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Summary record of the 1048th meeting

Topic:
Representation of States in their relations with international organizations

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when the Commission had discussed article 52. He proposed, therefore, that for the time being article 51 should be referred to the Drafting Committee.

48. Mr. USHAKOV said that the principle of protection of the rights of the organization, which some members had invoked as a reason for restricting the scope of article 51, was established clearly enough in articles 3 and 4 and even in article 5. If it was argued that the protection thus provided was inadequate, it might well be asked from what and from whom those rights had to be protected. One might suppose that the intention was to defend them against the principle of the universality of international organizations and against the principle of the sovereign equality of all States, including non-member States. The Special Rapporteur's proposal, on the contrary, aimed at protecting the sovereign equality of non-member States and their right to be represented in international organizations of a universal character. In fact, the discussion turned on the choice between those two views.

49. Mr. REUTER said that the first consideration must be the position of the host State and of the States which would have to apply the convention; the matter should be approached in a very practical way in order to produce a text that would guarantee the members of permanent observer missions established by non-member States well-defined rights vis-à-vis States which recognized the privileges and immunities of observers. He could well understand the concern of those who wished the principle of universality to be stated clearly and firmly. All members drew a distinction between the principle and the procedure for its application, but that distinction would not lead to a solution, for it was precisely in connexion with practical implementation that the question of principle arose.

50. So far as the principle was concerned, he agreed that it was not possible to take a stricter position on universality with respect to observers than with respect to admission to an organization. As he was not sure that that principle could be embodied in an article or in a statement in the commentary or that such a solution would satisfy those who wished the principle to be expressly stated, he thought it would be wiser temporarily to suspend the debate on article 51, which could well be referred to the Drafting Committee, and to pass on to the question of practical application, which would arise in connexion with all the articles. It was to safeguard the rights of observers that the Commission was preparing a convention, and their status should be clearly established, in particular, for the courts. Only after it had considered the various practical questions involved would the Commission be in a position to decide what concessions could be made in regard to article 51 and whether it was necessary to state the principle of universality in some form or other in the texts it was preparing.

51. The CHAIRMAN suggested that article 51 should be referred to the Drafting Committee with the request that it bear in mind the points made during the debate and in the Special Rapporteur's summing up, without prejudice to a final decision as to whether that article should be combined with article 52.

52. Mr. EL-ERIAN (Special Rapporteur) supported that suggestion.

*It was so agreed.**

The meeting rose at 1.5 p.m.

* For resumption of the discussion, see 1061st meeting, para. 56.

1048th MEETING

Wednesday, 13 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, 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]

(continued)

1. The CHAIRMAN invited the Commission to consider article 52 in the Special Rapporteur's fifth report (A/CN.4/227).

2.

Article 52

Functions of permanent observer missions

1. The principal function of a permanent observer mission is to ensure the necessary liaison between the sending State and the Organization.

2. Permanent observer missions may also perform *mutatis mutandis* other functions of permanent missions as set forth in article 7.

3. Mr. EL-ERIAN (Special Rapporteur) introducing article 52, said that while the principal function of permanent observer missions was to provide the necessary liaison between the sending State and the organization, they might also perform some of the functions of a permanent mission on an *ad hoc* basis, as explained in paragraph (6) of his commentary. An interesting example was the invitation extended by the Sixth Committee to the permanent observer mission of Switzerland at the twenty-fourth session of the General Assembly.

4. Mr. TAMMES said that the question which arose in his mind, in connexion with paragraph 2 of the article, was who decided what other functions of permanent

missions could be performed by permanent observer missions. It seemed obvious that the functions they could perform should be determined by the organization itself, but, as at present worded, paragraph 2 would give the sending State some freedom of choice among the functions of the permanent mission listed in article 7,¹ in so far as they were not regulated by the practice or rules of the organization. It might therefore be better merely to refer to article 7 and to allow permanent observer missions to perform all the functions which might contribute to the work of the organization, subject, of course, to its rules and to the provisions of article 3.² In his view such a liberal régime could do no harm. Certain examples had been given by the Special Rapporteur in paragraph (6) of his commentary; he would also draw the Commission's attention to rule 30 of the rules of procedure of the General Conference of the International Atomic Energy Agency, which read: "Representatives of States Members of the United Nations or of any of the specialized agencies which are not Members of the Agency shall be invited to attend the General Conference and may participate without vote on matters of direct concern to them."

