Document:-

A/CN.4/SR.1045

Summary record of the 1045th meeting

Topic:

Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-

1970, **vol. I**

posed to jettison, without suggesting any alternative, the two criteria set out in the Legal Counsel's memorandum of 22 August 1962, which had always been followed in practice.

47. He noted that article 60 would make articles 22 to 44 [11] applicable to permanent observer missions. Those articles imposed certain obligations on the organization concerned. Leaving aside the question whether organizations would become parties to the draft convention under discussion, it should be noted that the implementation of article 60 by an organization would create, for its executive head and secretariat, precisely those difficulties which had made it impossible for the Secretary-General of the United Nations to apply the "all States" formula in the exercise of his functions as depositary for multilateral treaties.

48. The views he had expressed would govern his attitude to articles such as article 51, unless the representative of the Secretary-General could authoritatively state that his misgivings were unfounded. For those reasons the Commission should adopt a cautious attitude, similar to that which it had adopted in 1965 on the question of participation in treaties.

49. The New York telephone directory showed how many entities claimed to have observer missions which were unknown to the United Nations internal directory. Observer status could only be created by the practice of the competent organs of the organization concerned or by its constituent instrument.

50. As to the problem of "micro-States" mentioned in paragraph (4) of the commentary to article 51, the Commission was not empowered to examine a question that was at present under consideration by a committee of experts appointed by the Security Council.

51. He thought that an amendment of the text on the lines suggested by Mr. Castrén and Mr. Reuter would change the whole concept of article 51 and was likely to make its provisions much more acceptable to him, but he reserved his position until he saw an amended text.

Organization of work

52. The CHAIRMAN announced that he had received a telegram from Mr. Bedjaoui confirming that he proposed to attend the Commission's session from 11 May and suggesting that some time might be devoted to his third report on succession of States in respect of matters other than treaties (A/CN.4/226). He reminded the Commission of its decision at the previous session to give priority to the topic of relations between States and international organizations, followed by State responsibility, succession in respect of treaties and, if time permitted, succession in respect of matters other than treaties. [12]

The meeting rose at 1 p.m.

[11] See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, pp. 4 *et seq.*

[12] *Ibid.*, p. 32, para. 93.

1045th MEETING

Friday, 8 May 1970, at 10.15 a.m.

Chairman: Mr. Richard D. Kearney

Present: Mr. Ago, Mr. Albonico, Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/227)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 51 (Establishment of permanent observer missions) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 51.

2. Mr. BARTOŠ said that the first point to settle was whether the convention which the Commission was preparing would have the effect of obliging the organization to grant every non-member State the right to send a permanent observer mission to it. If the convention was to be open for signature or accession by the organizations concerned, the question would not arise, but if only States could become parties to it, article 51 would establish a unilateral privilege for States, since they would in any case be able to impose their presence on the organization. Moreover, the convention would place non-member States in a more favourable situation that member States, which were obliged to fulfil certain conditions in order to become members of the organization. Consequently, although he was in agreement with the general principle laid down in article 51, he thought it should be decided that the right thus granted to non-member States could be exercised only under the conditions provided for in the rules of the organization or with the consent of the organization.

3. Mr. NAGENDRA SINGH said that the statement of the rule contained in article 51 was certainly not incorrect, if taken together with Mr. Ushakov's interpretation of articles 3 and 4 [1] regarding the overriding character of the rules of the organization concerned. It was a fact that a number of specialized agencies had made provision for observers.

4. Nevertheless, he was inclined to support Mr. Castrén's proposal to add a concluding proviso stating that the consent of the organization was required. The main argument in favour of such a proviso was that it would state at once, and at one point in the draft, what was the correct position.

[1] See previous meeting, para. 33.

5. The provisions of articles 3 and 4 could easily be lost sight of and the proposed proviso would help to clarify the position. Moreover, if the constituent instrument of the organization concerned was silent on the question of observers, the inference could be drawn—as was shown by the comments of the Netherlands Government (A/CN.4/221)—that any non-member State had the right to send an observer. Clearly, such an inference would be contrary to the Commission's intention; and as Mr. Rosenne had pointed out, articles 3 and 4 did not provide sufficient safeguard.

