissions [among other things]."). The foregoing principles' codification eliminates the traditional, pre-Charter exception to the norm of nonintervention, the permissibility of forcible intervention in conditions of intrastate "belligerency." *See* Eliav Lieblich, Intervention in Civil Wars: Intervention and Consent (2012) (submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the School of Law, Columbia University). This is so because such codification proscribes the threat or use of force against *states*, *see* U.N. Charter art. 2 ¶ 4, notwithstanding well-settled exceptions such as (i) "the inherent right of individual or collective self-defence," *see* U.N. Charter art. 51, satisfactorily triggered by the occurrence or imminence of an "armed attack," whatever an armed attack means; (ii) Security Council sanction of "measures . . . to maintain or restore international peace and security," *see* U.N. Charter arts. 39, 42 (permitting armed force and other acts in reaction to "any [ascertainable] threat to the peace, breach of the peace, or act of aggression"); and (iii) uncoerced state consent, *see* Alexandra Hofer, *International law regarding use of force*, OUP BLOG (Nov. 19, 2018), https://blog.oup.com/2018/11/international-law-regarding-use-force/ [https://perma.cc/W2SP-X2KP] ("States can . . . consent that another state use force in its territory, for example to combat rebel or terrorist actors."). For doctrinal reasoning implicating foundational principles of the *jus ad bellum* that synthesizes or illustrates the aforesaid concepts, see Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27). Beyond the seismic influence of the constraining, *preventive* forces of international law, *but see* Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT'L L. 57 (2013) (arguing that the orienting ideas and rhetoric of the "paradigm of prevention" betray deleterious tendencies), there are other causes for a decline in the practice of territorial annexation and related military aggression; indeed, there is a staggering profusion of political, moral and social theory hypotheses. For a study of the political and normative causes of decreasing territorial annexations in US foreign policy, which intimates the hefty value of domestic politics and leaders' decision-making modalities in elucidating international-political behavior, see RICHARD W. MAASS, THE PICKY EAGLE: HOW DEMOCRACY AND XENOPHOBIA LIMITED US TERRITORIAL EXPANSION 24 (2020). For a preliminary narrative on the evolution of international norms of collective security, see A.J. Bellamy, *Introduction: Security Communities and International Relations*, *in* SECURITY COMMUNITIES AND THEIR NEIGHBOURS (Palgrave Macmillan ed., 2004). For essential writing on why "collective security communities" matter, see KARL DEUTSCH, POLITICAL COMMUNITY AND THE NORTH ATLANTIC AREA: INTERNATIONAL ORGANIZATION IN THE LIGHT OF HISTORICAL EXPERIENCE 28 (1957). For a perspicuous discussion of the role of intersubjectivity in state interaction and its theoretic power in comprehending less war in the international states-system, see Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT'L RELS. 319, 327 (1997).

[7] This is an axiom in the constructivist perspective of world politics. "Anarchy is what states make of it" is the familiar indictment against a materialist orientation to the study of structure in a

in the anarchical domain that states inhabit; an institutionalized consensus against the threat or use of force is thus ephemeral and deeply unstable.[8] And some thinkers contest the weight of intersubjective meaning in the relations of states altogether and scoff at multivariate explanations that resemble anti-materialist worldviews that seek a more sophisticated account of complexity.[9]

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social system. *See* Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 391 (1992). Principally, it represents a challenge to the theoretical bases of so-called scientific realism, or neorealism. *Id.*; *see also* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (Cambridge Univ. Press ed., 2012) (systematically developing a cultural theory explaining state action).

[8] *See, e.g.*, Jonathan Mercer, *Anarchy and Identity*, 49 INT'L ORG. 229 (1995) (casting doubt on the sustainability of a future of restraint in great-power competition by making use of a multidisciplinary approach that presupposes the validity of the constructivist proposition that international anarchy as the framework of state action is not immutable). The novelty of Mercer's argument stems from its rebuttal of the process-based hopefulness that self-regarding states may yet transcend the birdcage of the Hobbesian self-help system. The rebuttal leverages empirical findings in the discipline of social psychology (particularly, knowledge-claims in Social Identity Theory), which suggest that self-categorization and intergroup competitive urges are not only perennial attributes of the social world but seemingly arbitrary, hardwired properties of the human psyche. Basic principles of neorealism, namely, the unchanging primacy of relative gains and fallibility of cooperative devices in the absence of world government, are in turn supported by Mercer's analytical approach, which concludes that, "[human] nature trumps process." *Id.* at 236.

[9] For example, such minimalism is on towering display in political scientist John J. Mearsheimer's "offensive realism," distinguished by over-deterministic parsimony in its behavioral predictions of states (theorized as power-maximizing rational actors seeking domination) and a disregard of ideational and other considerations integral to a more balanced or multifactorial perspective of world politics. *See generally* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001). *See also* Jonathan Kirshner, *The Tragedy of Offensive Realism: Classical Realism and the Rise of China*, 18 EUR. J. INT'L RELS. 53, 53 (2010) (arguing that Mearsheimer's account "is *a* realist perspective, [but] it is not *the* realist perspective," and that, despite Mearsheimer's critique of Waltz's perfect-competition-based, static-distribution-of-power theory on the grounds that it banishes strategic action from a theory of international politics by analytically relegating unit-level phenomena to a theory of domestic politics, Mearsheimer's structural realism woefully overlooks variability in domestic political forms and deflates the range of oligopolistic international-political competition, sputtering out a reductionist lens that is "dangerous" insofar as policy planners are swayed by its steadfast conclusions). In a sharp-witted defense of classical realism, Kirshner argues that Mearsheimer's view, like others in the neorealist and "neoclassical" schools of thought infused with structuralism and hyper-rationality, persistently discounts history, ideology, ills of psychology, diverse contents in "national interests" and foreign policies, and the universal effect of contingency and Knightian uncertainty in explaining international-political outcomes. *Id.* For the definitive work of neorealist underpinnings, see KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979). For an erudite criticism of the academic rule of Waltzian theory and subsequent literature in the neorealist perspective, see Jonathan Kirshner, *The Economic Sins of Modern IR Theory and the Classical Realist Alternative*, 67 WORLD POL. 155, 157–59 (2015). For an argument against the ultra-parsimonious leanings in Waltz's intellectual orientation following *Man, the State, and War*, see Barry Buzan & Richard Little, *Waltz and World History: The Paradox of Parsimony*, 23 INT'L RELS. 446, 446 (2009).

Whatever the cause of major war's disappearance and the waning of territorial aggrandizement, there is no manifestation of calmness in the world order.[10] States in the international-political arena increasingly embrace a proxy calculus for achieving military goals.[11] Indeed, nearly every global conflict has made use of proxy groups.[12] As a result, more armed factions have emerged between 2012 and 2018 than in the previous six decades.[13]

Proxy war is indirect war;[14] it essentially means a state or an international organization supporting non-state or state actors that

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For a short, but stellar defense of the orientation as well as an implicit counterargument to Mearsheimer's critique, see Kenneth N. Waltz, *International Politics Is Not Foreign Policy*, 6 SEC. STUD. 54, 54–57 (1996).

[10] *See* Benowitz & Ross, *supra* note 1; Sangha, *supra* note 5.

[11] Sangha, *supra* note 5, at 26 ("As major war has declined, non-traditional threats to security . . . gained a new lease on life, resulting in more uncontrolled and irregular forms of conflict. Moreover, the decline in direct conflict between the great powers does not imply that these countries have abandoned war altogether. Interventions . . . [and] proxy wars remain as viable options for great powers to pursue."). *See also* Andrew Mumford, *Proxy Warfare and the Future of Conflict*, 158 RUSI J. 40, 41 (2013) ("[T]he utilisation of proxy forces holds both an economic and political appeal to modern states. As the twenty-first century unfolds, the willingness of citizens to voluntarily join ever-shrinking national armies is declining, the cost of cutting-edge military technology is rising and, particularly in the wake of the protracted and costly wars in Iraq and Afghanistan, the appetite for repeated expeditionary counter-insurgency warfare . . . is diminished."). *See also* Andreas Krieg & Jean-Marc Rickli, *Surrogate Warfare: The Art of War in the 21st Century?*, 18 DEF. STUD. 113, 113 (2018) (averring that proxy conflict, as a "socio-political phenomenon," defines a "mode of war where technological and human surrogates enable the state [and the multilateral entity] to manage the risks of post-modern conflict remotely").

[12] *See* Pieter D. Wezeman, Aude Fleurant, Alexandra Kuimova, Nan Tian & Siemon T. Wezeman, *Trends in International Arms Transfers*, *2018*, SIPRI FACT SHEET (Mar. 2019), https://www.sipri.org/sites/default/files/2019-03/fs_1903_at_2018.pdf [https://perma.cc/BR27-C7C7].

[13] *Moving from outrage to action on civilian suffering*, INT'L COMM. OF THE RED CROSS (Sept. 26, 2018), https://www.icrc.org/en/document/moving-outrage-action-civilian-suffering [https://perma.cc/SX4W-GY23]. As suggested above, this matters because the furnishing of support to unpredictable proxy groups generally weakens the cause of peace. *See* Benowitz & Ross, *supra* note 1. *See also* Kenneth A. Schultz, *The Enforcement Problem in Coercive Bargaining: Interstate Conflict over Rebel Support in Civil Wars*, 64 INT'L ORG. 281, 281 (2010) (arguing that "[e]pisodes of rebel support [in particular] are associated with a substantial increase in the risk of interstate militarized disputes, the lethality of these disputes, and the likelihood of repeated violence").

[14] One simple description of proxy war is a "conflict[] in which a third party intervenes indirectly in order to influence the strategic outcome in favour of its preferred faction." Mumford, *supra* note 11, at 40. For more detailed writings on the aspects of proxy war, see Chris Loveman, *Assessing the Phenomenon of Proxy Intervention*, 2 CONFLICT, SEC. & DEV. 30 (Dec. 2002). Political scientist Karl Deutsch's definition is useful, despite its overemphasis on international rivalry between large states, downplay of non-state actors and their autonomous motives and proclivities, and inattentiveness toward states in international regional systems seeking hegemony or increased security by way of proxy war (great powers in the international-political

perform armed activities on behalf of the supporting state or international organization.[15] There is nothing inherently unlawful about war by proxy.[16] A supporting state or international organization is a "sponsor" of another actor's hostilities if the former intends that its support will be harnessed by the latter to further the sponsor's objectives in an armed conflict.[17] Actors that promote the military and political interests of the sponsor are "proxies."[18]

The international legal system, as it is presently constituted,[19] features various substantive bodies of law and corresponding

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system are instead the focus). Deutsch colorfully defined proxy war as "an international conflict between two foreign powers, fought out on the soil of a third country; disguised as a conflict over an internal issue of that country; and using some of that country's manpower, resources and territory as a means for achieving preponderantly foreign goals and foreign strategies." KARL W. DEUTSCH, *External Involvement in Internal War*, *in* INTERNAL WAR, PROBLEMS AND APPROACHES 100, 102 (Harry Eckstein ed., 1964). Mumford's objection to this characterization is that proxy conflicts "are not merely regional wars that seemingly mirror broader ideological struggles perpetrated by influential superpowers. Arguably this was not the case during the Cold War . . . and it is not an accurate reflection of the nature of proxy wars today." Mumford, *supra* note 11, at 40.

15 *See* Benowitz & Ross, *supra* note 1.

16 Of course, there are proxy relationships that are coterminous with the object of respecting the principles of international law; not all such relationships amount to black operations that are possibly illegal and illegal. *See, e.g.*, Moghadam & Wyss, *supra* note 4 ("For example, the U.S. Army's . . . Security Force Assistance Brigade (SFAB) core . . . aim is to enable local surrogates to deal with threats and challenges that the United States deems critical to its national security. . . . [T]his mode of proxy employment is not unique to the United States. Notably, China and multilateral actors such as the European Union . . . have in recent years emphasized the importance of security assistance and capacity building."). Therefore, "while the term 'proxy' often has a pejorative connotation aimed at denouncing illegitimate meddling by one's adversaries, some forms of military cooperation . . . are akin to defensive sponsor-proxy relationships." *Id.*

17 *See id. See also id.* at editor's note ("Minor powers, rebel groups, and other organizations often act as proxies for more powerful states or groups, which use them to fight (or commit) terrorism, counter rival regimes, or otherwise advance their interests.").

18 *See* Moghadam & Wyss, *supra* note 4.

19 International lawmaking is decentralized—a network of enforcement fora and monitoring infrastructure vivifies it. *See* DAVID WIPPMAN, JEFFREY DUNOFF, MONICA HAKIMI & STEVEN RATNER, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 27 (Wolters Kluwer L. & Bus. eds., 5th ed., 2006). "There is not a centralized legislature to enact the law, a centralized executive to apply or enforce it, or a centralized judiciary with general and compulsory jurisdiction to interpret it and adjudicate associated disputes under it." *Id.* at 31. Not surprisingly "[i]nternational law is created in highly decentralized processes, and at present, most international norms are made in specialized international legal regimes. . . . [E]ach of these regimes has its own treaties, other norms, and institutions, all designed to advance certain values and outcomes." *Id.* at 27. Moreover, states, international organizations, corporations, and others shape lawmaking in dissimilar and evolving ways. *Id.* For a succinct overview of participants in the international legal system, see *id.* at 87–90. Despite the preponderance of the sovereign state in world politics, a perceived, multifront challenge to the supremacy of states has led one

enforcement institutions that regulate proxy relationships.[20] The law of international responsibility, tethered to principles of agency law,[21] is one of the principal sources of authority.[22] In different ways, the law of international responsibility applies to states and international organizations, which are subjects of international law.[23] An international

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prominent commentator to believe in an "age of nonpolarity," by which there is "a world dominated not by one or two or several states but rather by dozens of actors possessing and exercising various kinds of power." *See* Richard N. Haass, *The Age of Nonpolarity: What will follow US Dominance?*, 87 FOREIGN AFFS. 44, 44 (2008). This is an unorthodox depiction of international-political structure, more specifically, the distribution of power (international anarchy, the base property of 'structure' in neorealist terms, is unchallenged by Haass). Separate and apart from perennial utterances on the ebb and flow of power in world politics, the very nature of international lawmaking can be an unflagging source of intellectual schizophrenia. In part due to the fact that there is no world government, international law has sometimes been viewed as not being genuine law. *See, e.g.*, JEREMY BENTHAM, OF LAWS IN GENERAL 16 (H.L.A. Hart ed., Athlone Press 1970) (1782) ("[A] treaty made by one sovereign with another is not itself a law," though it has "an intimate connection" with bona fide law.); HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 1, 52, 54–55 (1942) (averring that it is "possible to interpret" international law as being law, but perhaps only "primitive law," and that learned folks ought to "choose this interpretation" so as "to make of international law a workable order"). Relatedly, there has been a tendency to see international law as a vessel for utopian ends; writings of realist thinker, E.H. Carr may be a vestigial origin of mulish skepticism toward "elegant superstructures" in the international legal system. *See* E.H. CARR, THE TWENTY YEARS' CRISIS: 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 239 (Macmillan ed., 1946). Even so, despite his warning on unchecked moralism, Carr ends the pioneering realist analysis with a reminder of the necessity for moral rules in interstate relations and the need for statesmen to accommodate signs of dynamic shifts in the distribution of military capabilities. *Id.* at 169 ("[T]he responsibility for seeing that these changes take place as far as possible in an orderly way rests as much on the defenders as on the challengers."). The above beliefs about international law are odd because fragmentation of authority and the problem of enforcement in public law are constants in *both* domestic and international legal systems. As one scholar put it, "international law proves enforceable in the right circumstances, reasonably obligatory, and substantially objective. The stuff of law is in it." Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 FORDHAM L. REV. 2451, 2460–61 (2010).

