



The Aachen Mutual Defence Clause: A Closer Look at the Franco-German Treaty

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On 22 January 2019, Emmanuel Macron and Angela Merkel signed a new treaty on “Franco-German cooperation and integration” in Aachen. Complementing the 1963 Elysée Treaty which symbolized the reconciliation between Germany and France in the post-war period, the Aachen Treaty aims to further strengthen the ties between the two countries in the domains of economy, culture, administration, environment, diplomacy and defence. Although the Treaty has been criticised for its lack of ambition, a closer reading of its text reveals some hidden gems, including its mutual defence clause. What does this new clause mean for the Franco-German tandem and for collective defence in Europe?

A mutual defence pledge between France and Germany may seem quite unsurprising, or even redundant, in view of their existing commitments under NATO and the EU. However, during her speech at the signing ceremony, the German Chancellor still took the trouble to underline that, on this issue of mutual defence, Berlin and Paris had discussed “each and every word at length”.¹ So, what does this new mutual defence clause say exactly?

To which extent is it identical or different from existing EU and NATO collective defence commitments? And what can be reasonably inferred from its specific wording?

EMBEDDED IN EXISTING MULTILATERAL COMMITMENTS

The new mutual defence clause is situated in the second chapter of the Aachen Treaty, on peace, security and development, in Art. 4 §1. In full, it reads [author’s translation]:

Because of the commitments binding them [France and Germany] under Article 5 of the North Atlantic Treaty of 4 April 1949 and Article 42, paragraph 7 of the Treaty on European Union of 7 February 1992 as amended by the Treaty of Lisbon of 13 December 2007 amending the Treaty on European Union and the Treaty establishing the European Community, the two States, convinced of the indivisible character of their security interests, make their objectives and policies of security and defence converge more and more, thereby strengthening the collective security systems to which they belong. In the event of an armed attack on their territories, they afford aid and assistance to each other by all the means at their disposal, including the use of armed force. The territorial scope of the second sentence of this paragraph is identical to that of Article 42, paragraph 7 of the Treaty on European Union.

First and foremost among the original features of the mutual defence clause is the reference to the existing commitments that bind Germany and France in terms of collective defence: Art. 5 of the Washington Treaty and Art. 42.7 of the Treaty on European Union. This is not completely unprecedented for a mutual defence clause. Art. 42.7 TEU, for example, recognizes the political importance of NATO as it explains that “[c]ommitments and cooperation in this area [collective defence] 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 collective defence and the forum for its implementation”.

What is striking in the Aachen Treaty is in fact the absence of this “mantra” acknowledging the centrality of NATO for collective defence.² This can be regarded as quite a significant diplomatic signal, especially from Berlin. One should not forget that in 1963 the Bundestag when ratifying the Elysée Treaty added a preamble which underlined that “collective defence within the framework of the North Atlantic Treaty Organization and the integration of the armed forces of those states bound together in this alliance” remained one of the main goals of the Federal Republic, an addition which felt like a betrayal to de Gaulle, who entertained hopes of Europe emerging as a third force between the US and the USSR.³

Today, the Aachen mutual defence clause recalls existing EU and NATO commitments in order to underline that these compel Germany and France to move towards the same destination in the realm of security and defence. The clause speaks of a convergence in terms of “objectives” and in terms of “policies”, referring to two related but distinct issues. Convergence in terms of “objectives” can be read as a reference to the well-known problem of establishing a common threat perception within and between the EU and NATO. While

some EU and/or NATO countries have been more preoccupied by Russia and the eastern flank of the Euro-Atlantic space, others had their eyes mostly on the southern flank: the Sahel, the Middle-East, and the fight against terrorism. This is linked to the second issue, because different objectives will lead to different policies: prioritising territorial defence (for the east) or power projection and expeditionary forces (for the south). At the same time, the two issues are not always entirely connected: French and German security and defence policies are also the products of different strategic cultures, in particular concerning the readiness to use force. They also face different institutional constraints, as the use of force by the executive is under much more stringent oversight by the legislature in Germany than in France.

