Chapter Six

Handling the Legal Complications of the Absence of Effective Government

The absence of effective government brings into focus many important problems in international law because it involves states’ inability to take advantage of rights and fulfil duties under international law. Because public international law differs from other law orders in its lack of a central control mechanism, the principle of accountability in a decentralised legal order plays a more important role in ensuring stability and effectiveness.\(^1\) In the absence of effective government, the state, but also the international community, suffers either from ineffectiveness or a lack of organs or agencies to fulfil its duties and exercise its rights, which Herdegen described as ‘subjective impossibility’.\(^2\)

Because government incapacity differs from one state to another in appearance and implementation, no general rule, for example, *ulta posse nemo obligatur*, can be applied in the case of the absence of effective government. The Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission (ARSIWA)\(^3\) bring into public international law the reality that not only *de lege lata* but also *de lege ferenda* perceive the phenomenon not as unique but rather as a combination of complications.\(^4\) The answer to the question of the responsibility of states dealing with the absence

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4. Article 8 on Conduct Directed or Controlled by a State of the Responsibility of States for Internationally Wrongful Acts of 2001 states, “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions, or under the direction or contract of, that State in carrying out the conduct”.

of effective government, complications, consequences of violations, and the capacity to implement public international rules depends on the situation in each state.\(^5\)

The practice of public international law, like that of other law orders, is determined between two axes: the current political, economic, and social world order and the rules of positive international law. In this context, the reaction of international law to the complications of the absence of effective government is influenced on the one hand by the subjectivity of states and their consequent rights and duties and on the other by the state’s limited ability or lack of ability to enjoy rights and fulfil duties under international law. The international community’s handling of the legal complications of the absence of effective government is a research subject of its own.\(^6\) The present work maintains only that the reaction of the international community to the lack of effective government should be understood as part of its reconstruction efforts.

International law overcomes the difficulties of states dealing with the absence of effective government both actively and passively. Passively, other states ignore and tolerate the lack of effectiveness as much as possible and attempt to maintain normal diplomatic relations with those states. The international community applies different principles and criteria such as ‘continuity, identity, practicability, [and] stability of the law’ to justify ignoring or tolerating the lack of effectiveness. These principles are sometimes used alone and sometimes combined to decrease complications in practical international law.\(^7\)

In practice the international community also actively tolerates the absence of effective government. This is clearly seen in its acceptance of warring parties as respondent parties because of the ad hoc necessity of reconciling these parties.\(^8\) For example, the UK had contact with the warring parties in Somalia when there was no government,\(^9\) and many countries and international organisations

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\(^8\) Koskenmäki, “Legal Implications”, 8; Herdegen, “Der Wegfall effektiver”, 56.