5. Mr. CASTRÉN said that the Special Rapporteur had been right to include in his draft a provision on the functions of permanent observer missions. He had very properly stressed in paragraph (6) of the commentary that those functions were not identical with those of permanent missions of member States, but it could be objected that he had tried to follow too closely the provisions of article 7, to which article 52 referred *mutatis mutandis*. Moreover, the principal function of a permanent observer mission was not, as stated in paragraph 1, to ensure the necessary liaison between the sending State and the organization, but rather the function specified in article 7 (d), namely to ascertain activities and developments in the organization and report thereon to the government of the sending State. That function should therefore be mentioned in paragraph 1 of article 52.

6. The wording of paragraph 2 was far too general and imprecise; for a mere reference to article 7 *mutatis mutandis* might give rise to confusion, since the functions listed in that article were not applicable as such to permanent observer missions, particularly the one mentioned in sub-paragraph (e). Again, a permanent observer mission could not carry on negotiations in the organization, as provided in article 7 (c), but only with it, since, as the Special Rapporteur had himself acknowledged, a permanent observer was a representative not in the organization but to it. The fact that Switzerland had participated, without the right to vote, in the negotiations on the Convention on Special Missions in the Sixth Committee of the United Nations General Assembly in 1968 and 1969 did not invalidate that contention, since Switzerland had been invited not so much as an observer

to the United Nations, as because of its experience of the subject under consideration. Negotiations between the organization and permanent observer missions were mainly concerned with administrative matters of secondary importance and were part of the function of providing liaison between the sending State and the organization. The representative function was slight, and not worth mentioning separately; it was performed, as it were, in connexion with the liaison function.

7. Article 52 might therefore be recast by deleting paragraph 2 and making paragraph 1 a single paragraph, to which would be added a second sub-paragraph worded like sub-paragraphs (b) and (d) of article 7. The most concise formula, however, would be: "The principal functions of a permanent observer mission are those referred to in sub-paragraphs (b) and (d) of article 7 of the present draft".

8. Mr. USHAKOV said it was hard to distinguish between the principal functions and the secondary functions of any permanent mission, since the nature of those functions varied according to the circumstances. Moreover, the Commission had not done so in the case of diplomatic missions or special missions, or in the case of permanent missions of member States. In any event, it was impossible to list all the functions a mission might perform, and it would therefore be better to state what those functions consisted of "inter alia". Some of them must be mentioned, however, for the sake of clarity, since a mere reference to another article was not very convenient. It was therefore necessary to consider what those functions were. They were virtually the same as those of a permanent mission, as set out in article 7; for the purpose of a permanent observer mission was to represent the sending State in the organization (article 7 (a)), since without representation the necessary liaison between the sending State and the organization, referred to both in article 52 and in article 7 (b), could not be provided. It was self-evident that a further function of a permanent observer mission was to ascertain activities and developments in the organization and report thereon to the government of the sending State (article 7 (d)), since that was precisely the purpose for which it was sent. Similarly, it could not be sent for any purpose other than to promote co-operation with the organization, but in the case of permanent observer missions it might perhaps not be necessary to specify that such co-operation was for the realization of the purposes and principles of the organization, as stated in article 7 (e). On the other hand, it should be stated that another of their functions was to inform the organization of any developments in the sending State and of any measures taken by it which would be of interest to the organization in view of its purposes and activities.

9. It could accordingly be seen that article 7, as a whole, excepting sub-paragraph (c), was applicable to permanent observer missions, and article 52 should be worded just as explicitly and clearly. The great difference between the functions of permanent missions of member States and permanent observer missions was that the permanent representative could represent the member State in the organs of the organization, but that function, which re-

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 200.

² *Ibid.*, p. 197.

quired the authorization of the sending State, was a special function not mentioned in article 7.

10. He reminded the Commission that the term "sending State" was not defined in article 1, on the use of terms, and that it had been agreed during consideration of the part of the draft dealing with permanent missions that it meant the State member of the organization which sent the permanent mission. The term was therefore unsuitable for observer missions established by non-member States, and it might perhaps be preferable to say "accrediting State", in order to make it quite clear that, in that case, the sending State was not a State member of the organization.

