

The EU's mutual assistance clause First ever activation of Article 42(7) TEU

SUMMARY

On 17 November 2015, Article 42(7), or the mutual assistance clause of the Treaty on European Union (TEU), was invoked for the first time, when France asked for aid and assistance from the other European Union (EU) Member States in the aftermath of the deadly terrorist attacks in Paris on 13 November 2015.

Included in EU primary law in 2009 by the Lisbon Treaty, under the specific provisions on the Common Security and Defence Policy (CSDP), the EU mutual assistance clause (or the EU mutual defence clause as it is called by many), had never previously been used. As there is no precedent, many questions have arisen with regard to its scope, implementation and the role of the EU institutions, as well as to the relationship with other provisions in EU law which refer to the expression of solidarity between EU Member States, in particular the EU solidarity clause contained in Article 222 of the Treaty on the Functioning of the EU (TFEU).

France's decision to request assistance from the other Member States under Article 42(7) TEU, rather than following other possible approaches, has been explained in various ways, not least through the preference of dealing bilaterally with the other EU governments, without involving the EU institutions. All EU Member States have unanimously promised their full aid and support for France, but the process of defining the substance of their commitments is still ongoing.



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The EU's mutual assistance clause: the provisions of Article 42(7) TEU

Article 42(7) of the [Treaty on European Union](#) (TEU) – part of the Treaty's specific provisions on the Common Security and Defence Policy (CSDP) – contains the mutual assistance clause of the EU (also considered as the EU's mutual defence clause). Inspired by Article V of the 1954 [modified Brussels Treaty](#) establishing the Western European Union (WEU),¹ the mutual assistance clause was [included](#) in the EU framework by the Lisbon Treaty in 2009. Until then, no such provision had been agreed to complement the EU's crisis management powers in the context of defence cooperation under the CSDP.

Origins

During the [debates](#) in the Convention that led to the drafting of the Constitutional Treaty, the question arose whether the EU should have a mutual defence clause similar to that of NATO and the WEU, as well as on the future role of the WEU. In this context, [proposals](#) on the principle of solidarity in light of new threats such as terrorism and weapons of mass destruction were also discussed. In this regard, a Franco-German proposal aimed to incorporate the WEU mutual defence clause into the EU, through the mechanism of enhanced cooperation since an automatic defence obligation in the Treaty would have been opposed by the neutral Member States.² A subsequent Franco-German [idea](#) was to have a 'general clause on solidarity and security, binding all member states in the European Union, and allowing for a response to risks of any sort that threaten the Union', therefore combining in one clause both a mutual assistance obligation on the model of the WEU (addressing traditional threats such as aggression by another state) and a solidarity obligation to respond to new threats, such as terrorist attacks. In the end, the draft Constitutional Treaty included two separate provisions. First, a solidarity clause in event of terrorist attacks and natural or man-made disasters was included, and later incorporated in Article 222 of the Treaty on the Functioning of the EU (TFEU). And second, there was the mutual assistance/defence clause which constituted the fruit of a compromise and therefore contains weaker language than the WEU's mutual defence clause. This provision was incorporated by the Lisbon Treaty in Article 42(7) TEU. The [compromise](#) was meant to bring closer the positions of three groups of states: those seeking a mutual defence commitment; those aiming to protect their traditional neutral status (such as Austria, Finland, Ireland and Sweden³) and those wanting to ensure that the article would not undermine NATO. The introduction of the mutual assistance clause in the TEU also allowed for the [dissolution](#) of the WEU, officially announced in 2010.

Scope and reservations

Unlike the 'civilian' solidarity clause of Article 222 TFEU (see below), the mutual assistance provision covered by Article 42(7) TEU clearly has defence implications covering collective defence,⁴ as suggested by the reference to [Article 51 of the UN Charter](#),⁵ to the NATO commitments of those EU Member States which are also part of

Article 42(7) TEU

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area 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.

NATO, to the clause being located within the chapter on CSDP, as well as by the origins of the clause as outlined above.

A series of elements should therefore be underlined in this context.

