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Number of members voting:	136
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Number of votes obtained:	
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**President: Mr. Salim Ahmed SALIM**  
(United Republic of Tanzania)

*In the absence of the President, Mr. Makeka (Lesotho), Vice-President, took the Chair.*

**AGENDA ITEM 15**

**Elections to fill vacancies in principal organs (*con-*  
*tinued*):**  
**(a) Election of five non-permanent members of the  
Security Council**

1. The PRESIDENT: This afternoon the Assembly will continue balloting for the election of one non-permanent member of the Security Council from the group of Latin American States for a two-year term beginning on 1 January 1980.

2. As members are aware, during 16 plenary meetings since 26 October 1979 the Assembly has held 143 ballots which have proved inconclusive. The Assembly will now proceed to the one hundred and forty-fourth ballot—the second in a series of three unrestricted ballots—in accordance with rule 94 of the rules of procedure. In this unrestricted ballot, any member State from the group of Latin American States may be a candidate for election except, of course, Bolivia, which is about to vacate its seat, and Jamaica, which is already a member of the Council. The ballot papers will now be distributed.

*At the invitation of the President, Mr. Mardovich (Byelorussian Soviet Socialist Republic) and Mr. Çelikol (Turkey) acted as tellers.*

*A vote was taken by secret ballot.*

3. The PRESIDENT: I propose now to suspend the meeting while the ballots are being counted.

*The meeting was suspended at 4 p.m. and resumed at 4.10 p.m.*

4. The PRESIDENT: The result of the voting is as follows:

Number of ballot papers:	138
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5. The PRESIDENT: Since the second in this series of unrestricted ballots has proved inconclusive, we shall now proceed to the third unrestricted ballot. As before, in this unrestricted ballot any member State from the group of Latin American States may be a candidate for election except, of course, Bolivia and Jamaica. The ballot papers will now be distributed.

*At the invitation of the President, Mr. Mardovich (Byelorussian Soviet Socialist Republic) and Mr. Çelikol (Turkey) acted as tellers.*

*A vote was taken by secret ballot.*

6. The PRESIDENT: I propose now to suspend the meeting while the ballots are being counted.

*The meeting was suspended at 4.20 p.m. and resumed at 4.25 p.m.*

7. The PRESIDENT: The result of the voting is as follows:

Number of ballot papers:	143
Invalid ballots:	0
Number of valid ballots:	143
Abstentions:	2
Number of members voting:	141
Required majority:	94
Number of votes obtained:	
Cuba .....	78
Colombia .....	60
Mexico .....	2
Peru .....	1

8. The PRESIDENT: Since the third unrestricted ballot has proved inconclusive, the Assembly will now proceed to the first of a series of three restricted ballots in accordance with rule 94 of the rules of procedure. This balloting is restricted to the two candidates that have obtained the largest number of votes, namely Cuba and Colombia and any ballot paper containing any name other than that of Cuba or Colombia will be declared invalid. The ballot papers will now be distributed.

*At the invitation of the President, Mr. Mardovich (Byelorussian Soviet Socialist Republic) and Mr. Çelikol (Turkey) acted as tellers.*

*A vote was taken by secret ballot.*

9. The PRESIDENT: I propose now to suspend the meeting while the votes are being counted.

*The meeting was suspended at 4.35 p.m. and resumed at 4.40 p.m.*

10. The PRESIDENT: The result of the voting is as follows:

<i>Number of ballot papers:</i>	144
<i>Invalid ballots:</i>	1
<i>Number of valid ballots:</i>	143
<i>Abstentions:</i>	2
<i>Number of members voting:</i>	141
<i>Required majority:</i>	94
<i>Number of votes obtained:</i>	
Cuba .....	82
Colombia .....	59

11. The PRESIDENT: As neither of the two countries obtained the required two-thirds majority, the General Assembly will continue the voting and will hold a second restricted ballot. As in the last ballot, the only countries whose names may be included in the ballot papers are Cuba and Colombia. Any papers containing the names of other countries will be declared invalid. The ballot papers will now be distributed.

*At the invitation of the President, Mr. Marčovič (Byelorussian Soviet Socialist Republic) and Mr. Çelikol (Turkey) acted as tellers.*

*A vote was taken by secret ballot.*

12. The PRESIDENT: I propose now to suspend the meeting while the ballots are being counted.

*The meeting was suspended at 4.50 p.m. and resumed at 4.55 p.m.*

*Mr. Salim (United Republic of Tanzania) took the Chair.*

13. The PRESIDENT: The result of the voting is as follows:

<i>Number of ballot papers:</i>	143
<i>Invalid ballots:</i>	0
<i>Number of valid ballots:</i>	143
<i>Abstentions:</i>	3
<i>Number of members voting:</i>	140
<i>Required majority:</i>	94
<i>Number of votes obtained:</i>	
Cuba .....	79
Colombia .....	61

14. The PRESIDENT: As neither of the two countries obtained the required two-thirds majority, we shall have to proceed to a third restricted ballot. Before we do so, however, I should like to inform the Assembly that if that ballot also proves inconclusive, it is my intention—subject, of course, to the concurrence of the Assembly—to take up the proposal made earlier by the representative of India [117th meeting, para. 19] in connexion with the conduct of our work. As that appears to be agreeable to the Assembly, we shall

proceed accordingly. Consequently, we shall now proceed to the third restricted ballot, on the understanding that if it proves to be inconclusive, we shall suspend the balloting until a later stage. The ballot papers will now be distributed.

