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SUMMARY RECORD OF THE 12th MEETING

Chairman: Mr. LEHMAN (Denmark)

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The meeting was called to order at 3 p.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (A/50/10 and A/50/402)

1. The CHAIRMAN invited the Chairman of the International Law Commission to introduce the Commission's report.

2. Mr. RAO (Chairman of the International Law Commission) paid tribute to the memory of two illustrious jurists who had died recently, Mr. Roberto Ago and Mrs. Suzanne Bastid. Mr. Ago, a former member of the International Court of Justice, had contributed immensely to the study of the topic of State responsibility, in his capacity as Special Rapporteur of the International Law Commission on that subject. Mrs. Bastid, an eminent French jurist, had combined great human qualities with remarkable scholarship in international law.

3. Introducing the report of the International Law Commission on the work of its forty-seventh session (A/50/10), he said that the Commission was currently considering five topics. The topic "Draft Code of Crimes against the Peace and Security of Mankind" was well advanced and the Commission expected to complete its second reading by the end of its next session. Similarly, the topic of State responsibility, after several years of exhaustive work, was expected to be completed on first reading by the end of the next session. Concerning the draft Code of Crimes, at its latest session the Commission had considered a list of crimes to be included in the Code. It had decided to concentrate as a matter of priority on the inclusion of four crimes: aggression, genocide, systematic or mass violations of human rights and exceptionally serious war crimes. It had also been decided that, in formulating those articles, the Drafting Committee would bear in mind all or parts of the elements of the draft articles adopted on first reading concerning intervention, colonial domination and other forms of alien domination, apartheid and crimes concerning mercenaries and terrorism. Some decisions with respect to certain other offenses were to be taken at the next session. In addition, under the topic of the draft Code, the Drafting Committee had finalized a number of articles which would be presented the following year along with articles currently awaiting adoption in plenary.

4. On State responsibility, the Commission had discussed the legal consequences of internationally wrongful acts characterized as crimes. In addition, it had finalized two articles on countermeasures and the relevant commentaries, namely, articles 13 and 14 dealing with the concept of proportionality and prohibited countermeasures. It had also adopted draft articles with commentaries on the settlement of disputes under part III and the annex thereto.

5. With respect to the consequences of crimes, the Commission had considered the proposal that the right of the international community and of immediately aggrieved parties to respond to a crime should be subject to a prior determination of the wrongful act, through reference first to the United Nations for a determination of the existence of the crime and its attribution to the State and then to the International Court of Justice for a final legal

determination. The views expressed in that regard indicated that a consensus had yet to be achieved.

6. On the topic of international liability, he recalled that the Commission had so far finalized several articles with commentaries on the concept of prevention. At its latest session, it had made further progress and finalized four more articles: article A on the right of a State to pursue any activity within its territory and the delimitations thereon; article B on the duty to prevent and the concept of due diligence; article C on liability and reparation; and article D on cooperation or assistance from relevant international organizations. In addition, the Commission had discussed proposals concerning the definition of harm to the environment. Preliminary discussions had been held on a proposal to define harm to the environment in a restrictive manner for the purpose of liability. The Commission hoped that the progress made would enable it to complete its first reading of various draft articles on the topic of prevention.

7. The Commission had also begun preliminary work on the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", which had enabled it to clarify the issues involved and the direction to be taken in future work on those topics. Further, the Commission had recommended to the General Assembly that it should be allowed to work on the topic "Diplomatic protection" and to prepare a feasibility study, as a first step, on the topic "Rights and duties of States for the protection of the environment".

8. Turning to the report of the Commission (A/50/10), he said that in view of the way in which the Committee intended to consider the report, he would first introduce chapter II, on the draft Code of Crimes, chapter IV, on State responsibility, and chapter V, on international liability for injurious consequences arising out of acts not prohibited by international law. He would then introduce chapter III, on State succession, chapter VI, on reservations to treaties, and chapter VII, other decisions and conclusions of the Commission.