Firstly, the different formulations of the mutual assistance/defence clauses contained in the TEU, the WEU Treaty and NATO's Washington Treaty lead to the idea of differing obligations and to the conclusion that the WEU's Article V was [more exigent](#) than Article 42(7) TEU and NATO's Article 5.⁶ Article 42(7) TEU renounces the [automatism](#) implied by the WEU clause – the Member States '*will afford* the Party so attacked all the military and other aid and assistance in their power' – and provides instead that 'Member States *shall have ... an obligation* of aid and assistance by all the means in their power'; which is then subject to other conditions (see below) which alleviate to some extent this duty. Moreover, Article 42(7) TEU gives leeway to the Member States to decide with what means they fulfil the aid and assistance obligation (e.g. diplomatic, financial, military, police cooperation, etc.), just like Article 5 of the [North Atlantic Treaty](#) also leaves it to the individual member state to decide what [action](#) it deems necessary and does not automatically assume military response by all members. In this respect, Article 42(7) TEU does not expressly mention military means so as to accommodate those EU members with a neutral status and Denmark which has an opt-out from the adoption and implementation of decisions with military and defence implications. But the article does not exclude such military assistance, which would be contrary to the meaning of the clause.⁷

On the other hand, the Article 42(7) TEU clause is said to be more extensive from a geographical point of view than the equivalent WEU and NATO provisions: while assistance under those is limited to 'Europe' for the WEU and 'Europe and North America' for NATO, the TEU covers all armed aggression against a Member State 'on its territory' – which is said also to cover those extra-European territories to which EU law applies (e.g. France's overseas *départements*) but not to the Overseas Countries and Territories listed in Annex II of the Treaties.⁸

Secondly, in the context of the [reference](#) to Article 51 of the UN Charter, while the Charter speaks of a right to self-defence in the event of an 'armed attack', the TEU uses the term 'armed aggression'. However this distinction has been explained as a linguistic issue.⁹ More relevant in the context of response to terrorist attacks, there is a persistent debate on whether Article 51 of the UN Charter could also be invoked in relation to non-state armed groups. However, the predominant view is that Article 51 [applies only](#) to armed attack/aggression committed by a state, and that it cannot be invoked in relation to armed aggression, including terrorist attacks, perpetrated by non-state actors. In any case, the link to Article 51 in the EU's mutual assistance provision can be understood to mean that any military action in self-defence by EU Member States under Article 42(7) TEU will be assessed against the legality of that action in light of Article 51.¹⁰

Thirdly, the duty of assistance under Article 42(7) TEU is subsumed to two [considerations](#): the relationship with NATO and the 'specific character of the security and defence policy of certain Member States'.

As concerns relations with NATO, the EU Treaty's mutual assistance obligation is understood as not having precedence over the collective defence obligation contained in NATO's Article 5. In this respect, it is considered that the EU's mutual assistance clause is secondary to NATO's and could not be invoked if NATO's Article 5 had already

been invoked. It is argued that, in accordance with the Vienna Convention on the Law of Treaties, whereby 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail', NATO's founding act takes precedence over the application of the TEU, as also provided for in [Article 351 TFEU](#).¹¹ Moreover, other legal experts consider there is no danger of legal inconsistencies unless the EU mutual defence clause is triggered against a non-EU NATO member, which would be highly unlikely. The EU, in CSDP, and NATO have been portrayed as organisations complementary to each other, and problems could arise in the event of duplication. However with respect to the EU conducting crisis management operations, there is in principle no such NATO precedence. But the EU itself is [constrained](#) by primary law with regard to collective self-defence under the CSDP: in principle, the **EU cannot conduct self-defence operations within the framework of the CSDP (only its Member States)**, unless the Treaty is amended or the European Council decides unanimously on the establishment of common defence in accordance with Article 42(2) TEU. In this sense also, NATO is the primary organisational venue for Member States to exercise collective self-defence.¹²