[20] Principles of international responsibility, the Geneva Conventions, the Arms Trade Treaty, international human rights law, international humanitarian law, and customary international law form a constellation of guardrails that warps the protean character of proxy war-making. For a concise overview of safeguards and legal regimes, see *The Legal Framework Regulating Proxy Warfare*, AM. BAR ASS'N'S CTR. FOR HUM. RTS. & RULE OF L. INITIATIVE (Dec. 2019), https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf [https://perma.cc/J8HT-T2EW].

[21] *See, e.g.*, Rep. of the Int'l L. Comm'n, Text of the Draft Articles on the Responsibility of International Organizations art. 6, U.N. Doc. A/66/10 (2011) [hereinafter DARIO] (emphasis added) ("The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent *shall be considered an act of that organization* under international law, whatever position the organ or agent holds. . . .").

[22] AM. BAR ASS'N'S CTR. FOR HUM. RTS. & RULE OF L. INITIATIVE, *supra* note 20.

[23] *See* JAN KLABBERS, INTERNATIONAL LAW 67 (Cambridge Univ. Press 1st ed., 2013) ("The main subjects of international law are states, and for centuries states were held to be the only subjects

organization is a subject that may have legal personality, which means, *inter alia*, it can be held responsible for the breach of legal duties, in principle.[24] The law of international responsibility as applied to international organizations is the United Nations International Law Commission's ("ILC") 2011 Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts ("DARIO").[25] Designed to adjudicate whether an international organization is legally liable for agent conduct that breaches an international obligation of the international organization, DARIO is administered in cases that implicate the responsibility of international organizations.[26]

This Comment asks whether DARIO analyzes omissions of European Union ("EU") training advisors in connection with EU Training Missions that occur in precarious security environments. Its canvas is the Common Security and Defense Policy ("CSDP"), which is the EU policymaking scheme of collective defense, and military capacity-building undertaken in EU Training Missions, a class of military operations executed following CSDP governance processes.[27]

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of international law. . . . It is now generally recognized that entities such as intergovernmental organizations (the UN, the EU, the IMF or the WTO) are to be regarded as subjects of international law – and this was ultimately confirmed by the ICJ in the 1949 *Reparation* opinion, holding that the UN had to be considered as such. Yet, this was not always the case; early observers were at pains to come to terms with the status of the League of Nations, with some treating the League as an oddity similar to the Holy See.").

[24] *See* Chrysanthi Samara, *International Responsibility Of International Organizations (The Draft Articles of the International Law Commission)*, (May 20, 2017), https://ssrn.com/abstract=3480061 [https://perma.cc/H4H4-UXEF]. *See generally* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (Cambridge Univ. Press ed., 2009) (discussing the conception of international legal personality in the organizational space, among other theoretical questions and debates).

[25] *See* DARIO, *supra* note 21. *See* Samara*, supra* note 24 ("The contribution of the International Law Commission, a subsidiary organ of the General Assembly, in the process of codification and progressive development of the law of international responsibility is crucial. International responsibility, an institution of international law, began initially as a sum of customary rules and gradually there were efforts to receive a . . . [codified] form."). No doubt, its present concatenation merges elements of restorative justice, such as restitution, with goals of deterrence. *Id.*

[26] *See* DARIO, *supra* note 21, art. I.

[27] The CSDP's governance processes are a labyrinthine amalgam of law and policy. *Common Security and Defence Policy (CSDP)*, EUR. UNION EXTERNAL ACTION SERV. (May 3, 2018), https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/431/the-common-security-and-defence-policy-csdp_en [https://perma.cc/X8GU-7WHG] ("The . . . [CSDP] enables the . . . [EU] to take a leading role in peace-keeping operations, conflict prevention and

First, are there oversight and control apparatuses embedded in EU foreign policymaking that govern EU Training Missions?[28] DARIO's power to assess liability emanating from training inactions turns on whether data are maintained. Access to data facilitates the application of DARIO.[29] If the basis of information pertaining to sponsorship is opaque, then, this dearth undercuts swift resolution of legal actions.[30]

Second, how is DARIO applied in the context of training omissions? Does it make sense to hold the EU responsible for agent inactions in this setting? Whether training advisors defy binding obligations if and when they fail to instruct proxies in the law is the nub of the issue. This question is salient in light of the "increasingly multilateral nature of proxy war-fighting . . . and a trend toward collective proxy strategies" in world politics.[31]

As mentioned above, the subject matter of this Comment is the rules that shape judicial decision-making on issues of responsibility that

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in the strengthening of . . . international security. It is an integral part of the EU's comprehensive approach towards crisis management. . . .").

[28] EU Training Missions are particularly noticeable in the common defense regime. Oversight and control apparatuses would be risk management, governance, and audit-related tools that essentially monitor the EU's sponsorship of state security services in besieged states, including the provision of legal training to them.

[29] Recourse to publicly available information normally assists the work of international fora. *See* Benowitz & Ross, *supra* note 1 ("Transparency mechanisms serve to advance enforcement of the international legal framework surrounding proxy warfare. . . . [T]hese mechanisms subject the activities of sponsor governments to scrutiny by their citizenries and by the international community . . . [and] the data that . . . [they] generate provide insights that shape an understanding of . . . activities undertaken in support of proxy groups. This type of tracking can improve identification of state support of proxies that is inconsistent with the state's legal obligations."). Transparency mechanisms conceived by sponsors that are organizational actors probably benefit the international legal framework as well.

[30] For example, regarding questions of state responsibility, legal examination is not helped by information asymmetry in the case of the United States with respect to advanced military missions conducted by Special Operations Forces. The law of international responsibility is perhaps unlikely to reach the United States Defense Department's "rarely discussed" 127 Echo program, which reportedly cultivates proxy relationships in furtherance of counter-terrorism objectives. *See* Kyle Rempfer, *Special Operations Launches 'Secret Surrogate' Missions in New Counter-Terrorism Strategy*, MIL. TIMES (Feb. 8, 2019), https://www.militarytimes.com/news/your-army/2019/02/08/fighting-terrorism-may-rely-on-secret-surrogate-forces-going-forward/ [https://perma.cc/YC5G-T4MZ]. Expectedly, the pressures of investigative journalism oftentimes bolster levels of transparency despite watered down domestic law-based disclosure requirements. *See, e.g.*, Nick Turse, *The US Military's Secret Military*, AL JAZEERA (Aug. 8, 2011), https://www.aljazeera.com/indepth/opinion/2011/08/20118485414768821.html [https://perma.cc/AE22-4CAA] ("It's no secret (or at least a poorly kept one) that . . . forces like the Green Berets and Rangers are training indigenous partners as part of a worldwide secret war against al-Qaeda and other militant groups.").

[31] Mumford, *supra* note 11, at 45.

involve international organizations. Its focus is the omission to train proxies in the relevant substantive obligations of international humanitarian law and international human rights law. As explained in Part II, omission is an underdeveloped concept in DARIO, making for an unwieldy application toward instances of failure to instruct proxies on the dictates of international law. Specifically, the challenge is identifying what is and is not a legally relevant omission. If "failure to train" is *not* a legally relevant omission, then the conduct will not become an internationally wrongful act of the EU. This Comment will contend that even if DARIO does not make this exercise easy, distinguishing between legally relevant and legally irrelevant omissions is analytically realizable.

Submitted to the United Nations General Assembly in 2011, as part of the ILC's report of its sixty-third session, DARIO is ordinarily seen as a restatement of principles of international law.[32] Contrary to its modest name, DARIO possesses legal significance.[33] DARIO is

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[32] *See, e.g.*, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶ 66 (Apr. 29) ("[T]he question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts."). Principles now codified in DARIO were invoked by the court to assist the resolution of "the issue of compensation for any damages incurred" by virtue of conduct attributed to the United Nations. *See id.* For a view that the institution of international responsibility possesses a customary international law foundation, see MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES 8 (Martinus Nijhoff Publishers ed., 1995). For an argument that such institution is a general principle of law, see Mahnoush H. Arsanjani, *Claims Against International Organizations*, 7 YALE J. WORLD PUB. OR. 131, 131 (1981). Certainly, these authorities at least demonstrate that DARIO is not to be conflated with so-called soft law, or nontraditional "quasi-legal instruments," which are nonbinding resemblances of law. *See* WIPPMAN ET AL., *supra* note 19, at 63, 81. On the contrary, as mentioned below, DARIO consists of secondary rules of international law. *See infra* notes 34–35 and accompanying text.

[33] *See* Noemi Gal-Or & Cedric Ryngaert, *From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO)—The Responsibility of the WTO and the UN*, 13 GER. L.J. 511, 511 (2012) ("The adoption of the DARIO represents an enterprise of revolutionary implications for public international law and the future development of both international law and global relations and governance."). An advisory body, the ILC is entitled to embark on such projects and "shall have for its object the promotion of the progressive development of international law and its codification." G.A. Res. 174 (II), art. I (Nov. 21, 1947). Of course, there are critics. *See, e.g.*, José Alvarez, *Misadventures in Subjecthood*, EJIL: TALK! BLOG EUR. J. INT'L L. (Sept. 29, 2010), https://www.ejiltalk.org/misadventures-in-statehood/ [https://perma.cc/FT6Y-YV5T] ("With respect to . . . [DARIO], the ILC was not hindered by the absence of practice. It bravely (rashly?) undertook to delineate rules with respect to not only [international organizations], but with respect to states in connection with acts that they commit within [international organizations]. . . . [T]he ILC's view of its ambit is exceedingly broad as its proposed rules apply

composed of secondary rules of international law.[34] Primary rules of international law "establish obligations," whereas secondary rules "consider the existence of a breach of an international obligation and its consequences."[35] Accordingly "nothing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations."[36] Assuming the helpfulness in distinguishing between primary and secondary rules,[37] this Comment adopts the dichotomy.

The Comment proceeds as follows. Part I summarizes innovations in the history of the EU's foreign policy devices. Their substructure arises from the formative treaty-making that culminated in the CSDP, which facilitates and oversees EU policymaking in the states-system. In addition, Part I supplies a descriptive account of EU Training Missions and background on military capacity-building to contextualize certain behavior in international politics. In Part II, following a review of elemental ideas in DARIO, this Comment asks two questions. First, it asks whether there are CSDP governance processes that preserve information regarding EU Training Missions; effective transparency

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to all international (not just 'intergovernmental') organizations, from the WTO to the OSCE to OPEC, whether established by treaty or other instrument in international law and whether or not the organization includes non-state parties. . . . Another difficulty lies in . . . [DARIO's] failure to address with clarity the status and significance of [organizational] internal rules or procedures. . . . The ILC's proposed articles are inconsistent on whether adherence to [organizational] rules (e.g., denying a remedy with respect to the Rwandan genocide for failure to achieve nine votes in the Security Council) protects an [international organization] (or a state) from liability."). In the past, Alvarez has also questioned the assignment of subjecthood to non-state actors, which he views as uncritical and deeply misguided. *See* José Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 3 (2011).

[34] "At the risk of stating the obvious, while in [H.L.A.] Hart's scheme rules on responsibility (including responsibility for omissions) are counted among the secondary rules of international law, these are unable to ground responsibility on their own – one cannot be held responsible for being responsible." Jan Klabbers, *Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act*, 28 EUR. J. INT'L L. 1133, 1136 n.12 (2017). According to the mainstream view, primary rules are needed *a priori* for the allocation of responsibility. *See id.*; *see generally infra* Part II.E (casting doubt on the validness of this view).

[35] *See* DARIO *supra* note 21, cmt. 3 at 69.

[36] *Id.*

[37] It is far from clear whether the conventional nomenclature serves a purpose. For a persuasive inquiry into the soundness of this distinction in form, see Ulf Linderfalk, *State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System*, 78 NORDIC J. INT'L L. 53, 53 (2009) ("[T]he primary-secondary rules terminology builds on two assumptions. First, it assumes that the law of . . . responsibility can be described as separate from the ordinary (or primary) rules of international law. Secondly, it assumes that the two classes of rules can be described as pertaining to different stages of the judicial decision-making process. . . . Neither assumption can be defended as correct.").

controls tend to facilitate parties' assessment of relevant evidence in cases. Second, this Comment asks whether an internationally wrongful act may be exclusively attributed to the EU in virtue of omissions to train proxies on the requirements of international law. Basically, attribution is conditional upon what an international obligation of the EU means. Without one, there can be no legally relevant omission that underwrites attribution.

I. MAKING THE CSDP

Comprehending the EU's interventions in the internal politics of states in this context warrants some familiarity with the story of European integration in foreign policymaking. In one sense, the viability of ambitious military operations like EU Training Missions is a product of ultimate faith in the law. Repudiation of international-political choices that are red in tooth and claw sustained the EU's ability to aggregate and employ material capabilities in the international system. The various pacts that were forerunners to the CSDP show a growing—and common—dependency on the treaty form, which propelled into being a mighty and unique international organization. Part I reviews important milestones in EU treatymaking and sheds light on the latent disorderly properties of EU Training Missions.

A. LEGALIZATION OF EXTERNAL POLITICS

In the wake of the horrors of the Second World War, cooperation and multilateral problem solving became the hallmark of military and economic policy planning in the West.[38] Supranational foreign policy instruments begotten by various treaty commitments, representing the

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[38] For a comprehensive history of the project to build a unified Europe upon the demise of the Axis powers, see generally WILLIAM I. HITCHCOCK, THE STRUGGLE FOR EUROPE: THE TURBULENT HISTORY OF A DIVIDED CONTINENT: 1945 TO THE PRESENT (Anchor Books ed., 2004). For a classic reformulation of the theory of liberalism in International Relations, animated by the evidence of increasing economic interdependence and transnational political coordination in Europe, among other factors, see generally Joseph Nye & Robert Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INT'L ORG. 329 (1971). Cooperation inspired assiduous study. *See generally* ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 14 (Princeton Univ. Press ed., 1984) (propounding an "institutionalist modification" of neorealism, examining claims of hegemonic stability, and performing empirical analysis).

immovability of the post-war powers' twin goals of fostering common security and integrated financial capital markets, benefited from the formalization of promises.[39] The promises—fixed military guarantees and other forms of interstate partnership—took root in sophisticated matrices of legal obligations enforceable against the individual states that brokered them.[40] Those positioned to become influential members of the European system of states embarked on a multigenerational undertaking to repress self-destructive competition and forge a pathway built upon the principle of the rule of law and contempt for zero-sum squabbles.[41] Politicians and lawyers shaped and reshaped incentives and constraints to champion ideas of accountability and mercifulness in the (formal and informal) institutional fabric of the new states-system.[42] The common

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[39] Conspicuous emanations are the international contracts that spawned the North Atlantic Treaty Organization and the General Agreements on Tariffs and Trade and their subsequent architecture. On the deeper logic of treaty-making, see Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 508–12 (1991) ("The decision to encode a bargain in treaty form is primarily a decision to highlight the importance of the agreement and, even more, to underscore the durability . . . of the underlying promises. . . . The more formal and public the agreement, the higher the reputational costs of noncompliance. . . . States deliberately choose to impose these costs on themselves in order to benefit from the counterpromises (or actions of others)."). Students of postwar European history will recall that the European Coal and Steel Community, an international organization created by the 1951 Treaty of Paris, embodied the principle of supranational coordination and in part represented significant pacifist and anti-Gaullist aims. HITCHCOCK, *supra* note 38. In spite of its political undertones and influence upon future pan-European institutions, *see id.*, the organization is not central to an understanding of the emergence of a common military and foreign policy structure because a discussion of its purpose is more suitable to a history of economic integration.