*At the invitation of the President, Mr. Marčovič (Byelorussian Soviet Socialist Republic) and Mr. Çelikol (Turkey) acted as tellers.*

*A vote was taken by secret ballot.*

15. The PRESIDENT: I propose now to suspend the meeting while the ballots are being counted.

*The meeting was suspended at 5 p.m. and resumed at 5.10 p.m.*

16. The PRESIDENT: The result of the voting is as follows:

<i>Number of ballot papers:</i>	144
<i>Invalid ballots:</i>	0
<i>Number of valid ballots:</i>	144
<i>Abstentions:</i>	5
<i>Number of members voting:</i>	139
<i>Required majority:</i>	93
<i>Number of votes obtained:</i>	
Cuba .....	78
Colombia .....	61

17. The PRESIDENT: The third restricted ballot has also proved inconclusive.

18. I am informed by the delegation of India that it does not intend to submit formally the proposal to which it referred at the preceding meeting. Consequently I should like to announce that there will be a meeting of the General Committee right away, and I shall therefore suspend the meeting for 45 minutes.

*The meeting was suspended at 5.15 p.m. and resumed at 5.55 p.m.*

19. The PRESIDENT: I should like to inform the General Assembly that the General Committee at its 10th meeting, held this afternoon, agreed to recommend that the Assembly should recess now and meet again on Friday, 4 January 1980, in the morning and, if necessary, in the afternoon, on the understanding that if the situation so required it could meet before that date and also could meet again on Monday, 7 January, in the morning. If those meetings prove to be inconclusive, the Assembly will recess for two or three weeks.

20. If there is no objection I shall take it that the General Assembly adopts the recommendation of the General Committee.

*It was so decided.*

21. Mr. PETREE (United States of America): Mr. President, in the meeting of the General Committee that you convened just now, you drew attention to the fact that the Security Council will have important work before it during the month of January. In this connexion, many members are aware that you

have been advised that the Security Council will be competent—indeed, obliged—to meet to fulfil its responsibilities under the Charter even if the General Assembly has been unable to elect a fifteenth member to the Security Council. It would assist the Members of the United Nations if you would inform us what legal advice you have been given.

22. The PRESIDENT: I interpret the statement of the representative of the United States as seeking to know the legal advice the Legal Counsel has given me concerning what would be the situation in the Security Council on 1 January if the Council were not constituted with the fifteenth member.

23. I think that the best person to give that assessment is the Legal Counsel, and, if the Assembly does not object, I shall invite the Legal Counsel to speak.

24. As there appears to be no objection, I now call on the Legal Counsel.

25. Mr. SUY (Under-Secretary-General, the Legal Counsel): The question has been raised of the legal and constitutional consequences arising from the possible inability of the General Assembly to elect a non-permanent member of the Security Council which would thereby result temporarily in a Security Council of only 14 members instead of 15 members, as prescribed by the Charter.

26. Before addressing the consequences of such an eventuality, it is necessary to consider the function and role of the General Assembly in the election of non-permanent members of the Security Council and the nature of the obligation of the Assembly in this regard. Article 23 of the Charter provides, *inter alia*, that "The General Assembly shall elect 10 other Members of the United Nations to be non-permanent members of the Security Council . . .".

27. This provision is confirmed and clarified in rule 142 of the rules of procedure of the General Assembly, which states:

"The General Assembly shall each year, in the course of its regular session, elect five non-permanent members of the Security Council for a term of two years."

In addition, rule 94 contains detailed provisions on the conduct of the elections which leave no doubt as to the absolute nature of the obligation of the Assembly, since the balloting must continue until a result is achieved—that is, "and so on until all the places have been filled".

28. Finally, in the event that a member ceases to belong to a Council before its term of office expires, rule 140 requires the General Assembly to conduct a by-election at the next session to elect a member for the unexpired term.

29. From all those provisions it is clear that the Charter and the General Assembly's own rules of procedure establish the function and role of the Assembly as essentially procedural in nature—namely, the election of a non-permanent member of the Council—and it

is equally clear that the obligation of the Assembly in this regard is absolute and mandatory.