9. With regard to chapter II on the draft Code of Crimes against the Peace and Security of Mankind, the task of preparing a draft Code gained added significance in the light of the serious crimes being committed in various parts of the world. The Code must be sufficiently precise to meet the requirements of the principle nullum crimen, nulla poena sine lege. Further, its elaboration was fraught with immense political and legal difficulties. At the latest session, the Special Rapporteur on the topic had presented his thirteenth report recommending that only 6 of the 12 crimes identified in first reading for inclusion in the Code should be retained, namely, aggression (article 15), genocide (article 19), systematic or mass violations of human rights (article 21), exceptionally serious war crimes (article 22), international terrorism (article 24) and illicit traffic in narcotic drugs (article 25). The six remaining crimes, which the Special Rapporteur had proposed leaving out because they had given rise to opposition or reservations on the part of various Governments, were: the threat of aggression (article 16), intervention (article 17), colonial domination and other forms of alien domination (article 18), apartheid (article 20), the recruitment, use, financing and training of mercenaries (article 23) and wilful and severe damage to the

environment (article 26). It would be recalled that in his previous report, the Special Rapporteur had announced his intention to limit the list of crimes to those on which there was broad agreement as to their inclusion.

10. Some members of the Commission had favoured the shortened list, which they saw as focusing on types of behaviour involving a serious and immediate threat to the peace and security of mankind. They had thought it advisable to concentrate on those crimes whose prosecution and punishment was well-established in international law and had not considered it necessary to include in the draft Code those crimes which were only of historical significance. Other members, however, had felt that the list of crimes should not be reduced because a comprehensive Code would be a more effective tool for strengthening international law and international peace and security. They had noted that some of the crimes which had been excluded were covered and defined by international instruments and fully qualified for inclusion in the future Code. They had also pointed out that a restrictive approach would not necessarily enhance the acceptability of the Code nor increase the likelihood of a consensus on its content.

11. There had been broad agreement during the debate that aggression was the quintessential crime against the peace and security of mankind. The difficulties involved in the elaboration of a sufficiently precise definition of aggression for purposes of individual criminal responsibility had also been broadly acknowledged. In that connection, some members had considered that the definition adopted on first reading, which was drawn from General Assembly resolution 3314 (XXIX), should be adapted for the purposes of the Code. He understood that the Ad Hoc Committee on the Establishment of an International Criminal Court, which had met recently in New York and whose report would soon be considered by the Sixth Committee, had also dealt with that problem.

12. While the proposed deletion of the threat of aggression from the list of crimes under the Code had met with broad support, opinions had been divided on deleting the crime of intervention from the list. Some members, while recognizing the importance of non-intervention as a fundamental principle of contemporary international law, had considered the concept to be too nebulous and not sufficiently rigorous for criminal law purposes. Others had favoured keeping it in the Code, insisting that intervention had brought and continued to bring misery to millions of underprivileged people and qualified fully for inclusion in a draft Code of Crimes against the Peace and Security of Mankind.

13. Opinions had also been divided on the deletion of the crime of colonial domination and other forms of alien domination. Some members had felt that that crime was no longer relevant and was difficult to define, while others had thought that it was a phenomenon of major historical significance in terms of the rights of peoples and therefore should be included in the Code.

14. While there had been virtual unanimity among the members of the Commission on the inclusion of genocide in the list of crimes to be covered by the Code, the same could not be said of apartheid. Those who thought that the crime of apartheid should not be included in the Code had stressed that the practice in question had been abolished in South Africa, and that there was no evidence that it existed elsewhere. Proponents of its inclusion had noted that it was

dangerous to disregard the lessons of history, minimize the serious consequences of apartheid and ignore the many decisions of the relevant United Nations organs. It had been pointed out that the criterion for including a crime in the Code should be its seriousness and not the likelihood of its commission.

15. Systematic or mass violations of human rights - or, to use the term proposed by the Special Rapporteur, "crimes against humanity" - had been seen by most members of the Commission as qualifying for inclusion in the Code. The basic question, however, was to identify the point at which human rights violations, which were essentially matters of domestic concern within the jurisdiction of national courts, became a matter of international concern warranting international jurisdiction. The requirement under the article adopted on first reading, according to which violations must be massive to constitute a crime under the Code, had given rise to divergent views in the Commission, as had the Special Rapporteur's proposal to consider as punishable under the Code not only individuals acting as agents or representatives of the State but also persons acting in their individual capacity.