[40] The treaty law was, in all likelihood, found credible by war-weary contracting states because the instruments broadly operated to "constrain[] self-serving auto-interpretation" of mutual commitments and "reduce[] the transaction costs of subsequent interactions" among the contracting states. *See* Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 427, 430 (2000).

[41] HITCHCOCK, *supra* note 38.

[42] Institutional analysis ordinarily separates the formal from the informal in the universe of "institutions." *See generally* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (Cambridge Univ. Press ed., 1990) (putting forward ideas in economic science, particularly economic history). "Formal" institutions include constitutions, contracts, and forms of governmental authority whereas "informal" institutions encompass traditions, customs, sets of moral values, codified religious beliefs, and other norms of behavior that have passed the test of time. *See id.*; *see also* Henry Farrell & Adrienne Héritier, *Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe*, 16 GOVERNANCE 577–600 (2003) (skillfully analyzing the perplexing relationship between formal and informal institutions in the legislative process). Generally, "formal institutions capture rules and government structures, while the informal institutions focus on ideology and culture." Wesley Kaufmann, Reggy Hooghiemstra & Mary K. Feeney, *Formal Institutions, Informal Institutions, and Red Tape: A Comparative Study*, 96 PUB. ADMIN. 386, 387 (2018). A rigorous understanding of institutions was critical to Robert Keohane's rationalization of the paradigm of liberalism in International Relations. In Keohane's words:

language for incremental progress toward a more peaceful and equitable future of geopolitics was to be, unequivocally, the law of nations.[43]

B. INTERNATIONAL AGREEMENTS AND THE CSDP

Iterative refinements to treaty law governing EU external behavior distinguish the trail to the CSDP. It is marked by concerted attempts to engineer a supranational method of decision-making fitting of a cohesive military power or "global security actor."[44]

The CSDP is inseparably linked to international contracts beginning in the late 1940s. Historically, EU member states have chosen to "delegate authority for certain matters to independent EU institutions that represent the interests of the Union, its member countries, and its

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> Once I realized that institutions serve principally to reduce uncertainty and provide information and credibility, then it was clear how the institutions fit into the missing part of Waltz's theory. A rebel against orthodoxy is always greatly in the debt of the people who can express what is the dominant view with utter clarity and logic.

Conversations with History: Robert Keohane Interview on Understanding International Institutions, UNIV. CAL. BERKLEY: INST. OF INT'L STUD. (Mar. 9, 2004), http://globetrotter.berkeley.edu/people4/Keohane/keohane-con3.html [https://perma.cc/WHS8-AFR5].

[43] Since 1945, "the increased legalization of international relations" has been a largely unimpeded phenomenon in the world political system. WIPPMAN ET AL., *supra* note 19, at 27. "The institutionalization of international law that began in significant part with the League of Nations accelerated in the postwar era," and henceforth the Western European states-system rapidly became the epicenter for a new statecraft tethered to a distinctive legalism in interstate relations. *Id.* at 20. A constructivist orientation, for example, would endorse the claim that, while formal institutions increased in number and sophistication in the international legal system, the process of socialization across time and space inculcated the informal institution of collective security and moral condemnation of major war, which reordered national interests of Western European states on the basis of a shared political identity. For the theoretical underpinnings of arguments grounded in the proposition that actors' interests and identities are co-determined by the influence of intersubjective processes, see generally WENDT, *supra* note 7. *But see* John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 7–9, 14–15 (1994) (critiquing institutionalism as well as critical theory). For a brief response observing "some rather serious flaws" in offensive realism, see Robert Keohane & Lisa Martin, *The Promise of Institutionalist Theory*, 20 INT'L SEC. 39, 39 (1995). For a scholarly repudiation of parsimony as the organizing preference of explanatory theory and modeling in the field of International Relations (or the need to transcend the inhibiting pressures of supposedly incompatible research traditions), see Rudra Sil & Peter J. Katzenstein, *Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions*, 8 PERSPS. ON POL. 411 (2010). Provincial reliance on paradigmatic axioms and theoretical notions opposes the "combinatorial potential" within analytic eclecticism, "an intellectual stance that supports efforts to complement, engage, and selectively utilize theoretical constructs embedded in contending research traditions to build complex arguments." *Id.* at 411.

[44] *See* EUR. UNION EXTERNAL ACTION SERV., *supra* note 27.

citizens."[45] In time, the gravitational pull of "these institutions ha[s] generated a dense system of EU law that is separate from, and superior to, the domestic law of EU members."[46] Policymaking in world politics is no exception.[47]

In 1948, the Treaty of Brussels, having initially established an ephemeral military alliance (the Western Union (1948-54)), laid the foundations for the first bona fide defensive alliance, the Western European Union.[48] The treaty, modified in 1954 to include additional state-parties following missteps to create a pan-European army in the European Defense Community, is the CSDP's legal roots.[49] The Western European Union's purpose was to "offer mutual military assistance in case of external aggression" and elevate principles of political unity in the post-war years of economic reconstruction.[50] Article V, the solidarity and military assistance clause of the Modified Brussels Treaty, proved vital to the nascent collective security guarantees among the major Western European powers.[51] In these early years of common defense planning, implementation of Article V essentially rested on the military shoulders of the North Atlantic Treaty Organization ("NATO"), to which all members of the Western European Union (and the United States and Canada) belonged.[52] Both organizations constituted the so-called Western Bloc during the Cold War.[53]

In 1992, the Petersburg Tasks were treaty law central to developing the then-called European Security and Defense Policy because in part they articulated the types of military actions the EU could undertake in crisis management, which were generally confined to

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[45] WIPPMAN ET AL., *supra* note 19, at 24.

[46] *Id.*

[47] That being said, "[a]lthough there are EU-wide security policy documents, the major member states still have their own national security strategies." *See* LUK VAN LANGENHOVE, EGMONT - THE ROYAL INST. FOR INT'L RELS., THE EU AS A GLOBAL ACTOR IN A MULTIPOLAR WORLD AND MULTILATERAL 2.0 ENVIRONMENT 22 (2010). "Increased European integration seems therefore the only way forward. Only then will the national interest of all member states become part of the overall European interest." *Id.*

[48] *Shaping of a Common Security and Defence Policy*, EUR. UNION EXTERNAL ACTION SERV. (July 8, 2016), https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/5388/shaping-common-security-and-defence-policy_en [https://perma.cc/6G5U-C8YF].

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* "Between 1954 and 1984, the Western European Union was mostly used as a forum for consultation and discussion, making significant contributions to the dialogue on European security and defense." *Id.*

[53] *Id.*; HITCHCOCK, *supra* note 38.

peacekeeping, peacemaking, and humanitarian rescue acts.[54] The 1997 Treaty of Amsterdam increased the range of permissible ends, including, but not limited to, "joint disarmament operations," "military advice and assistance tasks," and "post-conflict stabilization tasks," and willed into being the general policy framework of external action, the Common Foreign and Security Policy ("CFSP").[55] Contrary to the framework naming it devised, the Treaty of Amsterdam did not establish a common defense policy in spite of its rationalization of many facets of external relations on the EU level.[56] But the treaty did leave open the possibility for "the progressive framing" of such a policy, which was prescient.[57]

In 1999, the European Council meetings in Cologne culminated in significant progress toward the actualization of a legal regime of common defense policymaking envisaged by the Treaty of Amsterdam two years earlier.[58] In particular, EU member states affirmed their shared agreement with the Franco-British St. Malo Declaration in 1998, which endorsed the view that "the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises without prejudice to actions by NATO."[59] Military preparedness and operational planning for EU missions dovetailed the boldness of international action suggested at Cologne. Among other external policy vehicles, the Cologne talks created various Brussels-based military and political committees dedicated to war games and analysis.[60] The EU member states contemplated the composition of supranational military forces; headcount would either be drawn from NATO or more targeted national contributions from individual states.[61] Additionally, the Cologne talks' contracting parties delineated a series of long-term goals in relation to future crisis management operations, which was believed to be crucial for common defense policymaking. For example, participating states were to have "equal rights" in the prosecution of EU-led operations, "without prejudice to the principle of

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54 EUR. UNION EXTERNAL ACTION SERV., *supra* note 48.
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*

the EU's decision-making autonomy."[62] Existing consultative arrangements with European NATO members that are not EU member states were to be strengthened, "to ensure their fullest possible involvement."[63] Fulfilling the aspirations of the contracting parties at the Cologne meeting, subsequent EU-led operations cumulatively improved cooperative channels between NATO and the EU.[64] Military and logistical aspects of NATO-EU teamwork were a part of the so-called Berlin Plus agreement in 2003, which assured the availability of NATO military assets for use in EU-led missions, promoted sharing of confidential data, and finalized other details to accomplish effective cooperation between NATO and the EU.[65]

In 2003, the EU adopted the European Security Strategy, a precursor document of common-defense thinking later reflected in the modern-day CSDP.[66] The instrument analyzed the contemporary security landscape and evaluated the political consequences of "key threats," such as regional conflicts and state failure.[67] In 2008, the EU proposed additional measures to refine the implementation of the European Security Strategy in a manuscript that expressed the view that the EU must strive to be "more capable, more coherent and more active" in world politics to "strengthen[] the international rules-based order through effective multilateralism."[68]

In 2007, the Treaty of Lisbon consolidated previous treaty law instruments, ushering in the CSDP (taking the place of the European Security and Defense Policy) and terminating the Western European Union. The international agreement adopted various mutual assistance and solidarity provisions (inspired by Article V in the 1954 Modified Brussels Treaty) that were coterminous with collective defense obligations under NATO.[69] A wide range of permanent political and

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62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* "Either the EU participates in the shaping of the coming order and becomes one of its major poles, or it will be relegated to the position of a mere spectator in global affairs." *See* THOMAS RENARD, EGMONT - THE ROYAL INST. FOR INT'L RELS., A BRIC IN THE WORLD: EMERGING POWERS, EUROPE AND THE COMING ORDER 7 (2009).

69 EUR. UNION EXTERNAL ACTION SERV., *supra* note 48. "[C]ommitments and cooperation in this area [of common defense] shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their

military committees was established under the CSDP, all of which have unique functions in the external policymaking process.[70] Crucially, the Lisbon agreement also expanded resource and defense harmonization for member states "whose military capabilities fulfill higher criteria" relative to the "the most demanding missions" (as understood by the Petersburg Tasks).[71] Furthermore, the EU solidified gains in operational readiness by ensuring that adequate quantities of military resources supported the full set of Petersburg Tasks; the EU expressed its level of preparedness in so-called Military Headline Goals.[72] These goals in part implicated the Battle Group Concept, or "high readiness forces consisting of 1,500 personnel that can be deployed within ten days after an EU decision to launch an operation," which reached full maturity in 2007.[73]

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collective defense and the forum for its implementation." *Id.* (quoting Consolidated Version of the Treaty on European Union art. 42(7), Oct. 26, 2012, 2012 O.J. (C 326/13), at 39).

[70] *Id.* Apart from the military and policymaking committees specific to the CSDP, the Lisbon agreement created the European External Action Service ("EEAS"), a diplomatic organ and defense ministry responsible for execution of the CFSP, which ensconces the CSDP. *Id.* The High Representative for Foreign Affairs and Security Policy, a function created by the Lisbon agreement, leads the EEAS. The EEAS implements policy developed by the High Representative for Foreign Affairs and Security Policy; the European Commission; and the Council of the European Union. *Id.* In addition, the Lisbon agreement prescribed that the EEAS cooperate with the European Defense Agency, a CSDP body charged with overseeing various integration efforts among the EU member states, in forming the Secretariat of the Permanent Structured Cooperation ("PESCO"), which facilitates harmonization among the armed forces of the EU member states. *See* Alessandro Marrone*, Permanent Structured Cooperation: An Institutional Pathway for European Defence*, CTR. FOR SEC. STUD. (Nov. 20, 2017), https://isnblog.ethz.ch/defense/permanent-structured-cooperation-an-institutional-pathway-for-european-defence [https://perma.cc/HN32-88DJ] ("The launch of PESCO represents an important policy decision for European defence. It . . . establishes a legally binding framework deeply rooted in the EU's institutional landscape. As such, PESCO is qualitatively different from declarations favouring increased European defence put forward by EU summits in recent years. Indeed, PESCO contains binding commitments, a mechanism to assess compliance by participating member states (pMS) and the (remote) possibility that single states can be pushed out of PESCO in the event of their non-compliance. Noticeably, this risk of exclusion will likely pressure pMS to follow through on these commitments.").

[71] EUR. UNION EXTERNAL ACTION SERV., *supra* note 48.

[72] *Id.*

[73] *Id.*

C. EU TRAINING MISSIONS

The EU implements CSDP military operations across Europe, Asia, and Africa.[74] EU Training Missions, a subtype of these operations, portend legal risks that conceivably invoke the workings of DARIO in matters of responsibility. As the EU becomes a unitary military power in world politics, this interregional policymaking is prominent in and of itself.

To date, there are four active military trainings under the CSDP.[75] The foregoing involve "support[ing] a more efficient and effective response by the Mozambican armed forces to the crisis in the Cabo Delgado province by providing . . . training and capacity

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[74] *Military and Civilian Missions and Operations*, EUR. UNION EXTERNAL ACTION SERV. (Mar. 5, 2018), https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/430/military-and-civilian-missions-and-operations_en [https://perma.cc/2GAG-52AD].