11. Mr. ROSENNE said that, like other members, he doubted whether the Commission could accept article 52 in its present form. In his opinion, it tended to make the scope of the concept of functional necessity variable, and functional necessity was one of the bases of the privileges and immunities of representatives of States to international organizations, as was explained in paragraph (3) of the Commission's general comments on Part II, section 2 of the draft articles in its report on the work of its last session.³ As he understood article 52, the varying scope of the functional necessity, which would depend on a subjective decision by the sending State, would affect the operation of such articles as 22, 34 and 45, in so far as they applied to permanent observer missions. The functions actually performed by those missions might not be completely identical with those performed by permanent missions, but their nature at least would be very similar to that of the functions listed in article 7. In some cases, there might be some doubt about the precise extent of the representative function, but he himself believed that such a function did exist and that it was brought out reasonably well in article 7.

12. The question of the variable scope of the functional necessity was not a purely theoretical one; at the last session, Mr. Bartoš had said, in connexion with the present article 45, that "it would certainly be wrong to impose on members of permanent missions, in the same way as on diplomatic agents, who were members of regular diplomatic missions, the duty not to interfere in the internal affairs of the host State. Members of permanent missions were occasionally obliged by their functions as members of a mission to criticise the host State, and that had sometimes been regarded by the host State as a breach of hospitality."⁴ The same doctrine should apply to permanent observer missions.

13. As to the drafting, he found the use of the expression "*mutatis mutandis*" in paragraph 2 objectionable. After all, that expression merely meant "that having been changed which has to be changed"; surely it was the duty of the Commission to specify what changes it considered necessary and not to leave them to what might be

a highly subjective process of interpretation and application by sending States.

14. Some qualification would be necessary to show that any list of the functions of a permanent observer mission was not intended to be exclusive; some such expression as "*inter alia*", which was used in article 7, should be introduced.

15. The word "ensure" in paragraph 1 seemed too strong and should be replaced by the word "keep", as in article 7(b).

16. Greater importance should be attached to the function referred to in sub-paragraph (e) of article 7; if a non-member State decided to send a permanent observer mission to an organization, the least that could be expected of it was that it would do its part in promoting co-operation for the realization of the purposes and principles of the organization.

17. With regard to paragraph (6) of the commentary, he drew the Special Rapporteur's attention to the fact that during the Sixth Committee's discussion of the draft convention on special missions, at the twenty-third and twenty-fourth sessions of the General Assembly, Switzerland had not been represented by its permanent observer at Headquarters, but by representatives sent direct from Berne. A careful distinction was made in the Secretariat Study between the capacity of a permanent observer at United Nations Headquarters and that of a plenipotentiary at a conference or meeting.⁵

18. Lastly, he considered that article 52 should either contain a general reference to article 7 or give a detailed list of the main functions of permanent observer missions. That point could be left to the Drafting Committee.

19. Mr. KEARNEY said he agreed with those speakers who thought that article 52 was in need of considerable revision. Mr. Ushakov had been quite right in pointing out the difficulty of singling out any one function of the permanent observer mission as its "principal" function: the views of the sending State on the subject might be entirely different from those of the organization. He therefore considered that article 52 should be revised to include a list of the functions; he could not agree with Mr. Rosenne that that need could be met by including a general reference to the functions set out in article 7.

20. As Mr. Castrén and Mr. Ushakov had said, there were substantial differences between the functions of a permanent observer mission and those of a permanent mission; in particular, the function of representing the sending State in the organization, referred to in article 7 (a), hardly applied in the case of permanent observer missions. In his opinion, it would be better to specify in article 52 the kind of representative functions performed by permanent observer missions and then to determine on that basis the facilities, privileges and immunities to which they should be entitled.

21. A permanent observer mission did not carry on negotiations "with or in" the organization; it might carry on negotiations with individual members of the organi-

³ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 4.

⁴ See *Yearbook of the International Law Commission, 1969*, vol. I, p. 175, para. 45.

⁵ *Op. cit.*, 1967, vol. II, p. 190, para. 173.

zation, but that was a different type of representation from that envisaged in article 7 (c).

22. Like Mr. Rosenne, he thought that the revised version of article 52 should include some such expression as "*inter alia*".