The new mutual defence clause props up this goal of convergence with the argument that the security interests of the two countries have an “indivisible character”. This political formula recalls the preamble of one of the two bilateral treaties signed at Lancaster House in 2010 between France and the United Kingdom about cooperation on security and defence, including on nuclear weapons. This treaty states that London and Paris “[do] not see situations arising in which the vital interests of either Party could be threatened without the vital interests of the other also being threatened”. The idea of a commonality of interest among European countries has in fact been a recurring theme in French nuclear doctrine. France has repeatedly asserted that an attack against another EU Member State could put at risk French vital interests, potentially entailing a nuclear response.⁵ But a nuance here is that the Aachen defence clause does not mention *vital* but only “security interests”, which could be interpreted as a persisting timidity when it comes to explicit references to nuclear deterrence within the Franco-German relationship.⁶

Finally, the clause asserts that the convergence between France and Germany, based on indivisible security interests, would contribute to reinforcing their existing systems of collective defence, i.e. the EU and NATO. This affirmation can be read as a way to forestall potential criticism. Stressing that Franco-German convergence will buttress the collective defence systems to which they belong is a signal addressed to other EU and NATO partners emphasizing that, by their further bilateral *rapprochement*, Germany and France are not looking for a substitute to the protection afforded by both organizations. At the same time, it must be recognized that such a signal remains difficult to square with Merkel's and Macron's previous statements about the uncertainties surrounding the US commitment to Europe and NATO, especially under the Trump presidency, and on the need for Europeans to hedge against those uncertainties.

A REVIVAL OF THE BRUSSELS TREATY?

If the first sentence of the mutual defence clause analysed above is first and foremost of a political nature, the second one adopts a more legal terminology. This second sentence is the real core of the mutual defence clause. The words used are not without importance, of course: “[i]n the event of an armed attack on their territories, [France and Germany] shall afford aid and assistance to each other by all the means at their disposal, including the use of armed force”. This appears to be a composite wording, drawing on the strongest elements of Art. 5 NATO and Art. 42.7 TEU, which can also be interpreted as a revival of the formulation of Art. 5 of the now defunct 1954 Modified Brussels Treaty.

First, the Aachen clause, Art. 5 NATO and Art. 42.7 TEU share the exact same cause of activation. The Aachen treaty can be triggered in case of an “armed attack” (“*agression armée*” in French, “*bewaffneter Angriff*” in German). Likewise, Art. 5 NATO and Art. 42.7 TEU can be triggered respectively by an “armed attack”

and an “armed aggression”, which are strictly equivalent concepts from the legal point of view as indicated by the explicit reference made in both clauses to Article 51 of the UN Charter on the right of individual or collective self-defence. Indeed, the only distinction between Art. 5 NATO and Art. 42.7 TEU on the one side, and the Aachen defence clause on the other, is that the latter does not explicitly mention the UN Charter (an absence with no real consequences, however).

The wording of the Aachen mutual defence clause should rather attract our attention on another point: the binding character of its provisions. The Aachen clause states that Germany and France “afford aid and assistance to each other by all the means at their disposal”. Those are significantly more muscular terms than Art. 5 NATO, according to which each party only has to take “such action as it deems necessary”, which leaves a significant margin of discretion in terms of the assistance effectively provided. The terminology of the Aachen defence clause is much closer to Art. 42.7 TEU, which provides for “an obligation of aid and assistance by all the means in [the Member States’] power”. But there also is a relatively important difference between Art. 42.7 TEU and the Aachen defence clause. Although the EU mutual defence clause creates a powerful obligation of aid and assistance, a caveat is immediately introduced: “This shall not prejudice the specific character of the security and defence policy of certain Member States”. The possibility is thus created to modulate the aid and assistance provided, even in case of a successful activation of Art. 42.7 TEU. The Aachen Treaty does not contain any such caveat.

The Aachen treaty directly borrows language from NATO's Art. 5 on another point, however. The Aachen and the Washington treaties both specify that armed force figures among the possible means to be used in response to an armed attack – something which is not explicitly stated, on the contrary, in the

EU mutual assistance clause. That being said, it should be noted that the use of armed force does remain a possibility in the framework of Art. 42.7 TEU. In fact, a 2017 report from the Bundestag underlined that nothing prevented the use of British or French nuclear weapons in response to the activation of the EU mutual assistance clause.⁷ The difference is that this is only implicitly contained in the wording: EU Member States have an obligation to respond to an armed aggression “by all the means in their power”, which, by deduction, includes the use of force. The only clear benefit of explicitly mentioning the use of armed force is to remove any doubt, if ever there had been any, about the potential military implications, and thus to convey a more vigorous message than Art. 42.7 TEU.

The phrasing of the Aachen mutual defence clause can therefore be seen as a hybrid between Art. 5 NATO and Art. 42.7 TEU, drawing on the strongest elements of both clauses. But the Aachen mutual defence clause could equally be considered as something of a revival, in a bilateral setting, of the Modified Brussels Treaty, terminated in 2011. Its Art. 5 provided that:

If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.

The Aachen Treaty largely replicates the robust language of the Modified Brussels Treaty as both treaties use clearly binding language and, at the same time, explicitly mention the possibility of the use of force in response to an armed attack.