16. On the question of exceptionally serious war crimes, members of the Commission had been virtually unanimous in considering that such crimes should be included in the Code, but the implications for existing humanitarian law of the distinction between war crimes and exceptionally serious war crimes had continued to be a source of debate.

17. The Commission had also been divided on the recommendation to exclude from the list of crimes the recruitment, use, financing and training of mercenaries. Some members had felt that the limited number of States which had accepted the relevant convention and the possibility of prosecuting the acts in question as acts of international terrorism or, in so far as agents of the State had participated in them, as crimes linked to aggression, justified their exclusion from the list of crimes. Other members had disagreed, considering the crime a threat to the sovereignty and territorial integrity of small and weak States.

18. One group of members had favoured the exclusion of international terrorism from the list of crimes, arguing that the concept could not be defined with the precision required by criminal law and that, in any case, the problem had already been dealt with in a multiplicity of international instruments dealing with specific aspects of terrorism. The question had also arisen as to whether and on the basis of what criteria a distinction should be made between the most serious acts of terrorism, which would come within the scope of the Code, and other acts of terrorism, which would not. A further issue was whether acts of terrorism should be covered by the Code only when they were committed by an agent or a representative of the State, since the Code, as it stood at the moment, provided only for the criminal responsibility of individuals.

19. Illicit traffic in narcotic drugs had also given rise to a divergence of opinion. Some members had viewed it as a threat to the survival of mankind and had underscored the destabilizing effect of "narco-terrorism" on small States and its dangerous links with terrorism and subversion. Other members had taken the view that illicit drug trafficking was effectively covered in existing instruments and that international cooperation provided the means to suppress

that scourge, since most cases could be effectively prosecuted in the national courts.

20. The categorization of wilful and severe damage to the environment as a crime had also posed a problem for the Commission. Some members had opposed its inclusion, pointing out that the Code was not intended to cover all crimes under international law committed by individuals, but only those that might threaten the peace and security of mankind. They had noted that the exclusion of a particular conduct from the list of crimes covered by the Code did not mean that such conduct was not considered as a crime punishable in law. Others had felt that certain kinds of environmental damage, such as damage caused by the deliberate detonation of nuclear explosions or pollution of entire rivers, should entail the individual criminal responsibility of those responsible, particularly since the fate of future generations was at stake.

21. Following the debate, the Commission had decided to refer to the Drafting Committee four of the draft articles adopted on first reading, namely, draft articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes), for consideration as a matter of priority on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary. That action had been taken on the understanding that, in reviewing the draft articles, the Commission would bear in mind and at its discretion deal with all or part of the elements of five other draft articles adopted on first reading, namely, draft articles 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 International terrorism). The Commission had also decided to postpone to its next session a final decision on illicit traffic in narcotic drugs and wilful and severe damage to the environment.

22. The Drafting Committee had made substantial progress on a number of articles of part I of the proposed Code, namely, articles 1, 5, 5 bis, 6, 6 bis, 8, 9, 10, 11, 12 and 13. With respect to part II, it had adopted texts on aggression and genocide. Bearing in mind the provisional nature of the outcome of the Drafting Committee's work, as some articles might require revision, the Commission had decided to defer adoption of the texts proposed by the Drafting Committee and to confine itself at that stage to taking note of the report of the Chairman of the Drafting Committee.

23. With regard to chapter IV of the report, on State responsibility, the Commission had addressed three aspects of the topic. The first was the question of the legal consequences of internationally wrongful acts characterized as crimes in article 19 of part one of the draft articles, as adopted on first reading. That question had formed the subject-matter of the Special Rapporteur's seventh report, which addressed, on the one hand, the special or supplementary consequences to be attached to "crimes" and, on the other hand, the machinery for the implementation of such consequences. In the presentation of his report, the Special Rapporteur had noted that those aspects called for a relatively high degree of progressive development.

