

HAGUE INTERNATIONAL TRIBUNALS

Carl-August Fleischhauer: His Life and Work

GIAN LUCA BURCI AND NICO SCHRIJVER*

Abstract

This article is written in memory of Judge Carl-August Fleischhauer, who died on 4 September 2005, aged 74, during the first year of his retirement after a long and rewarding career in the service of both his native country Germany and the United Nations. The first part of the article sketches Judge Fleischhauer's background and career before being elected to the International Court of Justice, the second part describes his contributions to the work of the Court, and in the last part the authors reflect on the significance of Judge Fleischhauer's contributions to international law.

Key words

Federal Foreign Office Germany; International Court of Justice; Judge Fleischhauer; Legal Advisor; UN Secretariat

I. BACKGROUND AND CAREER

Carl-August Fleischhauer died on 4 September 2005, aged 74, only months after retiring from a long and rewarding career in the service of both his native Germany and the United Nations, in particular as a judge on the International Court of Justice (ICJ).

He was born on 9 December 1930 in Düsseldorf during the rise to power of Hitler. Nazi Germany and the Second World War affected him deeply, which may well explain his commitment to the rule of law in international relations and to the cause of the United Nations that so strongly characterized his entire professional career. Fleischhauer studied at the University of Heidelberg, being a city to which he remained loyal throughout his life through, for example, his association with the Max Planck Institute for Comparative Public Law and International Law. He also studied at Grenoble, Paris, and Chicago (where he was a Fulbright scholar in 1954–5). In 1960 he defended his Ph.D. on 'Die Grenzen der sachlichen Zuständigkeit des Bundesverfassungsgerichtes bei der Kontrolle der gesetzgebenden Gewalt, der Staatsleitung und der politischen Parteien' (The limits of the objective responsibility

* Gian Luca Burci is Legal Counsel of the World Health Organization and Nico Schrijver is Professor of International Law, Leiden University; both authors were assistants to Dr Fleischhauer in the Office of the Legal Counsel, United Nations Secretariat, New York.

of the Federal Constitutional Court in the control of the legislature, the government and political parties) at Heidelberg University, under the supervision of Professor Hermann Mosler (later judge at the ICJ in 1976–85). For a short period (1960–2) he served as a research fellow at the Max Planck Institute, and then, in 1962, he entered the foreign service of the Federal Republic of Germany.

In the early years of his career he served as a diplomat in Tehran (1962–3) and Montevideo (1969–71). The latter posting was a particularly difficult one, as it followed the kidnapping of his predecessor by members of the Tupamaro urban guerrilla movement. In between these two diplomatic posts he worked for the legal department of the Federal Foreign Office and during this period he was actively involved in the *North Sea Continental Shelf* case.¹ In 1971 he returned to this department as deputy head before becoming head of the international law section of the Federal Foreign Office in 1972. From 1976 to 1983 he served as Principal Legal Adviser to the Federal Foreign Office.

In these capacities Fleischhauer represented Germany at numerous international law conferences, including the UN Conferences on the Law of Treaties (1968–9), the Law of the Sea (1974–82) and State Succession in relation to Treaties (1977–8), as well as the Diplomatic Conference on Humanitarian Law applicable in Armed Conflicts (1974–7). These remained issues in which he was particularly interested throughout his career. In addition, he represented his country on the Sixth Committee of the UN General Assembly and on numerous ad hoc committees, for example that on the elaboration of the International Convention on the Taking of Hostages (New York, 1979). Furthermore, he participated in international meetings in Europe, most notably as vice-chairman of the German delegation to the Conference on Security and Co-operation in Europe (CSCE – the precursor of the OSCE), in particular the Helsinki Final Phase (1974–5).

In 1983 Fleischhauer was appointed Under-Secretary-General and Legal Counsel of the United Nations. In carrying out this function, he demonstrated a deep sense of responsibility and great commitment for more than a decade. During this particular period the United Nations went through tumultuous phases which can, without exaggeration, be identified as epochal. In 1989 the Berlin Wall came down, after an easing of tension between the East and the West since the mid-1980s as a result of the perestroika policy of the Soviet leader Mikhail Gorbachev. The end of the Cold War enabled the United Nations to get back on its feet, as exemplified by its increasing involvement in peace processes in various parts of the world and the rise in the number, as well as in the legal and operational demands, of peacekeeping operations. Frequently, in addition to supervising a ceasefire and maintaining peace and order, these operations included innovative elements such as disarmament and demobilization, refugee repatriation, humanitarian assistance, and the organization of free and fair elections. Examples include the operations in El Salvador (ONUCA), Namibia (UNTAG), Mozambique (ONUMOZ) and – finally! – Cambodia (UNTAC). The UN Office of Legal Affairs, under the leadership of Fleischhauer, was closely

1. *North Sea Continental Shelf (Germany v. Denmark/The Netherlands)*, [1969] ICJ Rep. 3.

involved in designing these peace operations, formulating mandates, and drafting status of force or mission agreements. His particular concerns were the scope of the mandates (were they realistic?) and the safety, privileges, and immunities of UN personnel.