[75] *Id.*; Established in 2017, the Military Planning and Conduct Capability, "a permanent command and control structure at the military strategic level within the EU Military Staff, which is part of [EEAS] . . . [administers and oversees] . . . operational planning and conduct of non-executive [military training] missions." THE MILITARY PLANNING AND CONDUCT CAPABILITY (MPCC) FACTSHEET (Nov. 2018), https://www.eeas.europa.eu/sites/default/files/documents/mpcc_factsheet_november_2018.pdf [https://perma.cc/DS64-V3L6]. The Military Planning and Conduct Capability also has the power to "plan and conduct one executive military operation of the size of an EU Battlegroup" if authorized by the Council of the European Union. *Id.* Examples of non-EU Training Missions within the CSDP include supporting security sector reform in Iraq; advising, training and mentoring Libyan security services on the border; and multi-year training of certain armed forces and security-related activities in Bosnia-Herzegovina. EU ADVISORY MISSION IN SUPPORT OF SECURITY SECTOR REFORM IN IRAQ, https://eeas.europa.eu/csdp-missions-operations/euam-iraq_en [https://perma.cc/KV7A-AKQS] (last visited Mar. 12, 2022); EU BORDER ASSISTANCE MISSION IN LIBYA, https://eeas.europa.eu/csdp-missions-operations/eubam-libya_en [https://perma.cc/3JMD-WGYB] (last visited Mar. 12, 2022); EUFOR MULTINATIONAL BATTALION TRAINS WITH ARMED FORCES OF BIH, http://www.euforbih.org/eufor/index.php/eufor-news/latest-news/2815-eufor-multinational-battalion-trains-with-armed-forces-of-bih [https://perma.cc/4AXS-79S7] (last visited Mar. 12, 2022). The EU's conduct in Bosnia-Herzegovina is a wearying narrative distinguished by various sources of legal authorization, including United Nations approval; several policy objectives; capacity building; and security sector reform. *See generally* László Ujházy, *EUFOR and NATO's Partnership for Peace (PfP) Programme*, 77 EUFOR F., 2012, at 14 (discussing important aspects of the multifarious Bosnia-Herzegovina-related activity); Eur. Union Common Sec. & Defence Pol., *EU military operation in Bosnia and Herzegovina (Operation EUFOR ALTHEA)* (Jan. 15, 2015), https://eeas.europa.eu/archives/csdp/missions-and-operations/althea-bih/pdf/factsheet_eufor_althea_en.pdf [https://perma.cc/QP2B-RZDR] (describing EU involvement in the country); Ewa Agata Mączyńska, The EUPM and EUFOR Althea missions in Bosnia and Herzegovina: An evaluation (2012) (M.A. thesis, West Virginia University) (on file with The Research Repository, West Virginia University) (documenting early aspects of Althea missions in the post-war period).

building";[76] enhancing "the capacity and quality needed to meet the goal of a future modernized, effective . . . [Central African Republic army]" while partnering with United Nations peacekeeping forces;[77] multilateral "advising and mentoring . . . of Somali National Army . . . personnel" in the fight against Al-Shabaab, among other internal security challenges;[78] and "contribut[ing] to the improvement of the capabilities of the Malian Armed Forces,"[79] "with the ultimate result being self-sustaining armed forces"[80] in order to "support the restoration of state control and the rule of law throughout Mali."[81] There have been more than a dozen completed missions in embattled countries, including Afghanistan, South Sudan, Georgia, and the Democratic Republic of the Congo.[82] CSDP operations have had varying levels of partnership with non-EU actors.[83]

EU Training Missions disproportionately involve the provision of military equipment and conflict training to states that aim to neutralize the threat of insurgents.[84] This requires instruction on the laws that apply

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[76] *EU Military Training Mission in Mozambique set to start its operations*, COUNCIL OF THE EU (Oct. 15, 2021), https://www.consilium.europa.eu/en/press/press-releases/2021/10/15/eu-military-training-mission-in-mozambique-set-to-start-its-operations/ [https://perma.cc/52U9-YMHE]. In addition to "military training including operational preparation . . . [and] specialized training on counterterrorism," the EU Training Mission in Mozambique nominally seeks to contribute to "peacebuilding, conflict prevention and dialogue support, [and] humanitarian assistance." *Id.*

[77] *About Military Training Mission in the Central African Republic (EUTM RCA)*, EUR. UNION TRAINING MISSION IN CENT. AFR. REP. (June 6, 2020, 4:35 PM), https://eeas.europa.eu/csdp-missions-operations/eutm-rca/3907/about-military-training-mission-central-african-republic-eutm-rca_en [https://perma.cc/7WPV-59LD] (the mandate of the EU Training Mission in the Central African Republic seeks to effectuate security sector reform coupled with military capacity-building).

[78] EUTM SOMALIA, https://www.eutm-somalia.eu/ [https://perma.cc/QP7V-EQPC] (last visited Mar. 12, 2022).

[79] *EUTM Mali Mission*, EUTM MALI, https://eutmmali.eu/en/eutm-mali-mission/ [https://perma.cc/PDH6-6JWP] (last visited Mar. 12, 2022).

[80] *Id.*

[81] *Id.*

[82] *Military and Civilian Missions and Operations*, *supra* note 74.

[83] *Id. See also* Thierry Tardy, *CDSP: Getting Third States on Board*, EUR. UNION INST. FOR SEC. STUD. (Mar. 2014), https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_6_CSDP_and_third_states.pdf [https://perma.cc/BJF3-B33F].

[84] These are *defensive* sponsor-proxy relationships. They are not immunized from potentially disruptive effects that which contribute to the weakening of international peace and security.

> Any analysis that does not look at both state-to-state [or multilateral entity-to-state] relationships and state support of non-state actors would fail to capture the full picture of what drives proxy warfare. Research has shown that 'in the 114 civil wars between 1946 and 2002 where at least 900 people were killed, no rebel group was transferred

to the conduct of non-international war and international human rights law. The presence of security sector reform ("SSR")[85] goals in other CSDP missions that are not EU Training Missions has nevertheless led some scholars to argue that the process by which "national armed forces are trained with the intention of them assuming responsibility for countering internal security challenges" is counterproductive to SSR success.[86] Experts warn that EU Training Missions are possibly destabilizing because their military capacity-building priorities have, historically, outweighed the fulfillment of SSR objectives in non-EU Training Missions.[87]

> major conventional weapons without the government also receiving arms from another source.'

Benowitz & Ross, *supra* note 1 (citation omitted).

[85] "The EU has emerged as a key worldwide player in security sector reform in the last few years, reflecting its twin role as the world's largest source of development assistance and, ever increasingly, a major partner in international peacekeeping and police operations." *The European Union and Security Sector Reform*, INT'L SEC. SECTOR ADVISORY TEAM: GENEVA CTR. FOR SEC. SECTOR GOVERNANCE (2008), https://issat.dcaf.ch/Learn/Resource-Library/Books/The-European-Union-and-Security-Sector-Reform [https://perma.cc/3TK7-VAT8]. "While the mission mandates make no explicit reference to SSR, they do mention armed forces under control of, and accountable to, civilian authorities." Emma Skeppström, Cecilia Hull Wiklund & Michael Jonsson, *European Union Training Missions: Security Sector Reform or Counter-Insurgency by Proxy?*, 24 EUR. SEC. 353, 354 (2015) (citing Council Decision 2013/34/CFSP, 2013 O.J. (L 14/19) 56; Council Decision 2013/44/CFSP, 2013 O.J. (L 20/57) 56).

[86] *See* Skeppström et al., *supra* note 85, at 354. If trainees receive inadequate training in the substantive requirements of relevant international law and are not restrained by civilian checks, the prospect of a self-sustaining and legitimate security sector diminishes. *Id.* at 353. EU Training Missions embody a "critical but potentially controversial component of capacity building of the defense sector during ongoing conflicts. . . . [EU Training Missions] aim to improve the military capabilities of [state proxies] . . . by training several thousand recruits . . . [to] engag[e] in counter-insurgency operations." *Id.* at 354. The inquisitive research study concludes that EU Training Missions "may create negative side effects for long-term SSR efforts." *Id.* at 356. In particular, the operations:

> [S]how great potential for addressing civil wars and weak states, but maximizing the likelihood for positive outcomes requires learning from past failures and continuous improvement of existing practices. . . . If this is not done, there is a palpable risk that what is tactically and militarily efficient in the short term, may turn out to be strategically and geopolitically counter-productive. . . .

Id. at 364.

[87] *Id.* at 359. "Establishing the normative values of democracy and civilian control of the armed forces, alongside a functioning government system that allows the assertion of such control *lies outside the scope of* [EU Training Missions]. The missions nevertheless should make vital contributions to such efforts." *Id.* (emphasis added). The relative absence of these efforts from past and present EU Training Missions (with a possible exception to the mission in the Central African Republic) is an obstacle to their eventual goodness. The literature clearly supports the proposition that military capacity-building is no panacea. *See* Heiner Hänggi, *Security Sector Reform*, in POST-CONFLICT PEACEBUILDING: A LEXICON 344–47 (Vincent Chetail ed., 2007).

SSR has become commonplace in states' peacebuilding and "state-building" missions since its emergence in the late 1990s as a theoretical notion in the professional development community.[88] Broadly, its end is to "create a secure environment which is conducive to development, poverty reduction and democracy," according to policy guidelines issued by the Organization for Economic Co-operation and Development ("OECD").[89] The OECD stresses the "critical importance" of SSR to "supporting sustainable development" because "development and security are inextricably linked."[90] According to the United Nations, "security, human rights and development are interdependent and mutually reinforcing conditions for sustainable peace"; SSR aims to mold "effective, inclusive and accountable security institutions so as to contribute to international peace and security, sustainable development and the enjoyment of human rights for all."[91] That is to say, "SSR is meant to turn a dysfunctional security sector into a functional one."[92]

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[88] *See* Oya Dursun-Ozkanca & Antoine Vandermoortele, *The European Union and Security Sector Reform: Current Practices and Challenges of Implementation*, 21 EUR. SEC. 139 (2012).

[89] Org. for Econ. Co-operation & Dev. [OECD], *Security System Reform and Governance*, at 16 (2005), https://www.oecd-ilibrary.org/docserver/9789264007888-en.pdf?expires=1649905366&id=id&accname=guest&checksum=842127E15441C2E76C344EF6DAD416C8 [https://perma.cc/QNE9-XGHN]. "While capacity building within the defence sector certainly can be conducive to creating such an environment, this outcome is by no means a given." Skeppström et al., *supra* note 85, at 355.

[90] Org. for Econ. Co-operation & Dev. [OECD], *OECD Handbook on Security System Reform (SSR): Supporting Security and Justice*, at 13, 15 (2007), https://issat.dcaf.ch/download/478/3015/OECD%20DAC%20Handbook%20on%20SSR.pdf [https://perma.cc/XH23-A8AQ]. The World Bank has expressed similar views; it dedicated the 2011 World Development Report to the relationship between security and development. Specifically, the report maintained that "strengthening legitimate institutions and governance to provide citizen security, justice, and jobs is crucial to break cycles of violence." World Bank Group [WBG], *World Development Report 2011: Conflict, Security, and Development*, at 2 (2011).

[91] U.N. Secretary-General, *Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform*, ¶¶ 1, 45, U.N. Doc. A/62/659-S/2008/39 (Jan. 23, 2008). "Achieving these normative goals is a long-term, complex, and political process." Madeline England, *Security Sector Reform Best Practices and Lessons Learned*, THE STIMSON CTR. (Dec. 1, 2009), https://www.stimson.org/2009/security-sector-reform-best-practices-and-lessons-learned/ [https://perma.cc/MV6L-A3JY].

[92] Heiner Hänggi, *Establishing Security in Conflict-Ridden Societies: How to Reform the Security Sector*, *in* INTERNATIONAL STATE BUILDING AND RECONSTRUCTION EFFORTS EXPERIENCE GAINED AND LESSONS LEARNED 77 (Charles King Mallory IV & Joachim Krause eds., 2010). It may be said that there are two buckets of SSR policies. They are "measures aimed at restructuring and improving the capacity of the security apparatus and the relevant justice institutions" and "measures aimed at strengthening civilian management and democratic oversight" of such institutions. Hänggi, *supra* note 87. Both sets of measures underscore that

By contrast, military capacity building, or the practice of increasing a state's military capabilities and know-how, is narrower in scope.[93] As previously stated, the EU does adopt SSR ends in the CSDP and pursues them in other operations.[94] But, military capacity-building is the chief aim in the training of state actors, increasing exposure to legal liability in the interventions.[95] Indeed, an accumulating body of evidence suggests that SSR becomes harder to achieve when there is an inordinate weight on military capacity building.[96] Unintended effects of the imbalance may include: ineffective civilian control over the military forces,[97] defection of trainees,[98] trainees remaining loyal to their previous non-state-affiliated war leaders,[99] and erosion in democratic norms of culpability.[100] Military capacity-building is not flawed by its very nature. On the contrary, it is necessary in remedying a state's lack of monopoly on violence, and enhancing the set of offensive possibilities for a state in non-international armed conflict is no small order.[101] Undoubtedly,

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"[o]ne of the cornerstones of SSR is that security forces should not only be effective but also accountable and under civilian control, in consistence with democratic norms." *See* Skeppström et al., *supra* note 85, at 358. Notably, "[t]he mere act of 'building' military capacity does not guarantee that it is utilized in consistent with democratic norms." *Id.* at 355.

93 *See* Skeppström et al., *supra* note 85, at 356. "In general terms, the aim of military capacity building is to improve the ability of the recipient state to tackle security problems, with the longer-term aim of building a sustainable peace." *Id.* (citing CLAES NILSSON & KRISTINA ZETTERLUND, ARMING THE PEACE: THE SENSITIVE BUSINESS OF CAPACITY BUILDING (2011)).

94 *See* PHILLIP FLURI & DAVID SPENCE, THE EUROPEAN UNION AND SECURITY SECTOR REFORM (2008); *see also Military and Civilian Missions and Operations*, *supra* note 74.

95 *See* Skeppström et al., *supra* note 85.

> In contrast [to SSR], capacity building missions targeting the defense sector remain . . . controversial. While the EU seeks to promote SSR through its foreign policy [by way of non-EU Training Missions], previous research indicates that the type of military capacity building carried out by [EU Training Missions] under the common defense and security policy might potentially have damaging consequences for SSR. . . . This is because the annals of external support to national militaries are rife with examples of unintended negative side effects, which tend to manifest themselves over the medium term to long term.

Id. at 354–55. (citation omitted).

96 *See, e.g.*, CLAES NILSSON & KRISTINA ZETTERLUND, ARMING THE PEACE: THE SENSITIVE BUSINESS OF CAPACITY BUILDING 41, 44 (2011).

97 *See* Ludovic Hood, *Security Sector Reform in East Timor, 1999–2004*, 13 INT'L PEACEKEEPING 60, 73 (2006).

98 *See* Mark Sedra, *Security Sector Reform in Afghanistan: The Slide Towards Expediency*, 13 INT'L PEACEKEEPING 94, 97 (2006).

99 *See* Eirin Mobekk, *Security Sector Reform and the UN Mission in the Democratic Republic of Congo: Protecting Civilians in the East*, 16 INT'L PEACEKEEPING 273, 276 (2009).

100 *See* Morten Bøås & Karianne Stig, *Security Sector Reform in Liberia: An Uneven Partnership without Local Ownership*, 4 J. INTERVENTION & STATEBUILDING 285, 285–86 (2010).

101 *See* Skeppström et al., *supra* note 85, at 356.

fortifying the defense sector in states beleaguered by internal unrest enables SSR aims (it is, after all, a prerequisite condition), but military augmentation is best coupled with SSR policy in a concurrent manner; a dual approach militates against lawlessness and state-induced atrocity.[102] Absent SSR measures that restrain the use of force per rules of due process and civilian oversight, substantial capacity growth increases the probability of state actors infringing the duties of relevant international law in the course of hostilities. A besieged state that acquires new advantages on the battlefield may well use them in an indiscriminate, unlawful manner.

The OECD defines capacity itself as "the ability of people, organizations[,] and society as a whole to manage their affairs successfully."[103] Understood in this way, an increase in the military's capacity without complementary SSR measures that vitalize justice institutions decreases the likelihood of compliance with substantive duties owed by the state. Because most EU Training Missions do not substantially execute SSR, it is all-important that appropriate legal training be furnished to state proxies.[104] If training advisors fail to educate newly empowered militaries, separate EU state-building initiatives wedded to SSR might suffer over time.[105] In summary,

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[102] *Id.* at 355. "Within the specific mandate of the . . . missions [which elevates the practice of military capacity-building], the activities focusing on accountability and civilian control . . . seem to be limited. Previous research shows that the lack of civilian control can have dire consequences." *Id.* at 358–59.

[103] Org. for Econ. Co-operation & Dev. [OECD], *The Challenge of Capacity Development: Working Towards Good Practice*, ¶ 7, DCD/DAC/GOVNET (2005) 5/REV1 (Feb. 1, 2006).

[104] *See* Skeppström et al., *supra* note 85, at 360–61. "Armed forces that violate human rights . . . are often a major source of insecurity among civilian populations . . . and are thus fundamentally contradictory to the concept of a legitimate security provider." *Id.* (citing Eirin Mobekk, *Security Sector Reform and the UN Mission in the Democratic Republic of Congo: Protecting Civilians in the East*, 16 INT'L PEACEKEEPING 273 (2009)). *See also id*. at 361 ("The mandate of EUTM Mali includes training in the fields of international humanitarian law, protection of civilians, and human rights. . . . The mandate for EUTM Somalia does not make any such references. . . . Specialized training on gender, human rights, international law, and protection of civilians has nonetheless taken place within both missions [corroborated by an interview, a separate research study, and an online factsheet published by the EEAS]. . . . Whether or not this has actually resulted in greater professionalization of the . . . [military trainees] is difficult to assess. However, the short training periods and ambitious military goals gravitate against the likelihood that sufficient time and resources was allocated to adequately teach and reinforce such values.").