24. As far as the substantive consequences of crimes were concerned, the Special Rapporteur had concluded that the obligations laid down in articles 6 (Cessation of wrongful conduct), 6 bis (Reparation) and 8 (Compensation) were incumbent on the author of a crime in the same way as on the author of a delict, the only difference being that, in the case of a crime, all States were injured States, whereas, in the case of a delict, that was true only if the obligation breached was an erga omnes obligation. With regard to restitution in kind and satisfaction, however, the Special Rapporteur took the view that the obligations of the wrongdoing State should be more onerous in the case of a crime than in the case of a delict. As to the instrumental consequences of crimes, the Special Rapporteur had noted that they would be aggravated as compared with the instrumental consequences of delicts not only because, in the case of a crime, all States were injured States and entitled as such to resort to countermeasures, but also because the restrictions placed on the freedom of action of States in the case of a delict might not apply in the case of crimes. With regard to the institutional aspect of the implementation of the consequences of crimes, the Special Rapporteur had proposed a two-phase procedure in which the General Assembly or the Security Council would make a preliminary political assessment before the International Court of Justice was required to make a decisive pronouncement on the existence and attribution of an international crime.

25. The Sixth Committee knew all too well that the very concept of crime which underlay the Special Rapporteur's seventh report had, from the day of its adoption by the International Law Commission in 1976, been a source of some heated debate. Paragraphs 253 to 269 of the report captured the various points of view involved with regard to the legal basis of, and the need for, the concept in question. A view had been expressed that attribution of a crime to a State was not possible within the scope of the Commission's present exercise. Apart from the several precedents attributing responsibility only to individuals in the case of crimes, the main purpose of the Commission was to elaborate a regime of compensation and not to provide for a system of punishment. Further, it was argued that any such exercise would inevitably lead the Commission to enter the field of primary obligations rather than confining itself to the area of secondary obligations; the Commission ought instead to proceed on the assumption that there was a continuum ranging from minor breaches to very serious breaches affecting the international community as a whole, the solution to breaches of great magnitude being to ensure that the draft Code allowed for the imposition of compensation of equal magnitude.

26. Another view was that the concept of crimes in international law was well established and that for acts of exceptional gravity such a characterization with its legal, moral and political dimensions and negative and condemnatory connotations was quite appropriate. The view was further expressed that States had a legal personality and that there was nothing unusual in the notion that States had the capacity to commit crimes.

27. The Special Rapporteur's proposals, particularly those relating to the institutional aspect, had given rise to an interesting debate which was extensively reflected in paragraphs 282 to 319 of the report.

28. While some members of the Commission had approved the general thrust of the proposals made by the Special Rapporteur with regard to substantive consequences, others had expressed doubt as to their validity in view of the need to respect the sovereignty, independence and stability of the so-called "offending State", bearing in mind Article 2 of the Charter of the United Nations. The concept of full restitution in kind, the proposed restrictions on the freedom of the offending State to choose any form of government and the need to protect the vital needs of the population had all been the subject of extensive debate. The need to have a prior decision of the International Court of Justice on the crime alleged and its attribution to a State before countermeasures and other suitable demands could be taken or made against the offending State had also been questioned. Those who favoured prior judicial determination of the crime, on the other hand, had felt it to be very useful to curb or prevent power-play and coercive measures and essential to promote the equity and justice required for a new world order. Some members had continued to hold the view that article 19 of part one of the draft was basically flawed and that a scheme predicated on the acceptance of the notion of a crime stood no chance of being widely accepted by States.

29. The Special Rapporteur's proposals in articles 15 to 19 had been criticized as unrealistic, unduly complex and difficult to implement. It had also been pointed out that they raised questions concerning the Charter of the United Nations and should not be considered until the concept of crime in article 19 had first been re-examined in secondary reading by the Commission.

30. Other members of the Commission, arguing that the concept of crime was not new in international law and provided a good basis to develop the law further, viewed the efforts of the Special Rapporteur as worthy of serious consideration. Moreover, it was noted that, as article 19 had been adopted in first reading, the Commission was obliged to deal with the consequences as proposed by the Special Rapporteur, and that only such an approach would help the Drafting Committee to move forward with its mandate.