6. Lastly, the proposed amendment would serve to emphasize the difference between regular missions of member States and observer missions of non-member States.

7. Mr. TSURUOKA said he shared the general view which had so far emerged from the debate, that article 51, as now drafted, was rather over-simplified. Experience showed that there were all kinds of permanent observer missions, including missions from entities to which the Commission did not intend to grant an official international status; a clear distinction must therefore be drawn between such missions and permanent observer missions sent by States whose existence was not in dispute. For that reason, the establishment of permanent observer missions by non-member States should be made expressly subject to the consent of the organization, particularly since the proviso in article 3 [2] would not apply to article 51, as the Special Rapporteur had said that there were no rules concerning the establishment of those missions.

8. Mr. YASSEEN said that article 51 might be confusing unless it was linked to other articles of the draft. If the future convention was to apply to international organizations of a universal character, the right it stated already existed by virtue of a general customary rule which was part of the law of the United Nations. On the other hand, even those who did not question the universal character of the United Nations did not claim that a State could become a member of the Organization as of right, without following a certain procedure, or obtaining a certain decision by a competent organ, and it would therefore be neither just nor logical for a State to be able to establish a permanent observer mission to an international organization without its consent. Accordingly, without contesting the right of every non-member State to establish a permanent observer mission to the organization, it should be specified in article 51 that that right could only be exercised in accordance with a certain procedure and by virtue of a decision of the organization. Where regional organizations were concerned, permanent observer missions could be established only with their consent and if their constituent instruments so provided.

9. Mr. RAMANGASOAVINA said he approved of the basic principle of article 51, which enabled non-member States to maintain relations with international organizations, but was not sure how far the right thus conferred on them extended. He agreed with several other members of the Commission that the exercise of the right should be made subject to the consent of the organization concerned, mainly in order to establish a distinction between member States, whose right to establish permanent missions was absolute, and non-member States, for which that right so far derived only from practice. In addition to their rights, member States also had obligations and duties, and it would be unfair for non-member States only to enjoy privileges. It was true that by confirming the status of permanent observer missions the Commission would merely be following the progressive development of international law, for it sometimes happened that States having no diplomatic relations concluded bilateral agreements for the purpose of establishing trade missions whose members enjoyed the same privileges and immunities as officials of diplomatic missions.

10. Article 51 should therefore be adopted, but with the amendment proposed by Mr. Castrén.[3] Nevertheless, it might perhaps be advisable also to consider the case in which an organization did not agree that a non-member State could establish a permanent observer mission to it, whereas that State considered that it was entitled to do so.

11. Mr. USTOR said that the clear and short rule contained in article 51 was based on the same idea as article 6.[4] Both dealt with the relationship between a State and an organization of a universal character. For an organization of that type, it was appropriate to provide that States had the right to establish missions—permanent missions in the case of member States and observer missions in the case of non-member States. Such a rule was consistent with the postulate of universality and with the idea that general international treaties should be open to all States. The right to participate in organizations of a universal character was inherent in statehood.

12. That right was of course subject to the rules of admission. But those rules should be framed in such a way as to permit the participation of all States; they should not provide for a more restricted participation than Article 4 of the Charter.

13. It had been objected that article 51 would impose an obligation on an organization which might not be a party to the draft convention. The same could be said of the provisions of article 6, which imposed an obligation to accept a permanent mission.

14. It had also been said that article 51 would impose obligations on the host State; but those obligations were not more onerous than those resulting from article 6. The host State might well have more difficult relations with a State member of the organization than with a non-member State wishing to establish an observer mission.

[2] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 197.

[3] See previous meeting, para. 29.

[4] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 199.

15. The position was similar to that which arose in connexion with the definition of what constituted a "State", and the same difficulty would arise over the application of article 6. And in the implementation of either article a conflict could arise between two authorities claiming to represent the same State.

16. In short, the position wás that article 51 laid down a rule of principle which it might not be easy to carry out in certain cases; but that should not deter the Commission from adopting the rule.

17. Article 3 made it clear that the organization was in a position to regulate the establishment of observer missions, in the same way as that of permanent missions. Similarly, the organization could not be prevented from passing an individual resolution in respect of a State. The organization could exclude a State and could, by way of sanction, debar that State from maintaining an observer mission.