[105] *Id*. at 361. The shadow of this failure imposes a will beyond the immediacy of its harm.

> Both the . . . [Somali National Army and Malian Armed Forces] have been reported to having committed human rights abuses during 2013 . . . Whether or not these were committed by troops trained by . . . [the EU] is however very difficult to verify. Such

security studies literature puts forward that there can be adverse side effects of military capacity-building.[106] This empirical claim raises the importance of answering whether DARIO can hold the EU exclusively responsible for omissions to train.

Considering the risks of intervening sponsors' military capacity-building programs in capricious proxy wars, how does DARIO assign responsibility to international organizations?

II. TRANSPARENCY CONTROLS AND OMISSIONS

The below three subparts on DARIO are not intended to be exhaustive. A complete account of DARIO is beyond the scope of this Comment. Instead, they illustrate a range of crucial aspects that buttress the discussion in Part II.E. Following the limited inspection of DARIO, this Comment turns to the separate questions of transparency controls and their efficacy and omissions of training advisors in EU Training Missions. Both questions speak to the practicability of DARIO in this setting.

A. BASIC MECHANICS

DARIO provides a framework that allows claimants to sue international organizations for internationally wrongful acts. As indicated above, DARIO is secondary law.[107] Its *telos* is incentivizing adherence to international rules.

> abuses nevertheless hurt the legitimacy of the armed forces in the eyes of the population and at least indirectly the legitimacy of the missions as well.

Id. (addressing Kenneth Roth, *World Report 2014: Somalia*, HUM. RTS. WATCH (2014), https://www.hrw.org/world-report/2014/country-chapters/somalia [https://perma.cc/2CBK-X5MQ] & Kenneth Roth, *World Report 2014: Mali*, HUM. RTS. WATCH (2014), http://www.hrw.org/world-report/2014/country-chapters/mali [https://perma.cc/UF43-TUW9]).

[106] *Id.* at 356. Interviews on the ground in Somalia and Mali have incrementally supported the hypothesis that there can be substantial harm in an overbalance of military capacity-building in EU Training Missions. *Id.* However, policymakers do not seem to be taking notice. *Id.* ("These types of mission are often seen as more cost-efficient than large-scale peacekeeping missions as they require lesser resources . . . and fewer soldiers to be deployed in the mission area. A costly, complex, and dangerous engagement in Afghanistan spanning over a decade . . . makes it likely that there will be a continued increase in capacity building missions, at least as long as they are seen as successful.").

[107] *See supra* Introduction.

An international organization can possess legal personality,[108] and, if that is the case, it is subject to obligatory rules in international law, assuming some govern its behavior.[109] International organization has a broad meaning in DARIO. It signifies "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality"; moreover, "[i]nternational organizations may include as members, in addition to States, other

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[108] *See, e.g.*, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11) (attaching international legal personality to certain international organizations such as the United Nations). In the opinion, the International Court of Justice reasoned, in various ways, that the UN was a subject of international law—capable of carrying rights and obligations internationally. *See generally id.* "[F]ifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims." *Id.* at 185. This case is representative of a historic, doctrinal change in the understanding of international legal personality long dominated by notions of Westphalian sovereignty. *See* James E. Hickey Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL'Y SYMP. 1, 3 (1997) ("From the Peace of Westphalia in 1648 until the second half of this century, the source of international legal personality was, for the most part, relatively easy to determine. States were subjects of international law with international legal personality and other entities were not, unless either states specifically conferred personality on them . . . or states by acquiescence accepted their personality. The evolution of international legal personality for non state entities has focused principally on international organizations, specialized agencies, regional organizations, and human beings. . . . International legal personality for non state entities began with the evolution of the international organization out of multilateral diplomacy."). This manner of evolution brought forth international judicial recognition. "The source and extent of the international legal personality of the League [of Nations], and especially the U.N. Organization, ultimately was expressed in their founding charters created by the member states." *Id.* at 5. And so the *Reparations* court inferred that the United Nations was "intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane." Reparation for Injuries Suffered in the Service of the United Nations, *supra*, at 178. S*ee also* Brölman Catherine & Janne Nijman, *Legal Personality as Fundamental Concept for International Law*, *in* CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT (J. d'Aspremont & S. Singh eds., 2017) (discussing additional insights on personhood); Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 65, 89 (Dec. 20) (reaffirming the court's earlier reasoning and declaring unambiguously that "[i]nternational organizations are subjects of international law"). Even so, while "the discipline may claim . . . that international organizations are subjects of international law, and thus also subject to international law . . . it remains unclear which international law and why: there is no plausible theory of obligation." *See* Jan Klabbers, *The Paradox of International Institutional Law*, 5 INT'L ORG. L. REV. 151, 165 (2008). If no plausible theory of obligation currently exists, the realness of the mutability inherent in the formal sources of international law calls for a more changeable value of "an international obligation of . . . [an] organization" in the light of the dearth of primary rules regulating international organizations. *See* DARIO *supra* note 21, art. 4.

[109] *See* Klabbers, *supra* note 108, at 161.

entities."[110] Commentary to Article 2 verifies the expansiveness of this definition; "not only intergovernmental organizations are covered, but also international organizations that have been established with the participation of state organs other than governments or by other entities"—particularly, "[e]ntities, such as the European Union . . . are included in that notion."[111] Only organizations with legal personality can incur responsibility, which is consistent with general international law.[112] Article 1 and Article 66 clarify that DARIO does not apply to the responsibility of a natural person.[113]

Article 5 declares that "[t]he characterization of an act of an international organization as internationally wrongful is governed by international law."[114] That is to say, invoking the applicable international law determines an act's status as internationally wrongful. Claimants cannot avail themselves of domestic law to establish a legal theory under DARIO.

Article 4 pronounces the elements of an internationally wrongful act of an international organization. "[Agent] conduct consisting of an action or omission . . . [must be] attributable to that organization under international law," and such conduct must "constitute[] a breach of an international obligation of that organization."[115] "Circumstances

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[110] DARIO, *supra* note 21, art. 2(a).

[111] *See* Mirka Möldner, *Responsibility of International Organizations – Introducing the ILC's DARIO*, 16 MAX PLANCK Y.B. U.N.L. 281, 289 (2012).

[112] *Id*. at 319, 323.

[113] DARIO, *supra* note 21, arts. 1, 66. DARIO is "without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State." *Id.* art. 66.

[114] *Id.* art. 5.

[115] *Id.* arts. 4(a)–(b). The meaning of an organizational international obligation is amorphous. Its indefiniteness underwrites the contention that non-primary law obligations of international organizations that possess legal personality might make certain kinds of omissions legally relevant for purposes of conduct attribution because some non-primary law obligations *might* be considered international obligations. *See generally infra* Part II.E; *see also* Klabbers, *supra* note 34, at 1134. One might validly construe DARIO as permitting a liberalized conception of international obligation in Article 10. *See generally infra* Part II.C; The claim that primary law is "necessary for" legally relevant agent conduct (and hence the creation of an internationally wrongful act) is weakened by such a conception, and this is especially so if international organizations can sometimes make nonconventional international laws that are international obligations (the ILC rejects the view that binding interior rules are automatically considered international laws in Commentary to Article 10). *See generally infra* Part II.E; *see also infra* note 158. Conventional international law obviously binds contracting parties that are international organizations, and, if rules of customary international law bind entities other than states, they constrain the behavior of international organizations as well. *See, e.g.*, Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. INT'L L.J. 325, 326 (2016) (arguing, among other things, that customary international law binds international

precluding wrongfulness" in conduct (that is properly attributed to an international organization) track well-settled principles of international law: consent, self-defense, force majeure, countermeasures, and distress and necessity.[116] If these exceptions apply, even if the elements of an internationally wrongful act are satisfied, no responsibility arises.

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organizations "as a default matter"). General international law is also thought to regulate international organizations, which the International Court of Justice declares, in relevant part, in an advisory opinion. *See* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20). "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties." *Id.* ¶ 37. In regard to general international law, "[m]any scholars echo this language and affirm that general international law binds . . . [international organizations]. But this one sentence hardly settles the matter. Closer inspection reveals that the . . . [court's] statement lacks any support, and . . . [its] precise legal conclusion is also unclear." Daugirdas, s*upra* note 115, at 326. As the court observes, one source of international obligations is organizational constitutions. Bifurcating interior, nonconstitutional rules that order the life of the international organization and explicit rules and implied "function[s] or mandate[s]" forged in the constitution has utility, but the former rules are not unimportant. *See* Klabbers, *supra* note 34, at 1137; *see generally infra* Part II.E. Some interior rules that are not bargained for in a constitution can nevertheless express or denote fundamental principles of an international organization, and they can and do effect significant change in political and legal behavior in myriad ways. *See id.* Such rules of the organization may be more likely to be "regarded as" international law and thus international obligations. DARIO, *supra* note 21, art. 10, cmts. 2–5. If this is the case, presumptive consignment of such rules to a world of legal irrelevance in DARIO is perhaps unsound. Their non-primary "origin or character" does not appear to be a sufficient justification. *See id.* art. 10. A construction of Article 10 that breathes ordinary meaning into its terms entreats lawyers to move beyond the organizational contracts and other primary law in pleading alleged responsibility; at any rate, de-centering primary law makes sense because primary law instruments that govern states are unavailing in assigning legal relevance to agent conduct, and very little primary institutional law exists. *See generally infra* Part II.E. One scholar has averred that "[t]he ILC's attempt to delineate secondary rules on [international organization] responsibility seem[s] premature given the relative scarcity of real-world practice demonstrating the existence of primary rules for entities that cannot, for example, become parties themselves even to human rights conventions." Alvarez, *Misadventures in Subjecthood*, *supra* note 33, at 4; Such a view has been echoed by the EU itself:

> Because . . . [international organizations] are protected by privileges and immunities, there are few instances where principles of responsibility have been invoked before courts. Indeed, the Council of Europe's comment that it 'has had so far no specific practice regarding wrongful acts under international law involving the organization's responsibility' is a common observation.

See Kristen E. Boon, *New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations*, 37 YALE J. INT'L L. ONLINE 1, 8 (2011) (citing Int'l Law Comm'n, Rep. on Resp. of Int'l Orgs.: Comments and Observations Received from International Organizations, U.N. Doc. A/CN.4/637 (2011)). Unsurprisingly then, "[i]t has been criticized that the secondary rules of . . . DARIO have been framed before even the primary rules have been clearly established." *See* Möldner, *supra* note 111, at 325.

[116] DARIO, *supra* note 21, arts. 20–24.

It is axiomatic that "every internationally wrongful act of an international organization entails the international responsibility of that organization."[117] Notably, in Commentary to Article 3, "th[is] general principle . . . applies to whichever entity commits an internationally wrongful act."[118] The ILC appears to speak in terms of general principles of law or alternatively sees a rule of customary international law.[119] Regardless, "whichever entity" is extensive, indicating the broad reaches of Article 3.

Not surprisingly, Article 1 stipulates comprehensively that DARIO applies to "the international responsibility of an international organization for an internationally wrongful act . . . [and] to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization."[120]

There is no conceptualization of damage or fault of the sort seen in domestic law.[121] An internationally wrongful act is allocated to an international organization if an agent breaches an obligation of the international organization, and "any damage" is caused by the agent's

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[117] *Id.* art. 3. Whether its nature approximates or is a general principle of law, is an emerging customary international norm, or is a consequence of the enactment of international organizations' legal personalities, the institution of international responsibility finds its formal home in secondary rules of international law. *See generally supra* note 32. *See also* Möldner, *supra* note 111, at 286. The ILC partially conceives international responsibility as a rule born of customary international lawmaking because of its focus on experience and *opinio juris*. *See* DARIO, *supra* note 21, art. 3, cmt. 3, 1 (citing Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 63 (April 29) and U.N. Secretary-General, *Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations*, U.N. Doc. A/51/389, at 4 (discussing peacekeeping operations: "[T]he principle of state responsibility—widely accepted to be applicable to international organizations—that damage caused in breach of an international obligation and which is attributable to the state (or to the Organization) entails the international responsibility of the state (or of the Organization).")).

[118] DARIO, *supra* note 21, art. 3, cmt. 1.

[119] Möldner, *supra* note 111, at 286; "General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate." RESTATEMENT (THIRD) OF LAW: THE FOREIGN RELATIONS OF THE UNITED STATES § 102 (AM. L. INST. 1987).

[120] DARIO, *supra* note 21, art. 1. Note that the international responsibility of an international organization is not implicated if the international organization merely authorizes a state to carry out an operation whose action is not "in connection with the conduct of an international organization." *See also id.* art. 17, cmt. 10. DARIO "do[es] not say, but only impl[ies], that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations." *Id.* ch. 2, cmt. 5.

[121] *Id.* art. 31.

conduct that breaches such obligation.[122] So long as the agent's conduct violates an international duty owed by the international organization, attribution of conduct and blameworthiness to an international organization is valid, notwithstanding questions of control. Once an international tribunal adjudicates responsibility for such conduct, remedial measures envisaged by DARIO are cessation of the conduct (if ongoing), complete reparations for harm rendered, which suggests financial obligations, and the making of restitution.[123] Should there be noncompliance with "non-derogable," peremptory norms of general international law, or the *jus cogens* principles,[124] corrective penalties are

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[122] *Id.* art. 8. "The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act. . . . Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization." *Id.* art. 31.

[123] *Id.* arts. 30–31, 34–36.

[124] *Jus cogens* norms are a fixture of international lawmaking despite their relative newness:

> The concept has been extremely influential in shaping modern ideas about international law. The existence of *jus cogens* norms suggests that international law is not entirely a function of state consent and now advances certain core values that are independent from the interests of any one state . . . [because they] are meant to protect fundamental substantive values that are shared by the international community as a whole.