Furthermore, the EU's collective assistance obligation must [respect](#) the 'specific character of the security and defence policy of certain Member States'. In conformity with this provision and taking into account Declarations 13 and 14 annexed to the EU Treaties, on the Common Foreign and Security Policy (CFSP), the Treaty guarantees Member States' specific character in this field. In particular, it gives them the possibility that their specific principled reservations with regard to the duty of aid and assistance pursuant to Article 42(7) TEU be taken into account. This 'specific character' can entail for example the policy of military neutrality of the four abovementioned EU Member States, the reservation of the German Parliament, namely giving consent to the deployment of German armed forces, or could even be taken to encompass the [nuclear](#) armed EU Member States (France and the UK). The provision is assessed as not exempting absolutely these Member States from their legal obligation to provide aid and assistance, but as allowing these states to choose means of assistance which are not incompatible with their status or domestic law requirements.¹³

Finally, Article 42(7) TEU could be also viewed in connection with Article 44 TEU (and also Article 42(5) TEU), whereby the Council may entrust the implementation of a task, i.e. a CSDP mission/operation, to a group of willing states or with Article 43(1) TEU, whereby the EU's CSDP operations 'may contribute to the fight against terrorism, including by supporting third countries in combatting terrorism in their territories'.

Implementation and role of the EU institutions

Procedure

Article 42(7) TEU does not set out any [formal procedure](#). No Council decision or conclusion is needed to implement Article 42(7) TEU, only the existence of the facts/situation constituting the reason for invoking the article. If the Member State affected makes a request for assistance, it ensues from Article 42(7) TEU there is a legal obligation to assist incumbent on all the other Member States, through civilian or military means. As concerns the provision of military assistance, most agree there is at least a political obligation to assist. Subsequently, the other Member States must define in concrete terms the scope of their support and the means they intend to put at the requesting state's disposal.

On 17 November 2015, France [invoked](#) for the first time the mutual assistance clause during the Foreign Affairs Council meeting (in the format of Defence Ministers). France requested assistance, following the terrorist attacks in Paris on 13 November 2015 that left 130 dead and hundreds injured. Unanimously, the EU Defence Ministers promised their full aid and support.

As the article had never been triggered since 2009 there is [no precedent](#). France has already engaged in bilateral talks with the other Member States in order to specify their aid and assistance. The bilateral nature of the support means that it will not be a uniform contribution from the Member States, and will reflect the individual deals agreed between Paris and its counterparts. It also does not mean that EU Member States are obliged to provide any military assets to the campaign against ISIL/Da'esh.

EU High Representative and Vice-President of the Commission (HR/VP), Federica Mogherini, [clarified](#) that France's invocation of the article does not mean a CSDP mission or operation.

What is the role of the EU institutions?

The invocation by France of Article 42(7) implies an intergovernmental process, excluding the EU institutions from decision-making and the application of measures taken. According to the HR/VP, Article 42(7) TEU is [meant](#) to activate bilateral aid and assistance and the EU/EEAS role will be limited to coordination or facilitation of what France and the other Member States decide ('the European Union can [facilitate](#) this and coordinate this, whenever and however it is useful and necessary'). Already, the CFSP and CSDP are intergovernmental policies in nature. As such the Union's '*communautaire*' institutions – the Commission, the EP (according to [Article 36 TEU](#)) and the Court of Justice of the EU – play a limited role. The Court for example has no jurisdiction (with two exceptions: monitoring respect for the powers of EU institutions (Article 40 TEU) and reviewing the legality of CFSP decisions providing for restrictive measures against natural or legal persons (Article 275(2) TFEU)).

In the particular case of Article 42(7) TEU, the implementing obligations deriving from it belong rather to the Member States acting collectively or within NATO. As mentioned, the CSDP framework does not currently allow for EU self-defence operations. Also the invocation by France of the mutual assistance clause in the formal setting of the Council has been considered [purely incidental](#). Nevertheless, choosing the Council as the venue can be interpreted as having political, institutional and practical implications, in particular expressing solidarity and readiness to provide assistance according to the EU Treaties.

