The Effectiveness of the North Atlantic Treaty Organization in an Era of Adaptation: The Role of the North Atlantic Treaty Organization Administrative Tribunal

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Abstract

This chapter discusses the role that the North Atlantic Treaty Organization (NATO) Administrative Tribunal (AT) plays in the work of the political and military alliance charged with defending the security of its 29 members in Europe and North America. It explores how the AT's creation in 2013 has contributed to organizational success, played a valuable role in upholding respect for the rule of law, and driven change within the organization. NATO has a peculiar legal structure that must take into account the interests of a wide range of stakeholders, including military and political elements. The successful work of NATO is dependent upon effective and continual adaptation, both internally, with regard to its regulatory frameworks, and externally, with regard to NATO's primary mission of defense and deterrence. Success in the process of internal adaptation is not predicated only upon the smooth functioning of the AT, but also upon the effectiveness of the entire civilian staff member complaint resolution process. In the future, NATO will continue to invest in its system of dispute resolution and rely upon the AT to help demonstrate its commitment to the rule of law.

1 Introduction

In 2013, the North Atlantic Treaty Organization (NATO) completed a major overhaul of its employment dispute resolution processes leading to the establishment of a new administrative tribunal, the NATO Administrative

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Tribunal (AT). Since then, the AT has registered approximately 25 new cases each year.¹ Its AT's Annual Reports and its judgements (with names redacted) are available to the public through the NATO website.² The establishment of the AT was a major reform that has influenced NATO's culture and how the organization functions.

In the broadest terms, the reform was an important indicator of NATO's commitment to the rule of law, including a respect for the rights of staff members as reflected in international administrative law. The importance of the rule of law has been hardwired into the Alliance from the outset. The Preamble of the 1949 North Atlantic Treaty, which established the Alliance, affirms that NATO was founded for the collective defense of its members, on the basis of the principles of democracy, individual liberty and the rule of law.³ Respect for the rule of law and the role it plays in the security of the Allies is thus inherent in the exercise of NATO's core functions, including the way in which NATO's internal legal order is constituted.

This chapter begins by introducing NATO's legal structure, noting how its unique structure places emphasis on a culture of respect for the rule of law (Section 2). This is followed by two sections which, respectively, present the legal and the historical background to NATO's 2013 reform of its employment dispute resolution processes, providing the impetus behind the need for modernization and shedding light onto how it was done (Sections 3 and 4). The next section continues by explaining how the administrative tribunal was implemented within NATO, noting the importance of a broader commitment to dispute resolution (Section 5). It also explores how the existence of an administrative tribunal may affect NATO's work moving forward. This is followed by a conclusion (Section 6). Ultimately, the creation of, and successful functioning of, a robust rule of law-compliant dispute resolution procedure within NATO plays a crucial and valuable role in NATO's adaptation and its very existence helps drive necessary change.

2 NATO's Legal Structure

This section provides an overview of the legal structure of the NATO system, providing essential context to the successful functioning of the AT. The North Atlantic Treaty established the North Atlantic Council (NAC), the supreme

1 NATO, '2018 Annual Report of the NATO Administrative Tribunal', 5.

2 NATO's website has a section dedicated to the Administrative Tribunal (AT). It provides basic information about the AT as well as its judges, schedule of sessions, and its judgements. See NATO, 'NATO Administrative Tribunal', 14 June 2019.

3 The North Atlantic Treaty, Preamble.

decision-making body of the Alliance on which all Allies are represented.⁴ The NAC takes its decisions by consensus.

Below the NAC are the civilian and military structures of the Alliance. The civilian structure was established by the 1951 Ottawa Agreement, which provides for the legal status of NATO, and the formation of the International Staff, headed by the Secretary General.⁵ The International Staff supports the various civilian committees that carry out the preparatory work for decisions taken by the NAC itself.⁶ The civilian side also includes a number of other civilian bodies and agencies established by the NAC, which share in the legal personality of NATO, but are responsible for their own internal rules and finances. These include, for example, the NATO Communications and Information Agency and the NATO Support and Procurement Agency. Each of these entities in the civilian structure is subject to NATO's internal personnel rules, the Civilian Personnel Regulations (CPRS).⁷