WIPPMAN ET AL., *supra* note 19, at 48. The prohibition on the threat or use of force against states (notwithstanding exceptions honored in the Charter of the United Nations, namely individual and collective self-defense and Security Council authorization, state consent, and, *perhaps*, the post-Charter humanitarian intervention doctrine, *see, e.g.*, Mary Kaldor, *The 'Doctrine of Humanitarian Intervention': and how it exposes the absence of any serious intention to help Syrians*, OPEN DEMOCRACY (Apr. 22, 2018), https://www.opendemocracy.net/en/doctrine-of-humanitarian-intervention-and-how-it-exposes-absence-of-an/ [https://perma.cc/8FMY-9UKF]; Daniel Wolf, *Humanitarian Intervention*, 9 MICH. J. INT'L L. 333 (1988)); the prohibition on international criminal acts (including crimes against humanity and torture), slavery, piracy, and genocide; and the principles of self-determination and the equality of states are the most well-known general rules of international law that are typically viewed as being peremptory. WIPPMAN ET AL., *supra* note 19, at 48. For ineluctably masterful musings on the aforesaid exception of the right of self-defense, see CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 124 (2000) (examining, among other *jus ad bellum* issues, the import of Article 51's "inherent" wording and the proper relationship between the customary right of self-defense and Article 51's effects: "Those who support a wide right of self-defence going beyond the right to respond to an armed attack on a state's territory argue . . . that Article 51 . . . through its reference to 'inherent' right of self-defence[] preserves the earlier customary international law right to self-defence. . . . The opposing side argues that . . . Article 51 cannot be read to preserve customary international law that is inconsistent with its terms."). For materials devoted to the issue of temporal beginnings of armed attacks and hence valid invocations of the right of self-defense, see, e.g., U.N. GAOR, 59th Sess., Follow-up to the outcome of the Millennium Summit at 188, U.N. Doc. A/59/565 (Dec. 2, 2004) ("[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it, and the action is proportionate."); TOM RUYS, 'ARMED ATTACK' AND

presumably greater. Indeed, DARIO is attuned to "serious breaches" of obligations under peremptory norms.[125] An international organization owes a duty to "bring to an end through lawful means any serious breach."[126] Additionally, victims may be the recipients of collective help:

> An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization . . . if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole . . . is within the functions of the international organization invoking responsibility.[127]

In this circumstance, a non-injured international organization may seek from the allegedly responsible international organization total "cessation of the internationally wrongful act, and assurances and guarantees of non-repetition . . . and . . . performance of the obligation of reparation . . . in the interest of the injured."[128]

Lastly, DARIO calls on the doctrine of *lex specialis derogat legi generali*, or the idea that law regulating particular situations supersedes the operation of a general maxim.[129] DARIO will not govern questions of the existence of a breach of an obligation by an international organization if it voluntarily chooses to be bound by "special" rules of international law that decide matters of responsibility. In Article 64, the ILC affirms that DARIO:

> Do[es] not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be

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ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 328 (Cambridge Univ. Press ed., 2010). For divergent views on what an armed attack is and who might commit one, see, e.g., Michael N. Schmitt, *"Attack" as a Term of Art in International Law: The Cyber Operations Context*, *in* 2012 4TH INT'L CONF. ON CYBER CONFLICT 283 (C. Czosseck et al. eds., 2012); JUTTA BRUNEE & STEPHEN TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW 272, 296 (2010); Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem's Principle*, 107 AM. J. INT'L L. 570, 570–72 (2013).

[125] DARIO, *supra* note 21, art. 41.

[126] *Id.* art. 42.

[127] *Id.* art. 49.

[128] *Id.*

[129] *Lex Specialis Law and Legal Definition*, USLEGAL.COM, https://definitions.uslegal.com/l/lex-specialis/ [https://perma.cc/3AZT-H5C5].

> contained in the rules of the organization applicable to the relations between an international organization and its members.[130]

Whether the international organization contracts around DARIO partially depends on the contracting parties' intention; the ILC's Vienna Convention on the Law of Treaties is the usual method of settling issues of treaty interpretation.[131] It is well established that the Vienna Convention is considered a codification of customary international law.[132] Should an interpretation of the organizational constitution's

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[130] DARIO, *supra* note 21, art. 64.

> The limitation to this approach is that, due to the principle of consent, it would not bind states or entities that are non-members of the organization. As Article 34 of the Vienna Convention on the Law of Treaties confirms, "A treaty does not create either obligations or rights for a third State without its consent."

See Boon, *supra* note 115, at 10 n.54 (citing Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331). The *lex specialis* rule in Article 64 pointedly intersects with the question of whether secondary law of international organizations is part of international law. The ILC's view, in Article 10, favors the position that it sometimes does (a "breach of any international obligation . . . may arise for an international organization . . . under the rules of the organization."). DARIO, *supra* note 21, art. 10. Despite saying that it does not intend to "express a clear-cut view on the issue," the ILC rejects the argument that secondary law of international organizations is not part of international law, but it does not accept the inverse as true because not all secondary law is international law. *Id.* art. 10, cmt. 7 ("Breaches of obligations under the rules of the organization are not always breaches of obligations under international law."). However, the Commentary to Article 10 acknowledges that there is no scholarly consensus on whether all internal-law obligations are to be considered international obligations. *Id.* art. 10, cmt. 5 ("The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty-based organizations are part of international law. Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law. Another view, which finds support in practice, is that international organizations that have achieved a high degree of integration are a special case." (citations omitted)). If the EU were "a special case," certain interior rules that would otherwise be considered international obligations would not be. This would dramatically hamper the ability of lawyers to assert non-primary law obligations in the "rules of the EU" as the basis for legally relevant agent conduct because they would cease to be alleged international obligations of the EU.

[131] Articles 31 and 32 in the Vienna Convention on the Law of Treaties stipulate the general rule of interpretation and supplementary means of interpretation, respectively. *See generally Vienna Convention*, *supra* note 130, at 31–32.

[132] *See* WIPPMAN ET AL., *supra* note 19, at 43 ("Most of the international law norms applicable to treaties have been codified in the Vienna Convention on the Law of Treaties. . . . The Vienna Convention reflects two decades of study and deliberation by members of the International Law Commission. . . . Many of the Vienna Convention's provisions restate or codify customary international law already in place prior to the treaty's adoption. . . . Other Convention provisions reflect a deliberate effort to modify existing law or to create new law, a process referred to as progressive development. . . . The United States is not a party to the treaty, but the Executive Branch has described the Convention as 'the authoritative guide to current treaty law and practice.'"). Aspects of the Vienna Convention thus bind the United States because, even though

relevant contractual terms yield a finding that the contracting parties intended the relations of their international organization to be governed by other rules of international law concerning responsibility, DARIO does not operate.

B. ATTRIBUTION OF CONDUCT

Recall under Article 4 that the attribution of conduct is indispensable.[133] The following rules determine how agent action becomes internationally wrongful acts on the organizational level. Article 2 defines "organ of an international organization" as "any person or entity which has that status in accordance with the rules of the organization," irrespective of what it is formally named.[134] Further, agent is liberally defined, "mean[ing] an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."[135] Commentary to Article 2 clarifies that an agent can be a non-natural person.[136]

In Commentary to Article 6, the ILC posits that "[s]hould persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to . . . [A]rticle 2."[137] In Article 6, conduct is normally attributable if the organ or agent acts "in the performance of functions of that organ or agent."[138] Functions are understood in reference to the "rules of the organization."[139] Importantly, the ILC

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it is only a signatory that never ratified the treaty, it acknowledges in practice that such aspects are enforceable customary international law. *See Frequently Asked Questions: Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm [https://perma.cc/73SB-943M].

[133] *See* DARIO, *supra* note 21, art. 4.

[134] *Id.* art. 2.

[135] *Id.* Apparently, the ILC models its treatment of agents upon an Advisory Opinion of the International Court of Justice. *See* Reparations for Injuries Suffered in the Service of the United Nations, *supra* note 108, at 7 ("The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.").

[136] DARIO, *supra* note 21, art. 2, cmt. 25.

[137] *Id.* art. 6, cmt. 11.

[138] *Id.* art. 6.

[139] *See id.* art. 2 ("'Rules of the organization' means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization."); *id.* art 2, cmt. 17 ("One

concludes that "in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization."[140] Article 6 embodies the notion of de facto agency due to its holistic emphasis on conduct predicated on "the instructions, or the direction or control, of an international organization," particularly in the case of persons that do not have "functions" in congruence with the organizational rules.[141]

Moreover, the frontier of agency is enlarged in the terms of Article 7: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."[142] In Commentary to Article 7, the ILC further pinpoints the kind of control it deems legally meaningful: "'operational' control would seem more significant than 'ultimate' control since the latter hardly implies a role in the act in question."[143] Predictably, this means that the question of an international organization's effective control over the behavior of an organ of a state or an organ or agent of an international organization requires investigation of the relevant "factual circumstances and particular context" underlying the alleged conduct.[144] The ILC refers to

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important feature of the definition of 'rules of the organization' in subparagraph (b) [in Article 2] is that it gives considerable weight to practice. The influence that practice may have in shaping the rules of the organization was described in a comment by the North Atlantic Treaty Organization (NATO), which noted that NATO was an organization where 'the fundamental internal rule governing the functioning of the organization—that of consensus decision-making—is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization.'").

[140] *Id.* art. 6, cmt. 9. "For the purpose of attribution of conduct, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization." *Id.* art. 2, cmt. 16.

[141] *Id.* art. 6, cmt. 11.

[142] *Id*. art. 7.

[143] *Id*. art. 7, cmt. 10 ("It is therefore not surprising that in his report of June 2008 on the . . . [United Nations Interim Administration Mission in Kosovo], the Secretary-General of the United Nations distanced himself from the . . . [ultimate control criterion] . . . and [instead] stated: 'It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control.'").

[144] *Id*. art. 7, cmt. 4. For application of the effective control requirement as well as contemplation of ILC analysis in a European Court of Human Rights case, see, e.g., Grand Chamber Decision as to the Admissibility of Behrami and Behrami v. France & Saramati v. France, Germany & Norway, Nos. 71412/01 & 78166/01, ¶ 133, (May 2, 2007). The court adopted a standard of

peacebuilding missions conducted by the United Nations to highlight the importance of "a factual criterion" in determining effective control.[145]

In Article 6, the conduct of an organ or agent that is pursuant to her functions "shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization,"[146] but Article 8 says that attribution of conduct can happen under an *ultra vires* theory too.[147] The International Court of Justice ("ICJ") concluded, for example, in an advisory opinion, that the United Nations could be found responsible for the *ultra vires* acts of its agents:

> If it is agreed that the action in question was within the scope of the functions of the organization but it is alleged that it was initiated or carried out in a manner not in conformity with the division of functions among the several organs which the charter prescribes, one moves to the internal plane, to the internal structure of the organization. . . . [T]his would not necessarily mean that the expense incurred was not an expense of the organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent.[148]

DARIO expressly contemplates the above case in Article 8.

"ultimate authority and control" as opposed to the ILC's seeming preference of "operational" control in DARIO. *See also* Al-Jedda v. United Kingdom, App. No. 27021/08, ¶ 84, (July 7, 2011), https://hudoc.echr.coe.int/eng?i=002-426 [https://perma.cc/Z76Y-A348] (arguably taking after the ILC's thinking on "operational" control: "The United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations."). Textually contrasted with "ultimate authority and control," "effective control" is perhaps imbued with a semblance of "operational" control per the court's reasoning.

[145] DARIO, *supra* note 21, art. 7, cmt. 9. "When an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a particular conduct appears to be who has effective control over the conduct in question." *Id.* art. 7, cmt. 8. This formulation may well suggest that an "operational" control inquiry is germane to understanding the ILC's position on the meaning of effective control in DARIO.

[146] *Id.* art. 6.

[147] *Id.* art. 8 ("The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.").

[148] *See* Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 162 I.C.J. 151, at 168 (June 20).

C. ATTRIBUTION OF RESPONSIBILITY

Recall that under Article 4 the attribution of responsibility comes about when sufficiently attributable agent conduct constitutes a breach of an international obligation of an international organization.[149] Exclusive or independent responsibility is the orthodox approach to the question of allocation of international responsibility.[150] However, responsibility may be shared among several persons in DARIO. According to Article 48 "where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act."[151]

Rules of shared responsibility are not contemplated here; assuming there are no issues of joint responsibility in EU Training Missions, DARIO is understood in the context of the sole responsibility of the EU for agent omissions that have uncertain legal relevance.

Most importantly, Article 10 declares that "there is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned."[152] Additionally, Commentary to Article 10 specifies that "an international obligation may be owed by an international organization to the international community as a whole, one or several [s]tates, whether members or nonmembers, another international organization or other international organizations and any other subject of international law."[153] Duties owed to individual persons are also subsumed; "breaches committed by peacekeeping forces . . . affecting individuals" are an example provided in Commentary to Article 33.[154]

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[149] DARIO, *supra* note 21, art. 4(b).

[150] *See* Nollkaemper Andrè & Jacobs Dov, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT'L L. 359, 381 (2013).

[151] DARIO, *supra* note 21, art. 48. "[T]he responsibility of an international organization does not preclude any separate or concurrent responsibility of a State or of another international organization which participated in the performance of the wrongful act." Int'l L. Ass'n, *Report of the Seventieth Conference held in New Delhi, 2–6 April*, at 797 (2002).

[152] DARIO, *supra* note 21, art. 10.

[153] *Id.* art. 10, cmt. 3.

[154] *Id.* art. 33, cmt. 5.

In allocating responsibility, "the rules of the organization" matter.[155] Per Article 10, an international obligation "may arise" from such rules.[156] It is a taxing concept because only violations under international law are within the boundaries of DARIO, as per Article 5. The ILC grapples with this intricacy in Commentary to Article 10: "To the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed [in Article 10] apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law."[157] The opaqueness of this analysis is not universally embraced by the discipline; in the words of one scholar, for example, "[i]t is safe to conclude that legal acts of international organizations and institutions, inasmuch as they are binding, have by now acquired the status of a source of international law."[158] The ILC's backing of the

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[155] "The 'rules of international organizations,' . . . have a far greater importance in the DARIO than they had in the [1986] Vienna Convention, since, for example, they can be constitutive for the responsibility of an organization, as [A]rticle 10 . . . makes clear." Möldner, *supra* note 111, at 297. *See also* DARIO, *supra* note 21, art. 2.

[156] DARIO, *supra* note 21, art. 10(2).

[157] *Id.* art. 10, cmts. 2–5.

[158] *See* Markus Benzing, *International Organizations or Institutions, Secondary Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 49 (Rüdiger Wolfrum ed., 2007); *see also* JAN KLABBERS, INTERNATIONAL LAW 24 (Cambridge Univ. Press 1st ed., 2013) ("International law does not have a specific document specifying how it is made; there is no treaty on the correct ways and processes for making international law. Instead, the Statute of the ICJ contains a listing of instruments that the Court may apply in deciding cases, and it is this listing that is often used as a starting point for a discussion of the sources of the law. This already suggests that the list is not exhaustive; it is possible that there are sources of law not mentioned in [A]rticle 38 Statute ICJ. And indeed, recalling that the same list already graced the Statute of the PCIJ and was drafted in the early 1920s, it seems eminently plausible that in the years since then, the possibilities for law-making have expanded. It is plausible to say that international organizations can make law, although one can also explain their resolutions as being treaty based, since the authority of such resolutions derives from the constitutive instrument of the organization."). It is true that the ILC includes treaties, customary international law, and general principles of law as sources of international law in Commentary to Article 10. DARIO, *supra* note 21, art. 10 cmt. 2. Still, the "regardless of its origin" phrasing in Article 10 evokes an unrelenting sense of nebulousness. "Nowhere it is laid down that the list in Article 38 [Statute ICJ] is exhaustive, hence it is possible to have other sources of law. . . ." P.K. Menon, *An Enquiry into the Sources of Modern International Law*, 64 REVUE DE DROIT INT'L, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 181, 182 (1986). Moreover, "there are . . . [scholars] who do not believe that Article 38 [Statute ICJ] is the 'foundation for the doctrine of the sources of International Law.' Alf Ross comes to this conclusion, because for him the sources of law are themselves not based in law, but in facts." Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 541–42 (2004) (quoting ALF ROSS, A TEXTBOOK OF INTERNATIONAL LAW 83 (1947)). For an essay that disregards the view that Article 38 Statute ICJ is the "authentic" list of the formal sources of international law, see also Rüdiger Wolfrum, *Sources of International Law*,

notion that interior laws of international organizations indeterminately retain a dualism of sorts until an analysis is undertaken is a clear dismissal of the position that interior laws of international organizations are not international laws.

Indeed, as previously indicated, the ILC believes, in Commentary to Article 10, that the field of legal rules that is authored by international organizations is not unconditionally excluded from the mode of international lawmaking.[159] This is assessed on a case-by-case basis. International organization-created (secondary) legal rules may or may not be international law, which is a question that requires expert analysis.[160] Accordingly, Article 10 appears to propose that there can be *ample sources of law* within the meaning of international obligation that possibly activate the remedial tools of DARIO. This supposition is discussed in Part II.E.