The European Parliament

The EP adopted, in November 2012, a [resolution](#) on the EU's mutual defence and solidarity clauses. With regard to the mutual defence clause, the EP underlined the necessity to be prepared for situations 'involving non-NATO EU Member States or EU Member States' territories that are outside the North Atlantic area and are therefore not covered by the Washington Treaty, or situations where no agreement on collective action has been reached within NATO' and expressed the view that the clause could even cover non-armed attacks, such as cyber-attacks against critical infrastructure, 'if the Member State's security is significantly threatened by its consequences.' Furthermore, the EP invited the VP/HR to 'propose practical arrangements and guidelines' and an analysis of the role of the EU institutions in the event the mutual defence clause was invoked. Finally, the EP made a plea for using the EU's crisis management structures in this context, in particular activating the EU Operational Headquarters.

Member States' bilateral commitments

In the context of its request for assistance, France has been pointing out the need for assistance in meeting some of its [foreign military commitments](#), including its participation in UN peacekeeping operations in Africa and in EU [CSDP](#) missions and operations. France currently [contributes](#) 939 uniformed personnel (military and police) to UN peacekeeping missions, of which 845 are serving in UNIFIL, the UN peacekeeping mission in Lebanon. In 2014, almost 8 000 French troops were [engaged](#) in French and multinational (EU and UN) deployments outside France's territory. According to *Europe Diplomacy and Defence*, the external operations of the French army could mean [costs](#) of €1.128 billion in 2015 (similar to 2014), of which a large part was dedicated to France's operations in the Sahel (Barkhane), in Iraq/Syria (Chammal) and in the Central African Republic (Sangaris). France also [called](#) on the other Member States to take part in air strikes in Syria. It is [considered](#) that another priority will be greater sharing of intelligence between EU Member States and the reinforcement of the EU's borders.

The bilateral consultations are ongoing, but some commitments have already been made public. The UK has [offered](#) France the use of its Akrotiri airbase in Cyprus for French aviation and also given additional in-flight refuelling support. The UK government is currently preparing to [ask](#) the UK Parliament for backing for air strikes in Syria.

Germany had apparently already mentioned the possibility of increasing its contribution to the EU training mission (EUTM) in Mali, where it already contributes around 200 staff, while ruling out involvement in Syria. Ahead of President François Hollande's meeting with Chancellor Angela Merkel on 25 November, Germany also [announced](#) it will increase its contribution to the UN peacekeeping mission in Mali (MINUSMA) from 10 to 650 troops, subject to parliament's approval, so that French commitments in the country could be reduced to some extent.¹⁴ Belgium and the other countries active in the Sahel were [requested](#) by France to maintain their commitments in the region – Belgium had seemingly planned to end its military contribution of 80 troops to EUTM Mali in January 2016. As concerns Italy, which has ruled out any military intervention in Syria or Iraq, the [possibility](#) of increasing the country's presence in Lebanon is being considered.

The EU solidarity clause (Article 222 TFEU) and its relationship with CSDP and Article 42(7) TEU

Many have wondered why France chose to invoke the mutual assistance clause of Article 42(7) instead of the solidarity clause contained in Article 222 TFEU, which specifically provides for assistance from the Union and its Member States for an EU Member State victim of a terrorist attack, a natural or man-made disaster.

Article 222 TFEU, or the solidarity clause, provides for two [levels of assistance](#):

- by the EU jointly with its Member States to the Member State the object of a terrorist attack or victim of a natural or man-made disaster (Article 222(1) TFEU);
- by Member States, which have an obligation to assist the requesting Member State in the abovementioned situations, in which case the Council becomes the locus for coordination (Article 222(2) TFEU). Implementation by Member States should be seen against the provisions of Declaration No 37 annexed to the Treaties, whereby a Member State can choose the most appropriate means to comply with its own solidarity obligation towards another Member State.

In June 2014, according to Article 222(3) TFEU, the Council adopted a Decision setting out the modalities for implementation by the Union (but not by the Member States – Article 222(2) TFEU) of the solidarity clause ([Council Decision 2014/415/EU](#)) on the basis of a joint proposal from the Commission and the High Representative.