23. Mr. AGO said he wished, first of all, to make it quite clear that he approved of the principle underlying article 52 and his comments would be confined to the drafting of the provisions concerning functions, irrespective of whether the Commission decided to retain article 51 or to combine articles 51 and 52. Like other speakers, he thought that a mere reference to article 7 would not be satisfactory, since the functions of permanent missions of member States and those of permanent observer missions were not strictly analogous and the differences between them needed to be brought out. It remained to be decided whether to adopt a concise synthetic formula, which would have the advantage of covering the matter adequately without giving too much weight to permanent observer missions, or an analytic formula listing their functions as in article 7, but with the necessary changes. Like Mr. Ushakov, and for the same reasons, he thought that no distinction should be made between principal functions and secondary functions, and that the words "*inter alia*" should be inserted in the introductory phrase.

24. With regard to the functions themselves, article 52 did not mention the one which was inherent in the very nature of the mission, namely, to represent the sending State at the organization; the whole purpose of a permanent observer mission, for a non-member State, was to have a representative on the spot. That function was self-evident and did not need to be specially mentioned. But it was mentioned, for permanent missions, in article 7, and if that reference to it was retained, it should also be mentioned in article 52, in order to prevent wrong interpretations. Moreover, the Special Rapporteur agreed that permanent observer missions had a representative character, since he had recognized that sending such missions came within the sphere of bilateral diplomacy.

25. The function referred to in sub-paragraph (b) of article 7 could also be mentioned as one of the functions of permanent observer missions, but the wording should be slightly changed, for while liaison between a member State and the organization might be regarded as necessary, the same was not true of a non-member State, which might wish to confine itself to mere observer functions. The right to carry on negotiations with the organization, referred to in article 7 (c), was a direct consequence of the representative function and should be granted to permanent observer missions, except that the negotiations could be carried on only with the organization, not in it. The function listed in article 7 (d) was a normal function of permanent observer missions and could be carried out in both directions, as Mr. Ushakov had said, but the wording should not make it mandatory. Lastly, he was not sure that the functions of permanent observer missions could include promoting co-operation for the realization of the purposes and principles of the organization, as article 7 (e) provided in the case of permanent missions of member States. A distinction should be

made, in that regard, between member and non-member States. The Commission would be going rather too far if it provided for the same obligations, in the same terms, for both classes of State.

26. As Mr. Rosenne had observed when referring to the penultimate sentence of paragraph (6) of the commentary, the Commission should take care not to confuse permanent observer missions with observers whom a non-member State might send to an organ of an organization on a particular occasion. A State which had not even established a permanent observer mission to an organization might well wish to be represented, in a specific case, in an organ which was dealing with a question in which it was particularly interested; or again, a State which had established a permanent observer mission might be represented at a meeting by an *ad hoc* representative other than its permanent observer.

27. The term "sending State" was a convenient one, for it applied to both member and non-member States, and he was not sure that any other expression would remove the ambiguity which Mr. Ushakov had mentioned. That was a question which the Commission could consider when it reviewed the terminology of the draft as a whole. Incidentally, the French for "permanent observer missions" should be "*missions permanentes d'observateurs*" not "*missions d'observateurs permanents*".

28. Mr. BEDJAOUI said he fully approved of the substance of article 52 as drafted by the Special Rapporteur. He wished, however, to make two comments on the drafting. First, he did not think the expression "necessary liaison" in paragraph 1 was satisfactory, even though it was taken from article 7 on the draft. Secondly, he doubted whether the reference to the "principal function" of a permanent observer mission was justified, since it implied that there were secondary functions, and it was not certain that the other functions would always be secondary. He also noted that paragraph 2 contained the word "may", which had already given rise to difficulties because it meant both a subjective right of the sending State and permission granted to the sending State by a subject of indeterminate identity, which might be the host State or the organization.