On 1 August 1990 the United Nations was rudely awakened by the invasion of Kuwait by Iraqi forces. With unprecedented speed and consensus among its permanent members, the Security Council classified the invasion as a breach of international peace and security and employed over time the full machinery of Chapter VII of the UN Charter, from Article 39 to Articles 40, 41, 48, 50, and 51. In each particular phase Fleischhauer and his staff were deeply involved, providing legal advice to all relevant UN offices, including the Peacekeeping Department, the Disarmament Department, the Office of the Secretary-General and UNICEF. The Gulf crisis of 1990–1 and its aftermath tested the limits of the Charter as a framework for securing political consensus among the major powers for collective action in response to breaches of international security. The United Nations as an institution and as a decision-making forum survived the challenge and emerged with a different appreciation of the scope of its powers. It is fair to say that Fleischhauer and his office played a key role in reconciling political realism and legal imperatives, from interpreting the scope of the economic sanctions against Iraq to advising on the complex measures imposed against that country after the Gulf War.

Fleischhauer also had to deal with the complex and politically sensitive consequences of the dissolution of the Soviet Union and the fragmentation of Yugoslavia, for example the succession to the treaties ratified by the former and the calculation of the contribution that the newly independent states had to pay to the UN regular budget. Yugoslavia, however, presented the most formidable challenge to the United Nations, both from the point of view of managing a process of state dissolution on whose consequences there was no agreement, and with regard to the dramatic and controversial involvement of various peacekeeping operations in the conflicts between and within the former Yugoslav countries. Fleischhauer and his office, once again, were often at the forefront of the UN's response. His advice of September 1992 on the status of Yugoslavia after the adoption of General Assembly Resolution 47/1 was sometimes criticized.² What his critics did not appreciate, however, were the difficulties in reconciling the political realities of the different positions of the permanent members on the Security Council with respect to the legal and constitutional framework of the United Nations.

One of the last major issues dealt with by the Office of the Legal Counsel under Fleischhauer's leadership was the establishment of the International Criminal Tribunal for the former Yugoslavia by the Security Council, which was based on a report of the Secretary-General that was prepared in Fleischhauer's office.³ Although initially quite sceptical of the possibility of overcoming the many legal and

2. See, in particular, the finding of the ICJ in the *Legality of Use of Force* cases on the non-membership of the Federal Republic of Yugoslavia of the United Nations in the period 1992–2000 (e.g., *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004).

3. UN Doc. S/25704, 3 May 1993. The resolutions by which the Security Council requested, and then approved, this report were Res. 808 (1993) of 22 Feb. 1993 and Res. 827 (1993) of 25 May 1993.

political obstacles, Fleischhauer was extremely gratified by the reception that this report received and by the subsequent establishment of the Tribunal by the Security Council in May 1993.

2. FLEISCHHAUER AS A JUDGE OF THE INTERNATIONAL COURT OF JUSTICE

Fleischhauer served one full term as a member of the International Court of Justice, from 6 February 1994 to 6 February 2003. Subsequently, he was an ad hoc judge in the *Certain Property* case (*Liechtenstein v. Germany*).

Following his arrival in The Hague, Fleischhauer would tell in a somewhat amused way how he experienced his new life as a judge of the ICJ. He enjoyed recounting how his telephone initially seldom rang, whereas in Bonn and New York it had never stopped ringing. Furthermore, in both Bonn and New York he was used to working with and directing a sizeable number of staff; at the Court he suddenly had to do all his work on his own, given the Court's practice in this regard. However, it was obvious that he did so with great care and enthusiasm, although there can be no doubt that he missed very much his daily multiple contacts with his New York deputy Ralph Zacklin and all other staff members of the Office of the Legal Counsel.

During his nine-year term as a judge the Court was very busy, rendering as many as 35 judgments, orders, and decisions in contentious cases and providing three advisory opinions. Fleischhauer's thorough knowledge of the law of the sea, UN law, immunities, and procedures must have been of immense value to his colleagues.⁴ It typifies him as a team worker and a man always in search of consensus that he expressed a separate or dissenting opinion in only three cases. First, Fleischhauer appended jointly with Judge Guillaume a Declaration to the judgment in the *Lockerbie* case (1998) which related to the interpretation of Article 79 of the Rules of the Court concerning 'not exclusively preliminary' objections. In their view 'the Court wrongly concluded that the objection raised by the UK according to which Security Council resolutions 748 (1992) and 883 (1993) have rendered the claims of Libya without object does not, in the circumstances of the case, have an exclusively preliminary character'.⁵ Second, in the *Kasikili/Sedudu Island* case (Botswana/Namibia, judgment in 1999) Fleischhauer felt compelled to express a dissenting opinion. He had arrived at a different interpretation of the meaning of the 'main channel of that river' in the 1890 Treaty between Germany and Great Britain, and this affected his findings not only on the location of the boundary in the Chobe river but also on the status of the island.⁶ Finally, he gave a separate opinion in the advisory opinion procedure on *Legality of the Threat or Use of Nuclear Weapons* (1996). He referred to the 'terrible dilemma that confronts persons and institutions alike which have to deal with the question of the legality or otherwise of the threat or use of nuclear weapons in international law'. He agreed with the Court's majority finding that 'the threat or

4. See also R. Higgins, 'Fleischhauer Leaves the Court', (2003) 16 LJIL 55.

5. [1998] ICJ Rep. 47, para. 1.