The Council Decision specifically mentions that it has no defence implications, so it does not fall within the [remit](#) of CSDP; although the means put at the disposal can be military resources of Member States (e.g. one could envisage the European Gendarmerie Force deployed for civilian protection). Therefore the Council Decision does not represent a legal framework for action **if military means are used for defence purposes**. The Council Decision states that it 'is without prejudice to Article 42(7) TEU' and also provides that, 'in the event that a crisis requires CFSP or CSDP action, a decision should be taken by the Council in accordance with the relevant provisions of the Treaties.'

Although the EEAS and CSDP structures are involved under Article 222 TFEU – the Union will mobilise all instruments at its disposal such as police and judicial cooperation, the EU civil protection mechanism, the structures developed in the framework of the CSDP – this [role is defined](#) by the abovementioned Council Decision and cannot be understood as a CFSP/CSDP role. Both the primary law (Article 222(3) TEU) and the Council Decision specifically mention that decisions with defence implications should be taken in accordance with the specific procedures on CFSP/CSDP – unanimity under Article 31(1) TEU and the other relevant provisions of the Treaties.

It must also be pointed out that the implementation by the Union of the solidarity clause is restricted to the Member State's 'territory', in line with Article 222(1) TFEU, as regards the prevention of the terrorist threat and assistance in the event of a terrorist attack (although the notion of territory as used in the Council Decision might be better replaced by 'jurisdiction' according to some experts.) EU operational action under CSDP as mentioned above cannot mean self-defence action on the Union's territory. Also Article 42(7) does not have this territorial limitation when it comes to implementation, except with regard to the armed aggression that must have happened on the Member State's territory.

Another detail to underline is the Council Decision's provision on the invocation of the solidarity clause, according to which 'in the event of a disaster or a terrorist attack, the affected Member State may invoke the solidarity clause if, after having exploited the possibilities offered by existing means and tools at national and Union level, it considers that the crisis clearly overwhelms the response capabilities available to it.' This has been [considered](#) a contradictory provision – also because the other Member States have no means of assessing whether the affected Member State has indeed exploited all possibilities and tools at its disposal before invoking Article 222. Also, Article 222 TFEU is under the jurisdiction of the EU Court of Justice, therefore failure to assist a Member State that has invoked the solidarity clause could be the object of judicial proceedings.

Although the added value of the solidarity clause has been called into question, as there are already established cooperation and coordination mechanisms at EU level, experts still consider it an important tool that must be viewed in a broader context, including other Treaty provisions that pursue similar aims such as Article 42(7) TEU. Some interpretations point to the existence of a certain overlap or grey areas between the two clauses, which reaffirms the political discretion of the EU and its Member States as to the means employed (political, military or other means) to fight old and new security

threats. Finally, it could also be imagined that the two provisions might apply [in parallel](#), and in this case the different procedures for implementation should be reconciled.

Explaining France's choice

Neither the EU mutual defence clause nor the solidarity clause had been invoked so far, therefore France's decision is a first. When asked why France invoked Article 42(7) TEU and not Article 222 TFEU, the French Defence Minister, Jean-Yves Le Drian, (as well as Mogherini) [emphasised](#) this was mainly a 'political act' that the French hope to see translated into 'capability collaboration for French interventions in Syria and Iraq, either by relief to or support of France in other operations.' Both Mogherini and Le Drian seemed to downplay the operational significance of France's request under Article 42(7) TEU putting the emphasis on the political nature of the act. They also underlined that it needs to be seen as separate from NATO's similar Article 5 clause.

The Council in its [Conclusions](#) of 17 November 2015 specifies that 'offers may consist of material assistance and of support in theatres of operation where France is engaged'. Thus, some [view](#) France's invocation of Article 42(7) being not necessarily related to the substance of the article, but as a lever to use during the bilateral consultations in order to get something for which France has been asking for some time now: that other Member States make a contribution to French efforts, either in Mali or CAR or in the Middle East. This has been a longstanding French criticism of other EU Member States as it had the perception of being left to deal alone with the situation in various crisis theatres. In this context, it was also [assessed](#) that, as the EU's solidarity clause is restricted to EU territory and France was actually trying to get support outside its territory, opting for the mutual assistance clause was logical.