TERRITORIAL SCOPE AND ASYMMETRIC IMPLICATIONS FOR FRANCE AND GERMANY

The armed attack triggering the Aachen defence clause has to take place on the territories of either France or Germany. The third sentence of the Aachen defence clause

defines the territorial scope more precisely: “The territorial scope of the second sentence of this paragraph is identical to that of Article 42, paragraph 7 of the Treaty on European Union”. What does this Delphic reference mean exactly?

The negotiators of the Aachen Treaty may have worried that the clause, by referring both to Art. 5 NATO and to Art. 42.7 TEU, might induce uncertainty about which “territories” are effectively protected under the new treaty. This would be a legitimate concern as the territorial scope of the NATO and EU clauses are indeed not exactly the same.

According to Art. 6 of the Washington Treaty, NATO’s mutual defence clause can be invoked if an armed attack takes place on the territory of an ally in Europe or in North America, but not beyond those areas. NATO’s clause can also be triggered if the attack occurs against the forces of an ally which would be operating on or above the North Atlantic Ocean or the Mediterranean Sea. Consequently, this means that most of the overseas territories of the European allies are not in fact covered by Art. 5, because they are situated outside the North Atlantic area. The reason behind this is that, originally, the Washington Treaty was purposely designed not to include the European colonial holdings within its scope.

Some territories excluded from the scope of NATO’s Art. 5 may however fall within the territorial scope of Art. 42.7 TEU. The EU mutual assistance clause can be activated “[i]f a Member State is the victim of armed aggression *on its territory*”. This means any part of the territory of an EU Member State, including those situated outside of the European continent. This nevertheless raises a delicate legal point about which of the EU Member States’ overseas territories are effectively covered, a thorny issue which remains concealed in the sibylline formulation adopted by the Aachen clause.

In the EU treaties, a distinction is made between Outermost Regions (OMR), to which EU law applies (with some exceptions) although they are situated outside the European mainland (Art. 349 TFEU), and Overseas Countries and Territories (OCT), which are not part of EU territory (Art. 198-204 TFEU). Therefore, it could be argued that the EU mutual assistance clause covers only the portion of a Member State's territory that is part of the EU, including OMRs but excluding OCTs. This is an interpretation in the broader context of the EU treaties, which might go somewhat against a literal reading of Art. 42.7 TEU itself, which does not give any clear indication on this issue. It could indeed also be argued, on the contrary, that it does not follow automatically from the fact that EU law does not apply to OCTs that an aggression occurring there cannot create an obligation of aid and assistance among EU Member States.

How does this play out in the context of the Aachen clause? The implications are clearly asymmetrical for France and Germany. As the entirety of the territory of modern Germany is situated on the European mainland, whether the territorial scope of the Aachen clause is identical to that of Art. 42.7 TEU or Art. 5 NATO does not make any difference. By contrast, referring to Art. 42.7 TEU rather than Art.5 NATO enables France to include its overseas territories in the scope of the Aachen defence clause. In terms of its OMRs, the Aachen clause thus certainly covers French Guyana as well as the Martinique, Réunion, Mayotte and Saint-Martin islands. If its OCTs were included too, the Aachen clause would then also cover New Caledonia and its dependencies, French Polynesia, French Southern and Antarctic territories, Wallis and Futuna islands, Saint Pierre and Miquelon as well as Saint-Barthélemy.⁹

These precisions on the exact delimitation of

These precisions on the exact delimitation of the territorial scope of the Aachen clause may appear as irrelevant or pedantic, but one should keep in mind (like the negotiators of the Aachen Treaty perhaps) that the possibility of an armed attack against those territories cannot be totally excluded. In fact, the repetition today of the scenario of the 1982 Falklands War would raise those very questions about the precise territorial scope of the EU mutual assistance clause (until Brexit, of course, in this specific example).

CONCLUSION: A "BILATERALIZATION" OF COLLECTIVE DEFENCE IN EUROPE?

There is much to be gained from reading between the lines of the Aachen mutual defence clause. Behind its terse formulation, the new clause conceals a series of subtle and sometimes rather consequential diplomatic moves. Indeed, although the Aachen clause mentions NATO and EU commitments in the field of collective defence, it omits recognizing the former as the principal framework for its implementation. And though the Aachen clause draws on Art. 5 NATO and Art. 42.7 TEU, it goes beyond them as it contains both a strongly binding terminology and an explicit reference to the use of armed force, recalling the unequivocal language of the defunct Brussels Treaty. Finally, although the territorial scope of the Aachen clause is identical to the one of Art. 42.7 TEU, this in fact confirms that Franco-German solidarity is valid not only within the geographical confines of the European continent but also beyond them. In sum, the Aachen mutual defence clause reflects the new Franco-German treaty as a whole: not a groundbreaking diplomatic act, but not a trivial one either, it is as an additional insurance against gathering storms on the international stage.