29. The main difficulty with article 52 was its division into two separate paragraphs, the first defining the principal function of permanent observer missions and the second stating that such missions might perform other functions of permanent missions; for there was some danger of the Commission's being divided into two schools of thought, one blaming the Special Rapporteur for assimilating permanent observer missions too closely to permanent missions of member States, and the other blaming him for doing exactly the opposite. To remove that danger, Mr. Ago had suggested using the text of article 7, with certain changes. Personally, he thought that such a list might perhaps be too rigid in some cases, and he would prefer to leave it to time and experience to mould permanent observer missions into their final form. He was therefore in favour of a concise formula based on the criterion of function, which might read: "The role of a permanent observer mission is to main-

tain the necessary relations between the sending State and the Organization by performing all the functions which the sending of such a mission may entail." That wording, which would have the advantage of flexibility, could cover both the function of representation and that of negotiation.

30. Mr. NAGENDRA SINGH said that while he approved of the substance of article 52, he agreed that some attempt should be made to reformulate the text. The Drafting Committee should be asked to find some expression, such as "among others" or "*inter alia*", to replace the unsatisfactory adjective "principal" which qualified the word "function". It would also be necessary either to refer back to the provisions of article 7 or to reproduce the contents of that article. The first course was undesirable because the functions of a permanent observer mission, though similar to those of a permanent mission, were not identical. He would therefore suggest that article 52 should specify some of the main functions of a permanent observer mission.

31. Although the representative function certainly existed and was important in the case of permanent observer missions, it had only a very limited sphere of application. As far as the sending State was concerned, the extent of the representation was the same for both types of mission, but in relation to the work of the organization it was much more restricted in the case of a permanent observer mission. Unlike a permanent representative, a permanent observer was not entitled to participate in the organization's deliberations or cast a vote. Consequently, it would be preferable not to stress the representative function in article 52, but to mention it in article 0 (Use of terms). If the representative character of permanent observer missions was brought out fully and effectively in article 0, there would be no need to refer to it again in article 52.

32. He agreed that the liaison function, which was the subject of article 7 (b) relating to permanent missions and of article 52, paragraph 1, relating to permanent observer missions, was more characteristic of a permanent observer mission. The function of carrying on negotiations would not be performed "with or in the Organization" as in the case of permanent missions. In the first place, a permanent observer mission would carry out negotiations only "with" and not "in" the organization, since the sending State was not a member of it. In the second place, it was necessary to qualify the statement of the function by using some such formula as "if duly empowered by the sending State". Clearly, special instructions were necessary to enable a permanent observer to engage in negotiations, even with the organization.

33. An examination of the functions set out in article 7 showed that it would be wrong to include all of them in article 52. And the functions that would be included would have to be adequately described, so that article 52 would be self-contained. It was important that the qualification "as empowered by the sending State" should be introduced, because it was the sending State which decided what use it wished to make of its observer missions, consistent with its position as a non-member. It

would be right to state that the onus was on the sending State in a matter in which the organization had little responsibility.

34. Mr. RAMANGASOAVINA said that while he approved of the substance of article 52, he found the drafting not wholly satisfactory. In paragraph 1 the Special Rapporteur had found the best form of words to bring out the difference in nature between the functions of permanent representatives and those of permanent observers. The paragraph made it quite clear that, unlike permanent representatives, permanent observers had no representative function, and the reason why the Special Rapporteur had stressed the liaison function was, precisely, to exclude the representative function.

35. If the Commission decided not to use the expression "*mutatis mutandis*" in paragraph 2, it would have to find an equivalent expression, for the Special Rapporteur had rightly tried to bring out in that way the difference between the functions of permanent representatives and those of permanent observers. In view of those considerations he thought the text of article 52 might include some parts of article 7, namely, subparagraphs (b), (c)—but with the deletion of the words "or in"—(d) and (e), all of which stated functions which permanent observer missions could perfectly well perform.

36. Mr. REUTER said that in view of the general consensus of opinion which seemed to be emerging, the Drafting Committee should be asked to revise article 52. There were, however, two comments he wished to make.

37. Mr. Bedjaoui had once again raised a question which had been discussed at previous meetings; but he himself was still sure that the Commission would succeed in finding wording on which it could agree, and all the more easily because, in paragraph (6) of his commentary to article 52, the Special Rapporteur seemed to point the way by saying "The functions of representation and negotiation can be performed in particular by permanent observers...". The problem of representation was primarily semantic, and general agreement might perhaps be reached by adopting a formula which made it clear that permanent observers represented the sending State in the performance of their functions, for that would bring out their representative function without contrasting it with their other functions. Accordingly, article 52 might simply say that a permanent observer mission, in principle, represented the sending State in the relations established between it and the organization. That formula would have the advantage of avoiding the question of the nature of those relations by simply saying that they were established. For there was no need to specify what the relations were; it would be better to let that emerge from practice, as Mr. Bedjaoui had maintained.