The military command structure of NATO also provides advice to the NAC, but is very much a separate pillar from the civilian staff, and derives its legal status under the so-called Paris Protocol to the NATO Status of Forces Agreement.⁸ The Paris Protocol establishes the legal personality of the NATO Supreme Commands—the Supreme Headquarters Allied Powers Europe and the Allied Command Transformation—and provides for the establishment of their subordinate commands. On the military side, responsibility for the employment of the military staff remains with the Ally who contributes them. Therefore, this chapter focuses on the civilian side, who remain under the

4 Ibid., art 9.

5 Ottawa Agreement.

6 OLA operates as an independent office within the International Staff. OLA's primary role is to provide legal advice to the Secretary General of NATO, the International Staff and, as appropriate, the NAC and other NATO bodies, on a very broad range of matters. In addition to advising on matters of public international law (such as international humanitarian law, treaty law and practice, privileges and immunities, and so on), it also advises on the interpretation of the NATO legal texts, and the International Staff's internal rules and regulations. The two Military Commands and the various other NATO civilian agencies each have their own office of legal advisers. OLA works closely with these on questions engaging the responsibilities of the NAC and the Secretary General. In terms of the role of OLA in the dispute resolution process, the office cooperates with the relevant services at the decision stage to prepare legally sound staffing decisions, and also provides advice during the internal review process. And in case of an appeal, OLA defends the appeal on behalf of the Secretary General, both in writing and at formal hearings. But in addition, when an appeal concerns another NATO Body, OLA has the possibility to intervene in the case on its own initiative or to be invited to do so by the administrative tribunal, especially when the issue at stake could have consequence of a NATO-wide magnitude.

7 NATO Civilian Personnel Regulations (NCPR).

8 Paris Protocol.

purview of the 1951 Ottawa Agreement, and how employment is regulated and employment-related disputes are resolved.

3 Legal Framework for the NATO Dispute Resolution System

This section describes the legal framework to NATO's 2013 reform of its employment dispute resolution processes. Current and past NATO dispute resolution systems were created in accordance with the 1951 Ottawa Agreement that provides for NATO's legal status, and for its immunities from jurisdiction and execution before national jurisdictions, including domestic courts.⁹ Against this background, Article 24 of the 1951 Ottawa Agreement, which follows the model of Article 8 of the Convention on the Privileges and Immunities of the United Nations, states that the NAC shall make provision for appropriate modes of settlement of certain types of disputes, which include those between NATO and civilian staff.¹⁰

Prior to the reforms sparked in mid-2013, Article 24 was implemented through the NATO Appeals Board,¹¹ yet over the years this institutional configuration came to be the subject of criticism. Created in 1965, the Appeals Board was the primary method of resolving employment disputes. In the early 2000s, scrutiny was placed on the adequacy of the Appeals Board as a modern dispute resolution mechanism, in light of evolving norms of human rights and standards of access to justice in NATO's member States. In particular, a number of cases were brought before national courts challenging the jurisdictional immunities of NATO on the basis of the alleged incompatibility of the NATO internal dispute resolution mechanism with Article 6 of the European Convention of Human Rights (ECHR), which provides for a right of due process.¹² Although NATO would disagree in principle that its dispute resolution procedures should be subject to the European Court of Human Rights' (ECtHR) substantive review, the ECtHR repeatedly found in such cases that the NATO

⁹ Ottawa Agreement.

¹⁰ *Ibid.*, art 24.

¹¹ Chapter XIV of the 1964 NATO Civilian Personnel Regulations provided for the first iteration of the NATO Appeals Board. Such Appeals Board consisted of four individuals, including: a Chairman; a representative of the Administration; a representative of the Staff Committee, a committee formed to protect the professional interests of members of the staff; and a member of the staff at the same grade as the appellant. The Appeals Board had 15 days to give an opinion once a complaint was submitted by the appellant or head of NATO body. Decisions made by the Appeals Board were final.

¹² For example, ECtHR, *Chapman v Belgium* 2013.

Appeals Board was of a sufficient standard under its Article 6 jurisprudence. For example, in the case of *Gasparini v Italy and Belgium*, from 2009, the ECtHR found that NATO's internal dispute resolution mechanism could not be found 'manifestly deficient' specifically because a lack of publicity had not undermined procedural fairness and because the complainant had a mechanism to argue against partiality.¹³ Likewise, in the case of *Chapman v Belgium*, from 2013, the ECtHR found that the NATO Appeals Board was an effective internal procedure that afforded the appropriate protection to the complainant.¹⁴ The ECtHR reached similar conclusions with respect to the European Space Agency's Tribunal in its 1999 judgments in the cases of *Beer and Regan v Germany*¹⁵ and *Waite and Kennedy v Germany*.¹⁶

Despite the ECtHR judgments that the Appeals Board was indeed adequate, the NAC decided, in 2011, to conduct a thorough review of the dispute resolution system with the aim of its modernization.¹⁷ It tasked an independent panel of experts to assess the existing complaints and appeals system and make recommendations for its modernization in the light of organizational needs and contemporary standards of human rights and legal protections.