The question nonetheless remains whether the adoption of a bilateral defence clause will truly serve the interests not only of Paris and Berlin but also those of their broader collective

defence systems, as the Aachen Treaty seems to suggest. True, as has often been the case in the history of the European project, the Franco-German initiative might build up momentum for a bottom-up process, eventually leading all Europeans to give more substance to multilateral commitments such as Art. 42.7 TEU and European defence in general. But, at the same time, should one not worry that the Aachen Treaty might also compel other European capitals to look for bilateral reassurances for themselves? To push it even further, should one fear the spectre of a “bilateralization” of collective defence in Europe?¹⁰ It would be a tragic irony, indeed, if this were to be the ultimate historical significance of the Aachen Treaty and of its mutual defence clause.

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ENDNOTES

¹ Angela Merkel, Speech at the signing of the Treaty between the Federal Republic of Germany and the French Republic on German-French Cooperation and Integration, Aachen, 22 January 2019. Available at: <https://www.bundeskanzlerin.de/bkin-en/news/speech-by-federal-chancellor-dr-angela-merkel-at-the-signing-of-the-treaty-between-the-federal-republic-of-germany-and-the-french-republic-on-franco-german-cooperation-and-integration-in-aachen-on-22-january-2019-1572746>.

² Such a type of formula is nearly always present in EU documents whenever collective defence is touched upon. For instance, the 2016 EU Global Strategy equally asserts that “[w]hen it comes to collective defence, NATO remains the primary framework for most Member States”.

³ And, to add insult to the injury made to Gaullist sensitivities, the German Bundestag, in this preamble, also called for the United Kingdom to join the European Communities. But de Gaulle’s ills were also largely of his own making: three days before the signing of the Elysée Treaty he had publicly rejected the candidacy of the UK to the European Communities as well as refused to join the Nassau nuclear agreements which, overall, had conveyed the impression that the Franco-German Treaty had an anti-Anglo-Saxon bent. See: Soutou Georges-Henri, “L’émergence du couple franco-allemand : un mariage de raison”, *Politique étrangère*, no.4, 2012, p.732.

⁴ Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic for Defence and Security Co-operation, 2 November 2010, Preamble, sixth recital. The formula appeared earlier in the 1995 UK-France joint declaration on nuclear cooperation, London, 30 October.

⁵ Jacques Chirac, Speech on France’s defence policy, Paris, 8 June 2001. Available in French at: <http://discours.vie-publique.fr/notices/017000120.html>. François Hollande, Speech on the nuclear deterrent, Istres, 19 February 2015. Available in English at: <https://cd-geneve.delegfrance.org/Nuclear-weapons-statement-of-Mr-Francois-Hollande-in-Istres-on-the-19th-of>. On this issue, see: Bruno Tertrais, French nuclear deterrence policy, forces and future, Fondation pour la Recherche Stratégique (FRS), January 2019, pp.46-50. Available at: <https://www.frstrategie.org/web/documents/publications/recherches-et-documents/2019/201901.pdf>.

⁶ Jean-Dominique Merchet, "Traité d'Aix-la-Chapelle: la France et l'Allemagne ne partagent pas encore leurs «intérêts vitaux»", L'Opinion, 20 January 2019. Available at: <https://www.lopinion.fr/edition/international/traite-d-aix-chapelle-france-l-allemande-ne-partagent-pas-encore-leurs-175148>.

⁷ Bundestag Scientific Services. Völkerrechtliche Verpflichtungen Deutschlands beim Umgang mit Kernwaffen Deutsche und europäische Ko-Finanzierung ausländischer Nuklearwaffenpotential (Wd 2 – 3000 – 013/17, 2017), p.11. Available at: <https://www.bundestag.de/blob/513080/c9a903735d5ea334181c2f946d2cf8a2/wd-2-013-17-pdf-data.pdf>.

⁸ European Commission, Directorate-General for Regional and Urban Policy, The Outermost Regions: European lands in the world, 2017. Available at: https://ec.europa.eu/regional_policy/sources/policy/themes/outermost-regions/pdf/rup_2017/rup_eu_lands_world_en.pdf.

⁹ The list of EU's OCTs is provided in annex II of the TFEU.

¹⁰ On the broader issue of the decline of diplomatic multilateralism and the re-emergence of bilateralism in Europe, see: Alexander Mattelaer. The Resurgence of Bilateral Diplomacy in Europe, Egmont Paper no.104, January 2019. Available at: <http://www.egmontinstitute.be/the-resurgence-of-bilateral-diplomacy-in-europe/>



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