31. At the end of the debate, the Commission, by a vote of 18 to 6, had approved the Special Rapporteur's recommendation that his proposals should be referred to the Drafting Committee for consideration in the light of the debate. The arguments adduced for and against the proposal were clearly summarized in paragraphs 337 and 338 respectively and indicated the nature of the terrain to be covered before any consensus could emerge on that aspect.

32. The second aspect of the topic of State responsibility which the Commission had addressed at its forty-seventh session was the instrumental consequences of delicts. At its forty-sixth session, the Commission had provisionally adopted three articles on that subject, namely articles 11, 13 and 14, respectively entitled "Countermeasures by an injured State", "Proportionality" and "Prohibited countermeasures", article 11 having been adopted on the understanding that its wording might have to be reviewed in the light of the text that would eventually be adopted for article 12. At the same session, the Commission had also deferred the formal submission of those three articles to the General Assembly pending action on article 12 and the presentation of the relevant commentaries. At its forty-seventh session, the Commission had had before it the commentaries to all three articles. It had not considered the

commentary to article 11 for lack of time, but had adopted the commentaries to articles 13 and 14, both of which were currently before the Sixth Committee.

33. Article 13 dealt with proportionality. There was no doubt that the determination of the lawfulness of countermeasures on the basis of the criterion of proportionality was a delicate and complicated task, and one that was governed by contextual factors. Nevertheless, it was believed that the additional criterion which involved keeping the "gravity and effects" of wrongful acts in view would serve to limit the possibility for abuse. It had also been proposed that that criterion should not be applied in the case of human rights violations or violations of erga omnes obligations.

34. Article 14 dealt with instances in which the taking of countermeasures was prohibited. Such prohibitions, whether they involved the principle of non-use of force (subpara. (a)), avoiding extreme political or economic coercion (subpara. (b)), respect for the inviolability of diplomatic or consular agents, premises, archives and documents (subpara. (c)) or the requirement not to derogate from basic human rights, had been generally well accepted. He drew attention in that connection to chapter IV, section C, of the Commission's report, in which it was noted that the Commission had yet to take action on article 12 as recommended by the Drafting Committee, which occupied an important position in the scheme of articles prepared.

35. The third aspect of the topic of State responsibility was the settlement of disputes. Since beginning its work, the Commission had considered the possibility of including in the draft articles a third part on the settlement of disputes. In 1993, the Commission had received from the current Special Rapporteur a series of provisions for inclusion in part three, which it had referred to the Drafting Committee together with the proposals of the previous Special Rapporteur on the subject.

36. At its forty-seventh session, the Commission had considered the outcome of the Drafting Committee's work, consisting of a set of seven articles and an annex, contained in chapter IV, section C, of the report. Although the texts recommended by the Drafting Committee had been adopted by a vote, they could be deemed to reflect a broad consensus within the Commission.

37. The dispute settlement system proposed by the Commission extended to all disputes arising out of the interpretation or application of the future convention. It was residual in the sense that the parties to such disputes could at any time, by agreement, resort to any dispute procedure or settlement mechanism of their choice. It was, however, subject to an important exception in article 5, paragraph 2, concerning disputes following the adoption of countermeasures: the State against which countermeasures had been taken could at any time initiate arbitration by unilateral request. Article 7, concerning the validity of arbitral awards, had prompted a number of criticisms. Some members had found it useful to place an effective check on spurious claims of invalidity, while others had expressed concern about adding an additional layer to the dispute settlement process. The former view had prevailed. The annex, which comprised two articles dealing with the conciliation mechanism and the dispute mechanism respectively, had, like the rest of part three, laid down residual rules in the sense that the parties were free to agree on mechanisms

different from those provided for in the annex. However, in the absence of such agreement, third party dispute settlement proceedings could be initiated by unilateral request, meaning, first, that in the case of compulsory conciliation, a conciliation commission would be mandatory on the basis of article 1 of the annex. Secondly, in the case of the arbitration procedure, an arbitral tribunal would have to be constituted in accordance with article 2 of the annex.