The panel of experts made a number of recommendations. These included an increased focus on the resolution of complaints earlier in the process before they escalate into formal disputes, and increased use of mediation and other forms of dispute resolution. To this end, the panel of experts endorsed the introduction of an administrative review process, including at a senior level. The panel of experts then went on to suggest that the NATO Appeals Board become an administrative tribunal with the rules governing its constitution and function to be reflective of its judicial character, its independence and its professionalism. With regard to the new administrative tribunal, the panel of experts recommended that it be given the possibility to award specific performance and other nonmonetary measures beyond mere rescission of decisions.

13 ECtHR, *Gasparini v Italy and Belgium* 2009.

14 ECtHR, *Chapman v Belgium* 2013.

15 ECtHR, *Beer and Regan v Germany* 1999, recognizing that the right of access to a court under Article 6 may be subject to a limitation so long as "limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (para 49).

16 ECtHR, *Waite and Kennedy v Germany* 1999, recognizing that the right of access to a court under Article 6 may be subject to a limitation and that "the attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments" (para 63).

17 NATO, 'NATO Administrative Tribunal', 14 June 2019.

These recommendations were amongst those approved in the 2013 amendments to NATO's internal personnel rules, the CPRs. These amendments established, with effect from 1 July 2013, the AT that NATO now utilizes. This was a major milestone in the internal NATO reform process. It cemented the right of staff to have access to a full-fledged tribunal, both independent and impartial, to adjudicate appeals against decisions taken by NATO and indicated the important role that a rule of law-compliant judicial review procedure should play in an international organization like NATO.

4 Establishment of the Administrative Tribunal and New Rules since 2013

Any administrative tribunal must be effectively organized and carefully structured to inspire a commitment to the rule of law within an organization and respond to the needs of its staff. NATO's revised system of dispute resolution was created to that end. This section considers how the revised system improved upon the base of dispute resolution procedures established by the NATO Appeals Board and notes an important emphasis on the revised system's use of informal processes in tandem with the AT.¹⁸

Structurally, the AT is composed of five members of different nationalities, including a President, proposed by the Secretary General and appointed by the NAC for a five-year term.¹⁹ The members of the AT may be reappointed to one further term by the same procedure.²⁰ The members of the AT may not be members or former members of the staff or of the delegations to the NAC, and are required to be completely independent in the exercise of their duties.²¹ The decisions of the AT are taken by a panel of three judges or a full chamber of five.²² Further, it falls to the Secretary General to put in place the administrative arrangements necessary for the functioning of the AT, including designating a Registrar who, in the discharge of their duties in support of the AT, is responsible only to the AT.²³ Finally, the AT retains a critical level of independence

18 NATO, '2013 Annual Report of the NATO Administrative Tribunal'.

19 NCPR, annex IX, arts 6.1.1–2.

20 *Ibid.*, art 6.1.2(c).

21 *Ibid.*, art 6.1.1.

22 *Ibid.*, art 6.1.4.

23 *Ibid.*, art 6.4.1.

in terms of budget management, though expenses are ultimately borne by NATO.²⁴

After exhausting an internal review procedure,²⁵ staff or former staff may appeal a decision taken by the Head of a NATO body, such as the Secretary General, to the AT.²⁶ This can be done when staff members consider a decision to be affecting their conditions of work or service and when such a decision does not comply with the terms and conditions of their employment including their contracts or the internal personnel rules.²⁷

The AT is a valuable resource for staff complaint primarily because it is competent to decide disputes and award remedies.²⁸ Its decisions are final and binding on the parties, and not subject to any type of appeal, although there are limited procedures for clarification and correction.²⁹ Available remedies include the annulment of a decision; the specific performance of an obligation (such as a pay increase, promotion, transfer or reinstatement of employment); and the payment of compensation.³⁰

Importantly, the revised system is much more than the official procedures which characterize the operations of an administrative tribunal. The revised system also puts major emphasis on pre-litigation procedures, providing for a two-step administrative review,³¹ greater use of mediation,³² and an improved complaints procedure.³³ The 2013 reform placed greater responsibilities on NATO managers, and ultimately the Heads of the NATO bodies, to address, and wherever possible, to resolve, issues instead of leaving them for resolution by the AT through a contested legal proceeding.