38. Mr. TSURUOKA said he agreed with Mr. Reuter on the question of representation. If a permanent observer performed functions, he did so on behalf of the sending State, and to that extent he certainly represented it. As to the question whether it was necessary

to mention the representative character in article 52, he was inclined to think it was not: silence on the matter would obviate misunderstanding.

39. He also doubted whether negotiating was one of the proper functions of permanent observer missions. If a permanent observer carried out negotiations with an organization, it would probably not be solely in his capacity as permanent observer: he would have to have been given additional powers by the sending State. That was precisely that differentiated a permanent observer from a permanent representative, who was empowered to negotiate with the organization to which he was accredited. Consequently, although he agreed with the Special Rapporteur that it was generally necessary to let the practice develop freely, he thought that in view of article 7, which would inevitably invite comparison, article 52 should be modelled on sub-paragraphs (b), (d) and (e) of that article.

40. Sir Humphrey WALDOCK said the Special Rapporteur had been right to try to make it plain in article 52 that there was no intention of inflating the functions of permanent observer missions in a way that might alarm the States which would in due course be invited to adopt the draft convention. The Commission should not suggest that permanent observer status was something close to membership of the organization without the right to vote. What now had to be decided was whether the wording of article 52 was the wording best calculated to achieve those ends. In that respect, he found himself in agreement with several other speakers who had suggested changes.

41. In the first place, he too thought it undesirable to refer to a "principal" function. In that connexion, his own view was that the basic function was to watch over the interests of the sending State in regard to the activities of the organization.

42. He could not agree to the introduction of a reference to representation as one of the main functions of a permanent observer mission. During the discussion on article 0 (Use of terms)⁶ it had been agreed that, in the description of the use of the term "permanent observer mission", reference would be made to the representative character of such a mission. That reference should suffice and there was no need to give prominence to representation in article 52.

43. He was not very enthusiastic about the use of the term "liaison". The intention was to refer to the fact that a permanent observer mission would act as an authorized channel of communication between the sending State and the organization, as and when required.

44. If the various functions were to be specified in article 52, care should be taken to indicate the existence of some difference between the position of a permanent observer mission of a non-member State and that of a permanent mission of a member State.

45. He had not yet reached a firm view on the choice between a text which would specify the various functions

and a more concise formula which would be based essentially on the function of watching over the interests of the sending State in regard to the organization's activities. An extended statement on functions had been included both in the Convention on Diplomatic Relations⁷ and in the Convention on Consular Relations⁸ and, if desired, it should be possible to arrive at a similar statement for permanent observer missions, provided that the qualification "*inter alia*" was introduced.

46. He was glad to note that Mr. Ushakov had referred to an "accrediting State", because that approach implied recognition of the need for the organization's consent. Recognition of that need would dispose of many of the difficulties encountered by the Commission in dealing with permanent observer missions.

47. Mr. USHAKOV, in support of the arguments he had already put forward, drew attention to a difference between the French and English texts of article 7 (a) of the draft: the French version used the phrase "*auprès de l'Organisation*" and the English "in the Organization". To bring the English version into line with the French, he thought it should be amended to read "to the Organization".

48. He agreed with Mr. Ago that if the wording of article 7 was reproduced in article 52, the words "or in" in sub-paragraph (c) should perhaps be deleted.

49. The Special Rapporteur should note that if he decided to include a provision similar to article 14⁹ in his draft article on permanent observers, it would have to specify that a permanent observer was not authorized, in virtue of his functions and without having to produce full powers, to carry on negotiations with the organization to which he was sent; he would have to obtain full powers. That was another difference between the functions of representatives of member States and those of representatives of non-member States.