6. [1999] ICJ Rep. 1045, para. 3.

use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of international humanitarian law'. However, he wanted to make it clear, though with some reluctance, that if a state is the victim of an all-out attack by another state, which threatens the very existence of the state under attack, recourse to the threat or use of nuclear weapons in self-defence as recognised in Article 51 of the UN Charter could well be the last and only alternative to giving itself up and surrendering. He concluded: 'In the long run the answer to the conflict which the invention of nuclear weapons entailed between highest values and most basic needs of the community of States, can only lie in effective reduction and control of nuclear armaments and an improved system of collective security.'⁷

Shortly after his retirement from the Court in 2003, Fleischhauer was appointed as an ad hoc judge in the *Certain Property* case (*Liechtenstein v. Germany*). The newly elected Judge Simma, also a German national, had to withdraw from sitting in this case since he had previously acted as a legal counsel on behalf of Germany in this matter. Ad hoc Judge Fleischhauer attached a declaration to the judgment, with which he agreed. However, he wanted to make some remarks on the considerations which brought the Court to the conclusion of rejecting the preliminary objections of Germany and finding that there was a legal dispute between Liechtenstein and Germany.⁸ The judgment was delivered on 10 February 2005. Only a few months later Judge Fleischhauer fell seriously ill and died on 4 September 2005.

3. REFLECTIONS ON THE SIGNIFICANCE OF JUDGE FLEISCHHAUER

Judge Fleischhauer had an impressive career which enabled him to gain very rich experience during important stages in the evolution of international law. All his efforts were aimed at promoting as much respect as possible for the rule of law in international affairs. He served as one of the main architects of the international-law-based Ostpolitik of his country and was closely involved with active German policy within the United Nations after Germany was admitted to membership in 1973. His multifaceted experience in the United Nations made him eminently qualified to serve as the UN Legal Counsel and subsequently as a judge on the court which is the principal judicial organ of the United Nations. Judge Fleischhauer was a man of great integrity and high moral principles, with a sharp and insightful mind that could immediately identify the key issues in complicated and politically controversial situations. His constant efforts to reconcile political realism with the purposes and objectives of the United Nations allowed him to give advice and reach solutions that sacrificed neither the integrity of the rule of law nor the need to take actions that required political support from key players. During his tenure as legal counsel he functioned entirely independently of his home country and the Federal Office of Foreign Affairs, although he could not conceal his immense joy when Germany's

7. [1996] ICJ Rep. 310, para. 7.

8. See *ICJ Reports* 2005.

division into two states came to an end and reunification finally materialized in October 1990.

Judge Fleischhauer was an intensely private man who was devoted to his wife Liliane and his daughters Daniela and Katharina and to his grandchildren. The sudden death of his wife and life companion in 2003 was a major personal tragedy for him that he bore with remarkable courage and dignity. Fleischhauer attached great importance to personal relationships and won the loyalty and affection of his staff and colleagues.

He had a keen eye for the gradual evolution of international law and its moderating function in the daily practice of international relations. This can be read in particular in his chapter on 'Inducing Compliance' in *United Nations Legal Order*, edited by Oscar Schachter and Christopher Joyner.⁹ He also published on the position and role of the UN Secretary-General and of the UN Secretariat in general¹⁰ as well as on the United Nations and the rule of law.¹¹ His wide experience is reflected in his contributions on 'Declaration' and 'Negotiation' in the *Encyclopedia of Public International Law*.¹² He often received groups of students at the International Court of Justice and served for many years on the advisory board of the Telders International Law Moot Court Competition of Leiden University, including the role of president of this board and presiding judge of the finals from 2001 to 2004.

He was an extremely committed and serious-minded man, who always sought dialogue rather than confrontation. The great events of the twentieth century, including the Second World War, the establishment of the United Nations, the Cold War, and the détente between East and West, put a stamp on his character and his career. His personal characteristics and professional experience made him exceptionally well qualified to serve on the International Court of Justice as 'a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law' (Art. 2 of the Statute of the Court). Judge Fleischhauer is and will be sorely missed by all those who had the privilege of knowing and working with him.

9. C.-A. Fleischhauer, 'Inducing Compliance', in O. Schachter and C.C. Joyner (eds.), *United Nations Legal Order*, Vol. 1 (1995), 230.

10. C.-A. Fleischhauer, 'The United Nations Decade of International Law, the Role and Work of the Secretariat of the United Nations and of Its System of Organizations', in United Nations, *International Legal Issues Arising under the United Nations Decade of International Law* (1995).

11. C.-A. Fleischhauer, 'The United Nations and the Rule of Law', in (1985) 36 *Aussenpolitik* 225; 'The United Nations and the Progressive Development and Codification of International Law', (1985) 25 *Indian Journal of International Law* 1.

12. R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 1 (1992), 971–2, and Vol. 3 (1997), 535.