In summary, the newly revised dispute resolution system is better equipped to help NATO adapt to internal and external circumstances and to inspire organizational change. It does so primarily through the AT, which was set up to respect human rights guaranteed to staff and former staff as evidenced by its impartial and independent structure and by an emphasis on pre-litigation procedures.

24 Ibid., art 6.4.2.

25 NCPR, ch XIV, art 61.

26 Ibid., art 62.1.

27 Ibid., art 61.

28 NCPR, annex IX, art 6.2.

29 Ibid., art 6.8.4(a).

30 Ibid., art 6.9.1.

31 Ibid., art 2.

32 Ibid., art 3.

33 Ibid., art 4.

5 Impact on the Adaptiveness of NATO

The creation of an administrative tribunal, together with an emphasis on informal dispute resolution, more generally contributes to an international organization's ability to adapt. It does so in the sense that it offers an international organization legitimacy by presenting staff a forum to challenge changes and therefore provides an opportunity for an international organization to receive validation of changes made. Additionally, the creation of an administrative tribunal supports adaptation in the sense that it promotes effectiveness by ensuring that an international organization adheres to its own rules, highlighting areas for growth and evolution where needed.

NATO's ability to continually adapt has been central to its longevity and success since the Alliance's beginning. Indeed, NATO's defense and deterrence posture has had to continually shift over a wide variety of geopolitical environments, namely: from the Cold War years; to the 1990s unrest in the Western Balkans; to the transatlantic response to the 9/11 attacks; and, finally, to today's challenging security environment headlined by new methods of warfare.³⁴ Adaptation is, in principle, a core principle in maintaining the defense and deterrence posture NATO was founded upon.

This need to adapt, however, exists for internal procedures just as much as it does for the newsworthy external threats and political circumstances. Indeed, NATO has the need to adjust its administrative and institutional organization according to developments of the law, culture and modernization. To this end, NATO recently completed a functional review of its headquarters function in Brussels, in which NATO reviewed how its headquarters works and where it may be able to change. This was done with the aim of streamlining decision-making and increasing transparency.

The AT plays a crucial role in such internal adaptation, not only where actual challenges are launched and the AT opines on the lawfulness of changes introduced, but also as a spur to NATO to ensure that employment decisions are taken consistently and on the basis of defined rules. One recent trend is toward more detailed guidance and policy definition on how decisions affecting employees are taken, improving both transparency and consistency. The AT has played an important role in encouraging this and in providing a certain degree of muscle to the arguments from in-house legal advisers advocating this sort of good practice.

Policymakers also benefit from the increasing body of jurisprudence generated by the AT, providing important guidance to new employment policies as

34 NATO, 'Strategic Concepts', 12 June 2018.

they are crafted. NATO legal advisors similarly benefit from the wider body of jurisprudence generated from the administrative tribunals of other international organizations. The AT has cited both the Administrative Tribunal of the International Labour Organization and the Tribunal of the Council of Europe in its recent judgments. Notably, the NATO internal civilian personnel regulations specifically refer to the competence of the AT to rule on the internal personnel regulations themselves in the event that a provision seriously violates a general principle of international civil service law.

Three recent cases brought before the AT show the impact of the AT's judgments on policymaking in NATO, even in situations where there was no specific condemnation of NATO processes or where NATO's management came out vindicated. In a case brought by a former medical adviser, who had sought the transformation of their contract into a permanent staff contract, the AT concluded that it did not have competence to hear the case because the medical adviser's contract contained a dispute resolution clause providing for arbitration.³⁵ Nonetheless, the case highlighted a lack of clarity and consistency in the drafting of similar contracts. This soon became the impetus for reform across all consultancy contracts.

In another case, the AT ruled against a practice in NATO of repeatedly providing temporary contracts, rather than offering a more long-term staff contract.³⁶ This then led to a full review of the chapter in the internal personnel rules on temporary staff. In a further case, the AT ruled in favor of a staff member's claim for an allowance, notwithstanding that this was contrary to the applicable rules.³⁷ The AT did so on the basis of a previous example where management had allowed the allowance on an exceptional basis. Thus, the AT found that management's discretion was not to be unfettered in this regard, but must be exercised in a manner consistent with past decisions, or be overturned as discriminating between equivalent cases. The Organization has since taken this approach into account in its decision-making practices.