50. Mr. AGO said that if it were possible to adopt a synthetic formulation combining articles 51 and 52, he thought that would be the best solution. But assuming that the Commission would prefer the opposite idea, namely, to keep the two articles separate and include an enumeration, he doubted whether it would be wise to omit all reference to the representative function of permanent observer missions, as Mr. Tsuruoka had suggested. For article 7 stated explicitly that a permanent mission had a representative function, whereas it might very well not have done so. Consequently, unless it was decided to amend article 7, the comparison which would inevitably be made between article 52 and article 7 would lead to the conclusion that permanent observer missions did not have a representative character. The question whether the representative character of permanent observer missions should be mentioned in article 52 should therefore be considered very carefully.

The meeting rose at 1 p.m.

⁷ United Nations, *Treaty Series*, vol. 500, p. 98, article 3.

⁸ *Op. cit.*, vol. 596, pp. 268-270, article 5.

⁹ See *Yearbook of the International Law Commission, 1968*, vol. II, p. 206.

⁶ See 1043rd meeting, paras. 32-46 and 1044th meeting, paras. 1-23.

1049th MEETING

Thursday, 14 May 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, 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]

(continued)

ARTICLE 52 (Functions of permanent observer missions) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 52 (A/CN.4/227).
2. Mr. USTOR said he could accept the underlying idea of article 52 which, as he understood it, was that the functions of a permanent observer mission were essentially the same as those of a permanent mission.
3. With regard to the function of representation, difficulties had also arisen in connexion with permanent missions when the Commission had discussed article 7 (formerly article 6).¹ It had been pointed out at that time that some States made their permanent missions responsible for all functions, while others only entrusted their missions with routine duties and appointed special representatives to the organs of the organization; those representatives were sometimes permanent. The problem had been solved by adopting the language used in subparagraph (a) of article 7,² on the understanding that it would be read together with article 13.
4. Article 13 provided that a member State could specify, in the credentials submitted, that its permanent representative would represent it in one or more organs of the organization. In addition, a presumption was established in paragraph 2 that the permanent representative could represent the member State in the organs for which there were no special requirements regarding representation. Where such requirements existed, special credentials had to be produced. The function of representation specified in article 7 (a) was automatic in those organs for which there were no special requirements.
5. In the case of permanent observer missions, perhaps the largest body of practice concerned the observer mis-

sion of the Federal Republic of Germany at United Nations Headquarters. His impression was that that mission had very nearly the same representative functions vis-à-vis the Secretariat as a permanent mission. The same applied to the observer mission of the Holy See at Geneva.

6. The head of a permanent observer mission carried on negotiations, made representations and, on occasion, contacted the highest officials of the Secretariat. When carrying out those duties, he represented the sending State in precisely the same way as a permanent representative.

7. Representation in the organs of an organization was subject to the rules of the organization, just as it was in the case of permanent representatives. The rights and faculties of observers were also governed by the requirements laid down in those rules. It was difficult to see any difference between permanent observer missions and permanent missions in that respect. When it came to representation on solemn occasions, the heads of permanent observer missions were placed on the same footing as the heads of permanent missions.

8. It seemed to him that the only differences were really drafting matters. For example, the word "necessary" might not be needed before the word "liaison" in article 52. As to carrying on negotiations, they could take place either with the organization or with another State "in the organization". He felt sure that some language could be found to make it clear that the functions of permanent observer missions did not differ materially from those of permanent missions.

9. The CHAIRMAN, speaking as a member of the Commission, said that there appeared to be a wide measure of agreement that, in paragraph 1, the adjective "principal", before "function", and the word "necessary", before "liaison", should be omitted. There was also general agreement on the desirability of merging the two paragraphs of the article.

10. With regard to the question of representation, he agreed that the representative character of a permanent observer mission was slightly different from that of a permanent mission. The duties of a permanent observer were more limited than those of a permanent representative: he was not called upon to act generally as a representative unless there was a special agreement to that effect between the sending State and the organization.

11. Members should consider whether the term "liaison" sufficiently expressed the main purpose of an observer mission.

12. When the Commission had discussed article 1, on the use of terms, it had been agreed that some kind of mutuality of consent should exist between the sending State and the organization. The Drafting Committee should be asked to find some form of words that would introduce that notion into the definition of a "permanent observer mission", for that would dispose of much of the controversy which had arisen about the representative character of permanent observer missions.

13. Consideration should also be given to defining the

¹ See *Yearbook of the International Law Commission, 1968*, vol. I, pp. 42-50 and 214-216.

² *Op. cit.*, 1968, vol. II, p. 200.

term "sending State" so as to make a distinction between permanent observer missions and permanent missions.