D. TRANSPARENCY CONTROLS

First, this Comment addresses the question of transparency controls before answering whether or not an internationally wrongful act may be exclusively attributed to the EU on account of omissions to train proxies.

The CSDP, or the EU common defense framework, is accompanied by a governance, operational, and audit infrastructure that functions as a system of controls in respect to the handling of military

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in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 10 (Anne Peters ed., 2011) ("[Article 38 Statute ICJ] does not provide for a complete list of sources of international law the ICJ may use, and in effect has used, in its jurisprudence."). In the end, Article 38 is:

> [O]nly a starting point. . . . [I]t suggests that courts and other decision makers simply find international law in existing 'sources' and then apply it as appropriate to particular disputes. This reflects an unduly static . . . description of international law. Other scholars define international law in more dynamic ways – less as a set of sources and more as a process of decision making, a form of communication, or a mask for political power. . . . Article 38 lists treaties and custom as distinct, but they routinely intersect or apply simultaneously in particular situations. More importantly, although they remain the principal means for making international law and are rooted in the decisions or conduct of states, they increasingly are supplemented by other forms of law, *including those not mentioned in Article 38*. For example, international law also derives from various lawmaking and standard-setting activities by international organizations. . . .

WIPPMAN ET AL., *supra* note 19, at 32 (emphasis added).

[159] *See* DARIO, *supra* note 21, art. 10, cmt. 5.

[160] *Id.* at General Commentary, ¶ 3. *See also id.* art. 10, cmt. 6.

missions authorized by policy that tracks CSDP objectives in world affairs.[161] It is implausible that the transparency controls do not apply to the prosecution of EU Training Missions, a subtype of military operations sanctioned by CSDP directives. There are reasons to believe that they do and provide a minimum understanding of what the EU is up to in states disturbed by non-international armed conflicts.

The availability of data is critical to DARIO's administration. A need for information is obvious enough—situational facts reveal a conceivable set of omissions by training advisors, which in turn expose probative evidentiary items in possible controversies involving military capacity-building. As suggested above, training on the meaning of the laws of war in non-international armed conflict and international human rights law is key to decreasing the risk of commission of acts that are crimes against humanity and breaches of other duties while state militaries augment their abilities.

From an oversight and governance perspective, CSDP military operations are transparent in that they are, periodically, reviewed in accordance with a fixed democratic process. This process applies to the lifecycles of EU Training Missions as well. Importantly, a senior external action committee delineates the scope and undertakings of the interventions; specifically, "decisions of deployment and management of the mission are taken by the EU countries during the Foreign Affairs Council."[162] The Foreign Affairs Council "is made up of . . . [EU] Member State Ministers responsible for Foreign Affairs, Defense[,] and Development," who meet monthly to examine various foreign policy matters, which include the active supervision of CSDP missions.[163] Notably, the national ministers "ensur[e] the consistency and coordination of the EU's external action."[164] Fundamentally,

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[161] *Common Security and Defence Policy (CSDP) Structure, Instruments, Agencies*, EUR. UNION EXTERNAL ACTION SERV. (Jul. 8, 2016, 3:24 PM), https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/5392/common-security-and-defence-policy-csdp-structure-instruments-agencies_en [https://perma.cc/Q688-LRP5].

[162] *Military and Civilian Missions and Operations*, *supra* note 74. Moreover, there are other executive apparatuses that supervise the integration of national military policies and reflect the democratic institutional bases of EU security and defense conduct in international relations, such as the EEAS, EDA, and particularly PESCO. *See generally* Marrone, *supra* note 70. *See also Common Security and Defence Policy (CSDP) Structure, Instruments, Agencies*, *supra* note 161 (detailing the CSDP military, political, and civilian agencies created by the EU member states).

[163] *Foreign Affairs Council*, EUR. UNION EXTERNAL ACTION SERV. (May 17, 2019, 6:10 PM), https://eeas.europa.eu/diplomatic-network/foreign-affairs-council/2083/foreign-affairs-council_en [https://perma.cc/TC26-55ME].

[164] *Id.*

supranational decisions about the EU's military posture in world politics arise from the operation of democratic choice (as opposed to authoritarian fiat). This is undoubtedly true, notwithstanding the normative debate about how much political reform is needed in EU institutions.

Additionally, there is democratization in the allocation of funds for EU Training Missions.[165] Until recently, under the CSDP, the Athena Mechanism, a complex system of rules and procedures that covers the financing of shared expenses incurred by EU member states, implemented security and defense military operations.[166] In early 2021, the Foreign Affairs Council adopted a resolution inaugurating the European Peace Facility ("EPF"),[167] a similarly elaborate system of rules

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[165] *See European Peace Facility*, EUR. COUNCIL OF THE EUR. UNION, https://www.consilium.europa.eu/en/policies/european-peace-facility/ [https://perma.cc/SX6S-7KE2] (last visited Mar 12, 2022).

[166] *Athena: Financing Security and Defence Military Operations*, COUNCIL OF THE EUR. UNION (Sept. 17, 2021), https://www.consilium.europa.eu/en/policies/athena/ [https://perma.cc/6G6Q-56XL].

[167] *European Peace Facility*, *supra* note 165. *See* Giovanna Maletta & Eric G. Berman, *The Transfer of Weapons to Fragile States Through the European Peace Facility: Export Control Challenges*, STOCKHOLM INT'L PEACE RSCH. INST. (Nov. 10, 2021), https://www.sipri.org/commentary/blog/2021/transfer-weapons-fragile-states-through-european-peace-facility-export-control-challenges [https://perma.cc/7AJL-ZZKD] ("The EPF . . . [establishes] a single, streamlined mechanism for allocating funding . . . for EU actions with military and defence implications. These actions are not eligible to be covered by the EU's regular budget and this is why the EPF will be financed through EU member states' yearly contributions between 2021 and 2027."). Because the EPF is an "off-budget" instrument (like the predecessor, Athena Mechanism), the European Parliament is not accorded supervisory functions over its execution. *Id.* However, other political bodies, such as the Foreign Affairs Council, a democratically accountable organ of the Council of the European Union, are regulatory influences. *See also European Peace Facility*, *supra* note 165; The off-budget character of the integrated EPF structure, which encompasses, and enlarges, the scope of the common-cost accounting procedures of the Athena Mechanism, is a consequence of the "legal limitation stemming from article 41(2) of the Treaty on European Union, which prohibits the Union's budget from funding 'expenditure arising from operations having military or defense implications.' This treaty provision was reinforced by a restrictive interpretation from the European Commission." Pierre Morcos & Donatienne Ruy, *A European Peace Facility to Bolster European Foreign Policy?*, CTR. FOR STRATEGIC & INT'L STUD. (Feb. 2, 2021), https://www.csis.org/analysis/european-peace-facility-bolster-european-foreign-policy [https://perma.cc/M4FW-U9MW]; During the negotiations for the creation of the EPF, concerns were raised over the EPF's oversight capabilities regarding assistance measures, which are EU action supportive of third states and multilateral entities that does not constitute CSDP operational activity. *Id.*; *see also European Peace Facility*, *supra* note 165. For example, Ireland dissented, and "numerous civil society organizations also strongly opposed the delivery of lethal weapons through the EPF." Morcos & Ruy, *supra*. Accordingly, the EU member states bargained for "safeguards to ensure compliance with international standards, notably through risk assessments, traceability measures, and post-shipment controls." *Id.* In addition, the EU

and procedures that replaced the Athena Mechanism, rationalizing various decision-making processes in the arrays of financial governance.[168] Under the previous structure, all EU member states (except Denmark) contributed shares of financial capital toward CSDP military operations based on their Gross National Income;[169] this remains the case under the EPF.[170] The active EU Training Missions in Mozambique, Somalia, Mali, and the Central African Republic currently benefit from EPF financing, for example.[171] The EPF carries forward earlier practices imbued with financial management standards and principles that were administered for seventeen years since their introduction by the Council of the European Union.[172] Under the Athena Mechanism, practices concerning budgets and accounts were managed by an administrator and supervised by a committee "made up of representatives from the [EU] member states contributing to the financing of each operation."[173] Under EPF, the role of an administrator is preserved,[174] but individual representatives instead serve on a

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member states negotiated a so-called exemption mechanism, which "allows member states unwilling to fund such military equipment to abstain while increasing their contributions to other non-military assistance measures so as to preserve a form of financial solidarity." *Id.*

[168] *European Peace Facility*, *supra* note 165.

[169] *Athena: Financing Security and Defence Military Operations*, *supra* note 166.

[170] *European Peace Facility*, *supra* note 165.

[171] *Id*. The missions in Somalia, Mali, and the Central African Republic previously benefited from financing under the protocols of the Athena Mechanism. *Athena: Financing Security and Defence Military Operations*, *supra* note 166.

[172] *Athena: Financing Security and Defence Military Operations*, *supra* note 166. The Athena Mechanism's operating manual contained detailed information on the financial management standards and principles. *Id.* The EPF is no different in this regard. For example, the EPF Implementing Rules governing the operationalization of "revenue and expenditure financed under the . . . [EPF] . . . and on the presentation and auditing of the accounts" cover a vast terrain of financial rules, procurement rules, and asset policy, among other aspects of financial management. *See generally* Gen. Secretariat of the Council, *European Peace Facility: Rules for the Implementation of Revenue and Expenditure Financed under the European Peace Facility*, 11679/21 (Sept. 9, 2021) [hereinafter *EPF Implementing Rules*].

[173] *Athena: Financing Security and Defence Military Operations*, *supra* note 166.

[174] *See European Peace Facility*, *supra* note 165. Specifically, in operational terms, the EPF is "managed by an administrator for [CSDP] operations, the operation commander of each operation and mission[,] an administrator for assistance measures [which finance EU action for third states or multilateral entities][, and] the corresponding accounting officers for both . . . [CSDP operations and assistance measures]." *Id.* In executive oversight terms, the EPF, "[a]s a CFSP instrument, [is] . . . implement[ed] . . . by the High Representative [for Foreign Affairs and Security Policy], with the support of" the EEAS. *Questions & Answers: The European Peace Facility*, EUR. UNION EXTERNAL ACTION SERV., https://eeas.europa.eu/headquarters/headquarters-homepage/46286/questions-answers-european-peace-facility_en [https://perma.cc/KM5W-Z6W3] (last visited Mar 12, 2022). Additionally, the Council of the European Union is responsible for "tak[ing] political decisions on the EPF, such

committee led by a surrogate of the presidency of the Foreign Affairs Council.[175] Therefore, democratic representation is baked into the structure of the logistical and economic underpinnings of joint military operations. Governance controls are memorialized in EU policies and procedures,[176] revealing the logic and composition of institutional decision-making.[177]

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as where the assistance should be allocated, based on proposals by the High Representative [for Foreign Affairs and Security Policy]. Member States can also submit proposals for assistance measures under the EPF." *Id.* In regard to assistance measures, the Council of the European Union intends to subject third party beneficiaries to compliance requirements tethered to the circumstances of the contemplated support: "EPF assistance measures will be based on thorough context and conflict analyses and on the risks associated with the provision of military equipment. The greater the risk, the more robust the safeguards and risk mitigating measures the EU will employ." *Id.* In particular, assistance measures are preconditioned on the application of the EPF's Integrated Methodological Framework, a risk management approach that "comprises a number of elements including a context sensitive analysis, verification of compliance, identification of control measures and required commitments from the beneficiary, as well as identification of post-delivery monitoring and control requirements." *Questions and answers on the European Peace Facility's Integrated Methodological Framework*, EUR. UNION EXTERNAL ACTION (Mar. 3, 2021, 11:31 AM), https://eeas.europa.eu/headquarters/headquarters-homepage/95400/questions-and-answers-european-peace-facility%E2%80%99s-integrated-methodological-framework_en [https://perma.cc/9PEA-JPKW]. A fundamental principle of the Integrated Methodological Framework is ensuring "[c]ompliance with all relevant legal instruments and best practices based on national, international, and EU rules, standards and policies in the area of the supply of military equipment, and respect for international law." *Id. See also* Council Decision (CFSP) 2021/509 of 22 March 2021, Establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, 2021 O.J. (L 102) 14 (explaining the legal grounds for the Council of the European Union's adoption of the EPF and enshrining the need for risk assessments in ascertaining beneficiaries' compliance with international legal obligations in EPF-financed assistance measures).

[175] *See European Peace Facility*, *supra* note 165.

[176] *See EPF Implementing Rules*, *supra* note 172.

[177] For example, the EPF Committee Rules of Procedure, adopted in late 2021, enforce governance controls pertaining to committee decision-making because such rules of procedure spell out consistent obligations of parties and regular practice, such as voting arrangements and quorum, meeting minutes, and agenda construction and proper notice. *Id.* Beyond the matter of EPF Committee governance, the EPF must maintain controls to:

> [E]nsure . . . adequate risk assessment[s] and mitigating measures in compliance with international human rights law, international humanitarian law and EU arms export laws; monitor the respect of international laws and commitment by the beneficiary [of the financing] . . . [and] invite local civil society to report on violations of human rights and international humanitarian law.

The European Peace Facility Factsheet, EUR. UNION EXTERNAL ACTION SERV. (March 2021), https://eeas.europa.eu/sites/default/files/eu-peace-facility_factsheet_2021-03-22.pdf [https://perma.cc/84AH-EGS6]. Moreover, appropriations under the EPF "can be suspended or terminated any time by the Council in case of infringement and/or abuse by the beneficiary." *Id.* As a result of the compromise with EU member states that objected to the EPF's funding of assistance measures, the EU "will have the possibility to provide military equipment to increase

When the Athena Mechanism was active, its supervisory committee had promulgated data protection implementing rules to assure that information is retained.[178] The resolution adopting the EPF stipulates "general rules applicable to controls," internal and external auditing (the results of which are reported periodically to the EPF Committee), and public access to documents, among other legal requirements.[179] To date, it is uncertain whether the EPF has incorporated similar data protection implementing rules enforceable under the previous financial instrument. Nevertheless, the resolution authorizing the creation of the EPF mandates that the EPF Committee "shall adopt rules as necessary on public access to documents held by the Facility, consistent with Regulation . . . of the European Parliament and of the Council [of the European Union]."[180] Access contemplated in this manner is reasonably conducive to the holistic discovery and production of documentary evidence. Conceivably, the weight on accountability in the resolution's provision on information sharing has a tendency to illuminate a substructure of facts that concerns the acts of EU agents involved in providing military assets and knowledge to state actors. Moreover, the comprehensiveness of the financial management measures that operationalize EU Training Missions orthogonally mirrors abundant, publicly transmitted disclosure of various events and people in the military capacity-building activity.

All EU Training Missions have or have had a website that tells a narrative of operational actions and other initiatives associated with their mandates. For example, the archived website pertaining to the training mission in Mali features a trove of statements, fact sheets, command hierarchies, personnel identifiers, background material, and other updates

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partners' defence capabilities. The EU will be able not only to train partners, but also to equip them, subject to strict safeguards and control mechanisms." *Questions & Answers: The European Peace Facility*, EUR. UNION EXTERNAL ACTION SERV., *supra* note 174.

[178] *See Athena Data Protection Implementing Rules*, ATHENA SPECIAL COMM. (Mar. 9, 2016), https://www.consilium.europa.eu/media/21517/athena-data-protection-rules-201603.pdf [https://perma.cc/75WP-NZMH]. Specifically, the rules applied to:

> [A]ll actions and tasks undertaken on behalf of Athena mechanism, in particular by: any staff made available to Athena by Member States; any meetings of the [supervisory committee] . . . and any documents or proceedings thereof; any actions or tasks carried out by the [CSDP-authorized] operation commander; [and] any arrangements or framework contracts entered into with Member States, EU institutions and bodies, third States and International Organizations.