As exemplified in these cases, the administrative tribunal's ruling may have an influence on NATO regardless of whether or not NATO's defense was successful. In the case of the former medical advisor, NATO responded to the ruling by reviewing how it contracts with consultants even though the AT dismissed the case for lack of competence. Though NATO may have been successful on procedural grounds, NATO still recognized the need to change internal processes simply based on the issues raised by the case. Relatedly, the

35 NATO Administrative Tribunal, *ZS v NATO International Staff* 2015.

36 NATO Administrative Tribunal, *T v NATO International Staff* 2014.

37 NATO Administrative Tribunal, *MS v NATO International Staff* 2017.

successful defense of policy in an administrative tribunal provides an opportunity for NATO to build legitimacy amongst the staff so long as the AT is seen as a robust, independent arbitrator of issues. In these ways, the AT plays an important role in the adaptability of NATO and how adaptation is perceived by its staff.

Despite the benefits an administrative tribunal brings to an organization like NATO, it is not without its risks. Namely, there is always the possibility that focus on a robust administrative tribunal at the expense of other aspects of an organization's employment dispute resolution system leads to the creation of a litigation culture. This concern has yet to be realized at NATO. While the initial volume of appeals were at a worrisome rate, the AT's workload has lately appeared to stabilize or even decline.³⁸ This recent trend can, at least in part, be attributed to concerted measures to promote more informal forums or processes for the resolution of disputes without recourse to litigation. At the same time, in common with all international organizations, NATO needs to remain conscious of the risks of overreliance on formal dispute resolution procedures. Organizations risk a drift toward a culture of grievance and litigiousness unless they ensure that that vast majority of staff issues are addressed in a sensitive, transparent and effective way prior to the triggering of formal processes.

Noting this, NATO is working hard to build up a myriad of ways to resolve disputes outside of the AT. It is anticipated that the focus, in the near future, will remain on improving the processes by which staff concerns are raised and addressed earlier in the dispute resolution process. For example, the most recent set of the changes to the internal personnel regulations introduced the possibility of mediation at all stages of the complaints process.³⁹ Additionally, NATO is also in the process of reviewing and revising its processes for dealing with inappropriate behavior in the workplace (notably including bullying and harassment), and is in the initial stages for considering the establishment of an ethics board. The exact parameters of such a board have yet to be conceived, but the very discussion signals an organizational desire to provide staff with accessible routes for addressing issues. Other ideas in the pipeline include potentially establishing an Ombudsperson for administrative decisions, and also defining what role independent investigations might play within NATO followed by how and when these should be conducted.

For international organizations, ensuring access to justice for their staff is part of the corollary of an organization's privileges and immunities. This is especially so because international organizations typically function outside the

38 NATO, 'NATO Administrative Tribunal Statistics 2013–2018'.

39 NCPR, annex IX, art 3; see also NCPR, ch XIV, art 61.

purview of national judicial systems. An administrative tribunal, therefore, plays an important role in demonstrating an international organization's commitment to the rule of law and the upholding of individual rights. But the success of any international organization comes down to the engagement and well-being of its staff, and this is driven much more by the confidence they feel that their concerns will be listened to and responded to by the international organization without recourse to formal process, than by the robustness of a final appeal.

The present work being done by NATO on harassment supports this concept. A harassment case that ends up before the administrative tribunal—however the matter is determined—is already one with significant personal detriment to all those involved. Having the mechanisms in place to address such issues early, and in a way that has the confidence of staff, is the area that will have the largest impact on ensuring a positive and inclusive work culture within NATO, and should be an area of key focus for the immediate future.

Clearly, not all disputes will be able to be resolved below this level. For instance, increased life expectancy and related increases in medical costs are likely to continue to put pressure on budgets and the acquired rights of staff, and therefore require the AT's adjudication. Regardless, it is valuable for the staff to have multiple and tailored resolution procedures at their disposal, thus contributing to NATO's adaptation through organizational responsiveness and participation.

6 Conclusion

The AT, and the dispute resolution process that sits beneath it, is essential to NATO in supporting—and at times prompting—its effective adaptation, and as an expression of the adherence to the rule of law that underpins the Alliance. As important as it is to get right the establishment and functioning of an employment administrative tribunal, it is only part of the story in establishing a system of dispute resolution that contributes to a happy and motivated staff, and it is this above all that drives any international organization's successful adaptation.

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