18. If, however, there was no rule to the contrary in the organization concerned and there was no individual decision to prevent it, any State had the right to participate in an organization of a universal character. If a State did not participate as a member, it had the right to maintain contact with the organization through observers, as provided in article 51.

19. For those reasons, he did not favour the addition of a proviso on the lines proposed by Mr. Castrén. If the majority of the members believed that some addition should be made to the text of article 51, it should take the form of a concluding proviso on the following lines: "unless precluded by the rules of the organization or by a specific objection by the organization". But he did not think that such an addition was necessary, because the provisions of article 51, read in conjunction with articles 3 and 4, were clear and consonant with general international law.

20. Mr. USHAKOV said he wished to explain his own views and to be sure he understood those of other members of the Commission. Article 51 laid down a general principle applicable to a situation similar to that of the establishment of permanent missions by member States. The latter situation was governed by article 6, which did not mention the consent of the organization. Why, then, should that consent be expressly required in the case of permanent observer missions? It was quite obvious that no member State would establish a permanent mission without the organization's consent and that that consent was tacit and sanctioned by practice only. If the Commission considered that the organization's consent was necessary for the establishment of missions of all kinds, that should also be specified in the case of permanent missions of member States, but such a provision would be superfluous, because the customary rule already existed. It was equally superfluous to specify that the application of article 51 was subject to the provisions of articles 3 and 4 of the draft, though he would not object to such a proviso. The essential point was to make it clear that article 51 set out a general rule and that it was impossible to provide for all the exceptions which might arise and which, moreover, had a political, rather than a legal, basis. If the practice was to accept permanent observer missions, then any non-member State could establish such a mission, as the Special Rapporteur proposed. If no such practice existed, no State, whether a member or a non-member, could claim the right to send a permanent mission to an organization.

21. Mr. AGO said that the situations dealt with in articles 6 and 51, though apparently similar, were in fact fundamentally different. Article 6 stated a right of member States, in other words States which had become parties to the constituent instrument of the organization, and under article 3 that right was granted to them without prejudice to any relevant rules of the organization. The relevant rules, however, were usually silent on the matter, and the right of member States to establish permanent missions therefore derived from their membership. But admission to membership of an organization was not a right: the candidate State had to fulfil certain conditions, and its admission was subject to the organization's consent. Where non-member States were concerned, what was the source of their right to establish permanent observer missions? It had been claimed that there was a customary rule, but its existence had yet to be proved. Nor was there any relevant rule of the organization providing for such a right. Consequently, the only other possible source was agreement, even if tacit, between the organization and the State concerned.

22. Moreover, if the organization considered that a particular State did not fulfil the necessary conditions for becoming a member, that meant that it was not convinced of the desirability of allowing that State to take part in its work. If a State had not been admitted to membership and consequently could not establish a permanent mission, why should it be given the right to establish a permanent observer mission, when the organization might advance the same objections as it had to the State's admission? Since the Charter laid down conditions for the admission of Members, it was only logical that those conditions should apply to the acceptance of observers. Similarly, it would be paradoxical to recognize the right of a State which had been expelled from the organization to establish an observer mission, when it would no longer be entitled to a permanent mission under article 6. It was therefore clear that all the rights enjoyed by a State vis-à-vis an organization were of necessity subject to the organization's consent, which should be expressly provided for in appropriate wording in article 51.

23. Consideration should also be given to the position of the host State, which, in agreeing to act as host to the organization, certainly undertook to admit to its territory the permanent representatives of all States members of the organization, but not the representatives of non-member States.

24. Mr. ALBÓNICO said he agreed with Mr. Castrén that the position of non-member States was quite different from that of member States; for the former, the consent of the organization was obviously necessary. A new element would be introduced into the situation, however, if the organization refused its consent. Could it do so arbitrarily? Mr. Ushakov had argued that there should be absolute equality between member and non-

member States, but to him that argument was not legally acceptable. An organization might be justified in rejecting the application of a non-member State if that State's behaviour was not in conformity with the purposes and principles of the Charter. On the other hand, an arbitrary rejection would be unjust to a State which for financial reasons, for example, was unable to participate as a full member but wished to remain in contact with the organization through an observer. He hoped, therefore, that Mr. Castrén would amend his proposal to include the notion that any rejection of an application by a non-member State should at least be well-founded.