14. The Drafting Committee should take account of all the views expressed and consider recasting article 52 in a single paragraph, which would not unduly stress the representative element and would indicate that the basic function of a permanent observer mission was to watch over the interests of the sending State relating to the organization.

15. Mr. CASTAÑEDA said he was afraid he could not agree with some members of the Commission on the extent and nature of the functions of permanent observers. Moreover, the other members of the Commission were not in agreement as to which of the functions listed in article 7 was the most important in the case of permanent observer missions. Nevertheless, article 52 should state, not the principal function of those missions in the sense of the most important one, but the function which by its nature was their special sphere of competence. In his opinion, that function was observing and ascertaining activities and developments in the organization, so that was the one that could be stressed.

16. With regard to the other functions of permanent observer missions, it would be wrong to assimilate them to the functions of the permanent missions of member States; for although the function of representation was performed by means of similar formal and manifest acts, its content and character differed radically in the two cases. In the sense used in article 7, the representation of a member State in an organization meant chiefly representation in the organs of that organization; and since the activities of the organization were nearly all conducted through its organs, if the permanent observer was not accredited to them, there would be very little left of his representative function and it need not be mentioned in an article. The same applied to the functions of negotiation and co-operation, which only concerned related questions. As the Special Rapporteur had stressed, the function which indicated the real character of permanent observer missions was that of providing the necessary liaison, and it was that function which should be stressed, together with the function of observing and ascertaining activities and developments in the organization.

17. Mr. ROSENNE said he would like to have some information on the position with regard to the credentials of the representative of a non-member State to an organ of the United Nations for which special credentials were required. Had any particular form of credentials been required when Jordan had participated without the right to vote in certain Security Council discussions before 1956, when Jordan had not then been a member of the United Nations? To obtain a reply to that question, it might be necessary to consult United Nations Headquarters.

18. Mr. AGO said he did not entirely agree with Mr. Castañeda on the representative character of permanent observer missions. Either a mission had a representative character or it did not, but it could not have that character to a greater or lesser degree. An observer

mission sent to an organization by a non-member State necessarily had a representative character. Moreover, it could not be said that the essential element of the representative character of the permanent mission of a member State was that it represented the sending State, not in the organization, but in its organs. The head of a permanent mission sent by a Member State did not himself automatically represent the sending State in organs of the organization. The best proof of that was that, when considering the draft articles relating to permanent missions, the Commission had deemed it necessary to provide in a separate article—article 13—for accreditation to organs of the organization, and even to establish a presumption of such accreditation in cases where there was no formal accreditation. Thus there was a difference between representation in the organization as such, which involved a bilateral relationship between two subjects of international law, and representation in organs of the organization, which involved multilateral relationships between States. He saw no objection to omitting to state that the permanent observer mission of a non-member State represented that State in the organization, since that was self-evident, but then the reference to that function of the permanent missions of member States would have to be deleted from article 7, so as to avoid misunderstandings.

19. Mr. YASSEEN said he did not share Mr. Castañeda's opinion either. Representation was the essential function of a permanent observer mission. A permanent observer must necessarily represent the State by which he was sent; otherwise, on whose behalf was he acting as an observer? It was only the scope, not the nature of the representation that was different in the two cases. Furthermore, representation as such should not be confused with accreditation, that was to say, the credentials for representation, which did not create the representation, but were evidence of it.

20. Mr. BARTOŠ observed that the practice of presumed representation existed, particularly in the Security Council, where representatives were generally required to submit proof of their powers in advance, but where in certain emergencies persons having the status of representatives or observers accredited to the Organization had sometimes been authorized to take part in the debates, subject to subsequent confirmation of their credentials. The Special Rapporteur should therefore be asked to reflect on that question and submit appropriate wording to the Drafting Committee.

21. Mr. TSURUOKA said that if it were stated that observers represented the sending State in the organization and that their functions were similar in scope to those of permanent representatives, the only difference between observers and permanent representatives would be that permanent representatives were sent by member States and observers by non-member States. But that was not the case. It should therefore be decided whether the Commission intended the draft articles to confer a specific status on permanent observers or whether it wished to leave that question to be settled by the organization.

22. Some members had objected to the term "perma-