38. As indicated in footnote 203, the Commission still had to address the problem of the coexistence of dispute settlement obligations in the context of part three of the future convention and those arising from other instruments. It would also have to deal with the settlement of disputes relating to States crime depending on the outcome of its work in that area. Substantial progress had been achieved on the topic of State responsibility, and although the outstanding issues were highly complex, the Commission hoped that it would be able to complete the first reading of the draft articles at its next session.

39. Concerning chapter V of the Commission's report, on international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had had before it at its forty-seventh session the eleventh report of the Special Rapporteur, which elaborated on the place of harm in the regime to be established under the topic and attempted to define the term "environment". It had also considered a study, prepared by the Secretariat pursuant to a request contained in paragraph 5 of General Assembly resolution 49/51, entitled "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law" (A/CN.4/471).

40. In its preliminary debate on the two most recent reports of the Special Rapporteur, the Commission had focused particular attention on defining the concept of "harm to the environment". The Special Rapporteur had proposed that elements already covered by the traditional concept of harm, such as harm to property or persons, should be excluded from such a definition. He proposed that "landscapes" should be treated more as "values" treasured by the population than as "components" of the environment. Several members of the Commission had urged that the concept of harm to the environment should be broadened to take account of the human factor by including the following elements: loss of life, personal injury or other impairment of health, loss of or damage to property within the affected State, as well as impairment of the natural resources and human or cultural environment of that affected State. Discussions, however, had focused mostly on the scope of the future instrument and on the formulation of its basic principles.

41. The Commission had established a Working Group to review the question of the identification of dangerous activities and submit appropriate recommendations. On the basis of the Working Group's report, it had agreed that the scope of the future instrument, as envisaged in articles 1 and 2, should be more specifically delineated. Such specification would depend on the provisions on prevention adopted by the Commission and the nature of the liability obligations which it would be developing. One way of proceeding would be to prepare a list of activities, which the Commission could recommend at a later stage of its work. For the time being, the Commission believed that it could rely on the lists of activities contained in various conventions dealing with

issues of transboundary harm, such as the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the 1992 Convention on Transboundary Effects of Industrial Accidents and the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. It would reconsider the question of identifying the activities to be covered by the draft articles once it had completed its work on the liability aspect of the topic.

42. Concerning the general principles which should guide States in relation to dangerous activities, the Commission had adopted four articles, A, B, C and D, the placement of which would be determined once the entire draft had been adopted on first reading. Article A, entitled "Freedom of action and the limits thereto", drew upon Principle 21 of the Declaration of the United Nations Conference on Human Environment and Principle 2 of the Rio Declaration on Environment and Development. It was formulated so as to recognize implicitly the freedom of action of States, while also indicating the limits thereto. Together with Article D, Article B, entitled "Prevention", provided the theoretical foundation for the articles on prevention which the Commission had already adopted. It made it clear that the relevant obligation was one of due diligence, the standard against which the conduct of a State should be assessed being that which was generally considered to be appropriate and in keeping with the degree of risk of transboundary harm in the particular instance. Activities considered as ultra-hazardous required States to exercise a much higher standard of care in designing policies, as well as a more rigorous enforcement mechanism.

43. Article C, as indicated by the words "in accordance with the present articles", should serve as a basis for the articles on liability and reparation that were still to be developed. It was therefore a working hypothesis and, bearing in mind that the Commission had yet to agree on a specific regime of liability, left open the determination of: first, the entity to be held liable and provide reparation; secondly, the forms and the extent of reparation; thirdly, the characteristics or thresholds of harm giving rise to reparation; and fourthly, the basis or nature of liability. Having reviewed existing practice, the Commission had noted with interest that the approach adopted had been pragmatic, without any theory of liability held consistently applicable. Article D, entitled "Cooperation", extended to all phases of planning and implementation. The phrase "as necessary", which qualified the role of international organizations, indicated that the assistance of such organizations might not be required if the State of origin or the affected State was technologically advanced. Moreover, it recognized that organizations with the necessary resources were not necessarily available in every particular case and that, even if they were, they could act only in accordance with their constitutions and were not therefore obliged to respond to all requests for assistance from States.

The meeting rose at 4.25 p.m.