25. The CHAIRMAN,* speaking as a member of the Commission, said that he was in basic agreement with the observations made by Mr. Castrén, Mr. Reuter and certain other members. In particular, he agreed with those who thought that article 3 did not provide a satisfactory answer to the problem of article 51, since the latter article dealt not so much with constitutional provisions or actual rules as with practice. It would certainly be dangerous to attempt to solve the problem by relying on paragraph (5) of the commentary to article 3, which stated that "The expression 'relevant rules of the Organization'... is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization".

26. It had also been suggested that article 51 should include a reference, in some form or other, to the consent of the organization; if that suggestion were adopted, there would appear to be no need to refer to the relevant rules of the organization. He did not think, however, that the problem of article 51 could be solved by wording the article in a negative way, for example, by saying "non-member States may establish permanent observer missions... unless there is a decision to the contrary". That would place a substantial and perhaps unfair burden on both the Secretary-General and the host State, since in the event of disagreement between them, which might conceivably occur in political situations, the whole matter would be left in the air. In his opinion, such a decision could properly be taken only by the constituent organ of the organization itself.

27. It had been argued that article 51 could not possibly cover all exceptional cases, but surely that was what all law—the most obvious example being the law of contract—was designed to do. The Commission could not afford to ignore exceptional cases, since such cases were always arising as a result of civil wars and revolutionary régimes, and they posed grave political problems.

28. Sir Humphrey WALDOCK said that none of the arguments put forward in the discussion had led him to change his view that there was a fundamental difference between permanent observer missions from non-member States and permanent missions from member States. In the régime proposed for the former in articles 51 and 57, as well as in his explanations concerning credentials, the Special Rapporteur had laid down what many would regard as a blanket provision giving non-member States the right to appoint permanent observer missions, subject only to notification of the organization. To his mind, that would be a rather startling development in international relations, which by their very nature were based on mutual consent. It was only proper, therefore, that article 51 should include some reference to consent, although the Commission could not impose on organizations the procedure by which that consent was to be expressed.

29. In his view, what the Special Rapporteur was attempting to do in article 51 and certain other articles was not supported by, and was really contrary to, existing practice as described in the Legal Counsel's memorandum of 22 August 1962,[5] paragraph 1 of which said "... it has been the policy of the Organization to make such facilities available only to those [permanent observers] appointed by non-members of the United Nations which are full members of one or more specialized agencies and are generally recognized by Members of the United Nations". Moreover, by adopting article 51 as drafted at present, the Commission would be giving permanent observer missions not only a more clearly defined, but a larger legal status than they now possessed; that might be desirable as a progressive development of international law, and he himself was generally in favour of it, but it would be going beyond the present practice.

30. He supported the general concept which inspired the articles, but he thought they would be unacceptable to States if they failed to include some reference to the element of consent. Moreover, it was undesirable to leave the decision to admit a permanent observer mission to be taken largely by the Secretary-General and the host State in consultation. There should be some decision by the organization itself, which would be binding on the host State. Some members had said that it was unnecessary to provide for what would only be exceptional cases; but, as the Chairman had pointed out, such cases did arise. It would be unfair to throw the burden of dealing with them on the Secretary-General; and in an analogous context in the law of treaties, the Secretary-General had repeatedly declined to assume such a burden.

31. Mr. ROSENNE said that existing practice with respect to permanent observer missions, although meagre, seemed to be fairly uniform: the role of the organization ceased when it had accorded an appropriate seat to the observer in the gallery at a public meeting, and any privileges and immunities enjoyed by him were granted by the host State *ex gratia*. The suggestion that the draft need not make provision for exceptional cases was liable to obscure the fact that the institution of permanent observer missions itself was exceptional and anomalous and designed to meet exceptional and anomalous needs, which had their origin in highly political

* Mr. Kearney.