Moreover, it was [pointed out](#) that France opted deliberately for 'neither NATO nor supranational assistance'. In the case of NATO, France's choice not to invoke Article 5 may be [related](#) to France's current diplomatic [efforts](#), aimed at Russia and Arab countries also, to rally a grand coalition to combat ISIL/Da'esh in Iraq and Syria, which NATO involvement might jeopardise. Also, the limited role for EU institutions could explain the choice of Article 42(7) by France over other possibilities, thus clearly expressing a [preference](#) for the intergovernmental/bilateral framework.

Other [views](#) insist on the political symbolism of invoking the Article 42(7) TEU clause, seen as a necessary and bold affirmation on the part of France of the need for a common foreign policy towards the Middle East, therefore a 'common Middle East strategy and an integrated police and intelligence effort', something NATO cannot do. Also the choice of the EU's mutual assistance clause could be regarded in the light of past French efforts to enhance the EU's security and defence policy, as well as of a 'certain [conception](#) of Europe's role in global affairs'.

Main references

The Treaty on European Union (TEU) a commentary, Blanke, H-J., Mangiameli, S., Heidelberg, Springer, 2013 , 1813 p.

[The 'Solidarity Clause' of the European Union – dead letter or enabling act?](#), Martino, A-M, SIAK-Journal – Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis (2), 2015, pp 65-76.

Endnotes

¹ Article V of the WEU Treaty reads: '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

provision is complemented by Article IV of the modified Brussels Treaty which [emphasises](#) NATO's role and gives it de facto precedence to implement collective defence in case of aggression against one of the ten WEU members:

'In the execution of the Treaty, the High Contracting Parties and any Organs established by Them under the Treaty shall work in close co-operation with the North Atlantic Treaty Organisation.

Recognising the undesirability of duplicating the military staffs of NATO, the Council and its Agency will rely on the appropriate military authorities of NATO for information and advice on military matters.'

² The Treaty on European Union (TEU) a commentary, Blanke, H-J., Mangiameli, S., Heidelberg, Springer, 2013, pp. 1201-1235.

³ Currently [Malta](#) is another EU Member State with declared neutrality status. Cyprus is a non-NATO EU member.

⁴ Cf. Blanke, Magiamelli, op.cit.

⁵ [Article 51 of the UN Charter](#) provides an exception to the prohibition of the use or the threat to use force (Article 2(4) of the UN Charter) and allows for the right of individual or collective self-defence in the event of an armed attack against a state Member of the United Nations.

⁶ Article 5 of the North Atlantic Treaty states that: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.'

⁷ Cf. Blanke, Magiamelli, op.cit.

⁸ Ibidem.

⁹ While some consider this terminological distinction to imply a different threshold of gravity of the hostile act (that is, allowing for a right to self-defence at a lower threshold than armed attack), others point simply to the different language versions of the EU Treaties (as well as the French version of the UN Charter) and the fact that the negotiations for the Lisbon Treaty took place in French, thus the use of the English translation of 'aggression armée'.

¹⁰ Cf. Blanke, Magiamelli, op.cit.

¹¹ See [Commentario breve ai Trattati dell'Unione europea](#), Pocar, F., Baruffi, M C., Adinolfi, A., Padova, CEDAM, 2014, 1844 p.

¹² Cf. Blanke, Magiamelli, op.cit.

¹³ In 2009, following the Irish rejection of the Lisbon Treaty in the first referendum, the European Council adopted a [decision](#) meant to give concrete guarantees to Ireland (but not only) in the field of security and defence: 'It will be for Member States – including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military neutrality – to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory. ... It will be a matter for Ireland or any other Member State, to decide, in accordance with any domestic legal requirements, whether or not to participate in any military operation.'

¹⁴ Currently France [contributes](#) 35 troops and police to MINUSMA.

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