Id.

[179] *See* Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, arts. 40–42, 71, 2021 O.J. (L 102) 14.

[180] *Id.*

on the real-time progression of the mission's capacity building initiatives.[181] The website for the EU's training of Somali soldiers reports that "modules on international humanitarian law and human rights, and the protection of civilians are . . . delivered."[182] Similarly, press releases, fact documents, and mission command details are archived.[183] A rudimentary timeline of major events in the EU Training Mission can be constructed, and, significantly, expert witnesses regarding the supervision of training lessons are identifiable. Given that such details are in the public domain, it is plausible to extrapolate that forensic audit professionals employed by an international forum would benefit from other confidential data maintained by officials pursuant to EU rules.[184] In general, DARIO's application is facilitated when key facts, e.g., the names of military personnel in charge of training lessons, are more likely than not to enter the evidentiary record of a controversy that investigates the EU's responsibility (assuming omission to train is deemed to be an internationally wrongful act of the EU as a matter of law).

In short, the known arrangement of transparency controls rooted in CSDP governance and audit processes justifies the belief that the EU has monitoring capabilities that are effective. At least, it may be said that there is a foundation of information from which to evaluate the extent of their design and operating effectiveness.

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[181] *EUTM-Mali*, EUR. EXTERNAL ACTION SERV., https://eeas.europa.eu/archives/csdp/missions-and-operations/eutm-mali/index_en.htm [https://perma.cc/L4JU-DT5R] (last visited Mar. 5, 2022).

[182] *EUTM-Somalia*, EUR. EXTERNAL ACTION SERV., https://eeas.europa.eu/archives/csdp/missions-and-operations/eutm-somalia/index_en.htm [https://perma.cc/VQ3V-WJGX] (last visited Mar. 5, 2022) [hereinafter *EUTM-Somalia*]; *See also About European Union Training Mission in Mozambique*, EUR. UNION TRAINING MISSION IN MOZAM. (Sept. 27, 2009), https://eeas.europa.eu/csdp-missions-operations/eutm-mozambique/104669/about-european-union-training-mission-mozambique_en [https://perma.cc/S5E6-FVH8] (emphasizing that the mission's mandate will contribute to "training and education on the protection of civilians and compliance with international humanitarian law and human rights law").

[183] *EUTM-Somalia*, *supra* note 182.

[184] *See* Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 ST/5212/2021/INIT, arts. 38–39, 53, 2021 O.J. (L 102) 14, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32021D0509 [https://perma.cc/J7GZ-X75U] (implying that rules applicable to data confidentiality exist in the context of auditing).

E. FAILURE TO TRAIN

Assuming the CSDP has transparency instrumentalities that support neutral fact-finding in legal actions, the question is whether an internationally wrongful act may be exclusively attributed to the EU in virtue of omissions by training advisors.

Clearly, DARIO sets forth rules that guide the final resolution of a lawsuit adjudicating EU responsibility for proxies' unlawful conduct. But it is less clear whether or not DARIO is helpful in a scenario whereby there is a showing that training advisors failed to instill in proxies their international legal duties.

It is indisputable that international organizations can be held responsible for agents' omissions.[185] As per Article 4 of DARIO, an internationally wrongful act exists when conduct consisting of action or omission is attributable to the international organization under international law, and such conduct violates an obligation that governs the international organization.[186] Nonetheless, DARIO is silent on what types of actions or omissions count as actions or omissions as a matter of law.

A lawyer may stipulate that a failure to train state proxies on the apposite laws would constitute an omission, logically. But there is a deeply impoverished understanding of what constitutes a legally relevant omission in DARIO.[187] A legally relevant omission is an omission that brings forth a legal consequence. There is no implication in the law, if the omission cannot be considered behavior that defies an obligation applicable to the international organization.

No duty in international law obliges the EU to train state militaries.[188] There are primary rules regarding the prosecution of non-

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[185] *See* DARIO, supra note 21, art. 4.

[186] *Id.*

[187] *See* Klabbers, *supra* note 34, at 1134.

[188] *See id.* at 1142. The lack of a positive duty of this sort matters. Klabbers demonstrates the point as follows:

> Surely not all omissions are relevant; a refusal by the United Nations (UN) to organize the next soccer World Cup is probably not best seen as the sort of omission for which it could incur responsibility . . . but, in other situations, one may legitimately wonder. Can failure by the UN to intervene against climate change be seen as a legally relevant omission on its part? Can failure by the International Labour Organization (ILO) to address the plight of migrant workers be construed as a legally relevant omission? Since the UN Charter does not contain an obligation on the UN to address climate change, and the ILO Constitution likewise does not contain an

international war[189] in international humanitarian law, and there are primary rules in the international conventions, state custom, and general principles of law that make up international human rights law.[190] Noncompliance with these bodies of law in the form of omission is legally relevant because primary rules are contravened.

If it were shown that training advisors' inactions in their legal training contributed to state actors' (willful or negligent) nonconformity with primary rules, the fact is that there is no generalized duty levied on the EU to perform training in other countries. Thus, "failure to train" cannot be inferred to be a legally comprehensible omission by mere reference to the primary law because there is no positive obligation in it that prescribes that the EU shall train security services in particular parts of the world.[191]

There needs to be a judicially manageable standard that distinguishes a legally relevant omission from an irrelevant one. But little work has been done to ascertain what a legally relevant omission looks like for an international organization.[192] In the absence of a Napoleonic edifice of obligations that hyperregulates the life of international organizations, there must be a way to trace agents' inactions that are legally irrelevant from the perspective of primary international law to organizational responsibility as an adjudicatory outcome. What is the bedrock of responsibility in this case if it is not primary international law?[193]

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obligation on the ILO to address migrant labour, the answer cannot be found by the simple deontological exercise of pointing to a positive obligation.

Id. at 1134.

[189] *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 (June 8, 1977), https://www.ohchr.org/en/professionalinterest/pages/protocolii.aspx [https://perma.cc/P9LY-T3FQ].

[190] For an introductory overview on the various sources of international human rights law, see *International Human Rights Law*, U.N. HUM. RTS.: OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx [https://perma.cc/8DSG-7YEQ].

[191] *See* Klabbers, s*upra* note 34, at 1136.

[192] "Specific legal literature on the notion of 'omission' in the law of responsibility is very rare, and discussions in the ILC when preparing the various sets of articles on responsibility are neither rich in detail nor in conceptualization." *Id.* at 1135.

[193] *Id.* "[W]hen primary rules offer no relief, one cannot simply look to the secondary rules for relief." *Id.* at 1136 (citing H.L.A. HART, THE CONCEPT OF LAW (1961)).

Most substantive obligations in international law do not rest with international organizations; they govern states.[194] This claim has led one scholar to propound a view of "role responsibility" by which "the mandate of the organization" serves as the glue between an omission and legal responsibility "without being able to point to directly applicable [substantive] obligations."[195] This perspective identifies legally relevant omissions by objectively focusing on the international organization's mandate.

A lawyer might ask whether there is a "function or mandate" in the international contracts that undergird the EU's external-action institution[196] that would ground a "failure to train" omission in some obligation that "flows directly from the function" of the international organization.[197] If, assuming arguendo, a first principle of the EU is to "take a leading role in peace-keeping operations, conflict prevention and in the strengthening of . . . international security," which is "an integral part of the EU's comprehensive approach towards crisis management,"[198] role responsibility analysis *could* plausibly support the proposition that "failure to train" is a legally relevant omission. In this way, the function or mandate of the EU could "form a useful yardstick."[199] Following this method, an omission to train proxies on the dictates of international norms is legally attributable to the EU because the inaction breaches an "obligation [that] flows directly from the function that has been

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[194] *Id.*

[195] *Id.* "[H]olding organizations responsible [by reason of their mandates or raisons d'être] is not unique – individuals in high positions sometimes incur responsibility by virtue of their position ('command responsibility'), and sometimes organizations benefit from their mandates in the absence of any directly applicable rights." *Id.* Klabbers sketches a preliminary analytic framework that posits that, "an organization can be held responsible for not living up to its mandate, and that mandate will be defined in terms of the general (or main) function assigned to the organization. This is broad but not overly broad in light of the dominant approach to the law of international organizations." *Id.* at 1137. "If the organization's function or mandate can play a role in delimiting powers, or delimiting privileges and immunities, as is commonly thought, then it must also be deemed to have some analytical rigour in *delimiting the relevant from the irrelevant omission for purposes of assigning responsibility*." *Id.* (emphasis added).

[196] The author is characterizing the CSDP, the common defense policy framework, and the CFSP, the general foreign policy framework that encapsulates the CSDP, as being the EU's external-action institution (a formal institution). *See* sources cited *supra* note 42 and accompanying text.

[197] *See* Klabbers, *supra* note 34, at 1133, 1135, 1137.

[198] EUR. UNION EXTERNAL ACTION SERV., *supra* note 27.

[199] Klabbers, *supra* note 34, at 1134, 1138 (claiming it might "add clarity" to the problem of distinguishing legally relevant omissions from irrelevant ones "to think along the lines suggested in" role responsibility analysis).

delegated to the international organization (its mandate)," which is *not* "a separate legal obligation contained in some primary obligation."[200]

Similar to the idea of role responsibility, which makes the omission to train legally relevant by virtue of an underlying obligation that "flows directly from the function"[201] of the EU, a lawyer may imaginably attempt to infer the locus of an obligation[202] in "the rules of the EU"[203] without invoking the function or mandate. Recall that Article 10 says that a breach of an international obligation happens when an international organization is "not in conformity with what is required of it by that obligation, *regardless of the origin or character of the obligation concerned*."[204] Additionally, Commentary to Article 10 avers that certain international organization-created legal obligations may become binding as a matter of international law.[205] Therefore, a legally relevant omission may be derived from an enforceable, secondary obligation of the EU, if the latter is considered an international obligation of it for some reason.

The above mirrors the idea of role responsibility in which an obligation is inferable from the objective function or mandate of the international organization, and that inference suffices for purposes of

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[200] *Id.* at 1135.

[201] *Id.*

[202] *See supra* text accompanying note 155.

[203] *See* sources cited *supra* note 139 and accompanying text.

[204] DARIO, *supra* note 21, art. 10 (emphasis added). Even though the ILC, in Commentary to Article 10, says that the "reference . . . [in Article 10] to the character of the obligation concerns the 'various classifications of international obligations,'" such as obligations of conduct and obligations of result, there are reasons to believe that the formal sources of international law are not preset or incontrovertibly known. DARIO, *supra* note 21, art. 10, cmt. 10; *see also supra* note 158 and accompanying text. Notwithstanding the intrinsic and unremitting equivocalness in the formal sources of international law, which is partly a consequence of the fact that international law "does not seem to have a constitution which regulates the nature, foundation and interrelation of sources [and thus] . . . we can neither adequately know the rules of custom-formation nor how those rules come about," the classifications the ILC alludes to are not always sufficient in analyzing the temporal moment of breach. *See* Kammerhofer *supra* note 158, at 536. And, according to the ILC, although the "distinction is commonly drawn between obligations of conduct and obligations of result [which] . . . may assist in ascertaining when a breach has occurred . . . [,] it is not exclusive." Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/56/10, at 56 (2001).

[205] DARIO, *supra* note 21, art. 10, cmt. 7 ("[T]o the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed [in Article 10] apply."). *See also* sources cited *supra* note 158 and accompanying text (discussing scholarly views that suggest that binding organizational law is, or can be considered more definitively as, a source of international law).

assigning responsibility despite there being no primary obligation to speak of. If a lawyer may be permitted to argue that an obligation anchored in the "rules of the EU" imposes a duty to, say, effectuate training relations with state militaries in the maintenance of security in destabilized regions, then, an omission to train becomes, in principle, legally intelligible, if such obligation is validly "regarded as" a rule of international law that binds the EU. If correct, this approach is an alternative method of attributing responsibility to the EU for omissions to train proxies in the law. Of course, an all-inclusive review and analysis of the organization's rules would be necessary to uncover the obligation that makes these omissions legally relevant.[206] If it is accepted that an obligation resulting from the function or mandate of an international organization can create meaning in agent conduct and be the inception of responsibility (as the idea of role responsibility suggests), another non-primary obligation, such as a rule of the organization, might also create meaning in agent conduct, if it assumes the status of an international obligation. A rule of the organization might transubstantially take on this status if, in part, its contents are essential to an understanding of why the agent conduct is legally relevant to the international organization and its personality.

Finally, it is worth noting that, if the EU Training Mission succeeds in instructing trainees within a time interval (i.e., there is no omission to train), but alleged illegality on the part of trainees in the future sparks a lawsuit, DARIO is well equipped in transforming the conduct into an internationally wrongful act. The vehicles of conduct attribution are robust.[207] For instance, an "operational" control test, in Commentary to Article 7, means that the EU might bear responsibility for trainees' contravention of primary international law if the facts and circumstances show effective control.[208] Even if effective control is unproven, in Article 8, DARIO invites the possibility of principal liability in connection with the *ultra vires* acts of an international organization's agential persons.[209]

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[206] *See generally* DARIO, *supra* note 21, art. 2 (expansively defining the "rules of the organization").

[207] *See supra* Part II.B.

[208] DARIO, *supra* note 21, art. 7, cmts. 4, 10.

[209] *Id.* art. 8, cmt. 5.

III. CONCLUSION

While the EU exercises its shares of military power in the world political system, fora will likely apply DARIO in relevant cases. Thus, a rigorous treatment of concepts in DARIO, such as omission, is plainly beneficial to the judicial disposition of narrow issues of fact and law.

First, this Comment suggests that the CSDP includes transparency controls that support fact-finding in the juridical process,[210] which generally increase the accountability of EU Training Missions, an important subclass of global operations that sponsor state proxies in non-international armed conflict. Second, this Comment contends that DARIO does not tidily apportion blame to the EU for possible training omissions in the operations; more laborious analytical techniques are needed to make these omissions legally relevant.[211] Aside from the impracticalness in dispute resolution, this conceptualization problem matters because military capacity-building, the modus operandi of EU Training Missions, is insufficient to achieve SSR. Decreasing the risks associated with disproportionate military capacity-building begins with effective legal training; state proxies are more likely to act in accordance with substantive requirements if they receive overarching instruction. DARIO's enforcement machinery has the potential to mediate better outcomes in training and deter poorer ones.

Irrefutably, evaluating the implementation of material capabilities in internal wars involving intervening sponsors is vital to maintaining international peace. Therefore, assessing bases for liability that spring from conceivable training inactions in the lifespan of proxy relationships strengthens the cause of peace. Intervening sponsors that fail to instruct their proxies on the duties they owe can and should be held responsible for agent-based inactions that proximately bring forth or otherwise condition incidents of lawlessness in proxy war.

This calls for a broader universe of obligations that goes beyond primary ones to establish responsibility in some cases; omissions that could be legally relevant do not have to be tethered to primary law. At least in relation to the omission to train, the rectification of past wrongs under DARIO is made more attainable if the set of obligations encompasses the functions or mandates and appreciable interior rules of

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[210] *See supra* Part II.D.

[211] *See generally supra* Part II.E.

law of international organizations. Future disputes that unearth wrongdoing of proxies might engender uncertainty over categorizing their handlers' actions or omissions as being legally relevant. Refinements in DARIO that make it easier to identify conduct that has legal value are hence important. As the discussion of the omission to train implies, progressive development in this respect would benefit the notion of independent international responsibility.