[5] See *Yearbook of the International Law Commission, 1967*, vol. II, p. 190, para. 169.

circumstances. That political aspect was evident from a perusal of paragraph (1) of the Special Rapporteur's general comments on Part III (A/CN.4/227). He feared, however, that if the institution of permanent observer missions was given an exaggerated legal status, the result would not be the progressive development of international law, but rather that in a few years some new informal institution would have to be created to meet exceptional needs. As a result of the discussion he now had serious doubts about the wisdom of going too far in the matter of permanent observer missions, and he thought it preferable for the Commission to confine itself to the problem of clarifying the respective rights and duties of the five parties concerned, namely the sending State, the host State, other member States, non-member States with permanent observer missions, and the organization itself, after a permanent observer mission had been established.

32. Mr. USHAKOV observed that there was no reason for leaving it to the host State to decide whether or not it accepted a permanent mission or a permanent observer mission sent to a given organization, since it had to bear all the consequences of the presence of the organization in its territory; the decision lay exclusively with the organization concerned and had to be respected by the host State. In his opinion, moreover, the rules which all organizations had to apply in accepting permanent observer missions were the relevant rules of the organization, referred to in article 3 of the draft. In the absence of such rules, it was for the organization itself to decide whether it should lay down new provisions on the subject; in any case, rules could not be imposed in advance on international organizations of a universal character, and he would therefore accept the addition of the words "subject to the provisions of articles 3 and 4" at the end of article 51.

33. Lastly, although he agreed that there were exceptional cases connected with political difficulties, he considered that the principle dealt with in article 51 should be stated without attempting to provide for those exceptions, since the Commission should not venture into the political sphere.

34. Mr. USTOR said that Mr. Ago had raised the question of the source of the right of a non-member State to establish a permanent observer mission. He (Mr. Ustor) submitted that every State, by virtue of the mere fact of being a State, had the right to participate in organizations of a universal character. It was clear that the organization itself was entitled to prescribe the conditions governing the admission of a permanent observer mission, but in his view no organization of a universal character could lay down more restrictive conditions than those in Article 4 of the Charter. If a State was unwilling, for financial reasons, for example, to become a full member of an organization, it should at least have the right to send observers, so that it could keep itself informed about what was going on.

35. It had been urged that a certain element of consent was necessary on the part of the organization, but surely the very fact of the establishment of an organization of a universal character implied that while member States had the right to send permanent representatives to it, they must also tolerate the presence of permanent observer missions from non-member States. That principle corresponded more or less to existing practice and must be accepted if international law was to develop along progressive lines. Mr. Ago had noted that the constitutions of international organizations did not deal with the question of observers; he hoped that the present discussion in the Commission would encourage those drafting such constitutions in the future to give the matter some thought.

36. Mr. BARTOŠ said he had not intended to adopt an anti-liberal attitude, as some members of the Commission had made out. On the contrary, it seemed to him liberal to forestall the disputes which might arise from shortcomings in the precise conditions imposed on those who wished to make use of the articles under discussion. He endorsed Mr. Ushakov's first comment, but disagreed with the last, which was not clear. Mr. Ustor had tried to provide an explanation, but it did not seem to be legally convincing: he had said that access to international organizations could not be subjected to any conditions other than those laid down in the Charter for becoming a Member of the United Nations. But in saying that, he had ignored the fact that an organization such as ICAO laid down conditions which were not in the Charter, since it required the candidate State to accept the obligation to observe in practice some of the Chicago "freedoms of the air". It was indeed hard to conceive of a State not a member of ICAO, which refused to observe the principles on which that organization was founded, being allowed to establish a permanent mission or a permanent observer mission to ICAO. In his opinion, it was not necessary for the international organization concerned to make separate decisions on each request by a non-member State for the establishment of a mission, but it was necessary for the requesting non-member State to fulfil certain general, non-discriminatory, conditions stipulated in advance by the organization.

37. With regard to the exceptional cases referred to by Mr. Ushakov, he thought they were political rather than legal in origin, and the organization concerned might sometimes have to deal with them by adopting appropriate resolutions. He recognized that that procedure was discriminatory, but thought it was sometimes necessary, because certain States must be prevented from abusing the non-discrimination rule in order to evade the general rules laid down by the organization. In such cases, the organization must have the means of defending itself.

38. To sum up, he thought that international organizations should be allowed to decide whether or not to accept permanent observer missions, and he was therefore in favour of inserting a reference either to the relevant rules of the organization or to its consent, though he preferred the former solution.

The meeting rose at 1 p.m.