30. In the past the Assembly has resolved difficulties of this nature by resorting to the technique of split terms of membership. That was the case in 1956-1957 with Yugoslavia and the Philippines, in 1960-1961 with Poland and Turkey, in 1961-1962 with Liberia and Ireland, in 1962-1963 with Romania and the Philippines, and in 1964-1965 with Czechoslovakia and Malaysia. It should, however, be noted that no split terms of membership have occurred since the enlargement of the Security Council in 1965 from 11 to 15 members.

31. The failure of the General Assembly to elect a non-permanent member would constitute a failure to comply with its constitutional functions and would violate the clear language of Article 23 of the Charter, the mandatory nature of which leads to the conclusion that a Security Council of less than 15 members would not be legally constituted in accordance with the Charter.

32. We now turn to the consideration of the consequences of such a failure of the General Assembly for the constitution and functioning of the Security Council. The question arises whether there are circumstances in which the Security Council may continue to function notwithstanding the fact that temporarily it may not be legally constituted in membership. The first such situation, which has never in fact occurred, is that foreseen in rule 140 of the rules of procedure of the General Assembly, which states:

"Should a member cease to belong to a Council before its term of office expires, a by-election shall be held separately at the next session of the General Assembly to elect a member for the unexpired term."

33. That rule applies also to the Security Council. However, the fact that that rule is part of the rules of procedure of the General Assembly indicates, first and foremost, the obligation of the General Assembly to hold a by-election. But the implication of that rule is that it may occur that between the cessation of membership in the Council and the time of the by-election in the General Assembly the Security Council does not consist of the number of members prescribed by Article 23 of the Charter. A membership short of the prescribed number would not, therefore, affect the functioning of the Security Council in this situation. As pointed out, however, this situation has never developed, but even if it were to develop it would be a very exceptional circumstance and one, furthermore, over which the General Assembly could have no control.

34. A further situation in which the Security Council membership might no longer be in accordance with the constitutional requirements of the Charter would be during the period of time between the entry into force of a Charter amendment increasing the membership and the actual election of the new members. This very exceptional situation arose in connexion with the Charter amendments adopted by the General Assembly in 1963. The amendment increasing the membership

of the Security Council was adopted by the General Assembly on 17 December 1963 and came into force on 31 August 1965. The Legal Counsel's opinion was sought on the legal position of the Security Council during the interim period between the entry into force of the amendment and the election of new members. The Legal Counsel was confronted with the alternatives presented by Articles 23 and 28 of the Charter, respectively. In his opinion, he argued that, where the two alternatives are both possible,

“... the interpretation to be adopted is the one most consonant with the terms and purposes of the instrument as a whole. An interpretation tending to so extreme a consequence as a break in the functioning [of the Security Council] could not be accepted without clear support in the text itself. . .”

That legal opinion can be found in the *United Nations Juridical Yearbook, 1965*.<sup>1</sup>

35. Therefore, notwithstanding the entry into force of the new Article 23 expanding the membership of the Council from 11 to 15, the Council continued to function under the previous régime until the election of the additional members.

36. A third situation in which the Security Council could be faced with a discrepancy between the prescribed membership and the actual membership could arise because of the inability of the General Assembly to reach agreement on an election. This situation, which we face today, may be distinguished from the two previous situations in which the temporary short-fall in membership was beyond the control of the Assembly, although the Assembly has the ultimate obligation to fill the vacancy. The inability of the General Assembly to elect all the non-permanent members of the Security Council is not something which is beyond the control of the Assembly. On the contrary, under the Charter the General Assembly is under an obligation to elect the members of the Council. The question, then, is whether the Security Council may continue to function even when its membership is not the prescribed number as a result of a situation which is not beyond the control of the Assembly.

37. As indicated, Article 23 of the Charter provides that the Security Council shall consist of 15 Members of the United Nations. It is clear, therefore, that a legally constituted Security Council must have 15 members. However, Article 23 must be read in the context of the Charter as a whole, taking into particular consideration its object and purpose. The object and purpose of a treaty are of particular importance in the interpretation of treaties establishing international organizations because constitutions, such as the Charter, as distinct from mere contracts, are designed to give effect to certain purposes and principles in a moving political context.

38. In this broader perspective, it must be recognized that the Members of the United Nations have conferred on the Security Council “primary responsibility for the maintenance of international peace and security”

[Art. 24, para. 1], which is one of the purposes of the Organization [Art. 1, para. 1], and that the Security Council “shall be so organized as to be able to function continuously” [Art. 28, para. 1]. Thus, at the very least, the compositional requirement of Article 23 must be balanced against the requirements of other provisions of the Charter concerning the functioning of the Council in so far as the non-compliance with the requirement of Article 23 does not run counter to the provisions of Article 27, which may be considered as an implied quorum provision.

39. Accordingly, an act of omission or the failure of the General Assembly to fulfil its constitutional obligations cannot be held to produce legal consequences so fundamental to the Organization as the paralysis of a principal organ. To argue otherwise would be to effect a constitutional amendment of the Charter through extraconstitutional means. Such a paralysis could have the gravest consequence for the whole system of the preservation of international peace and security, including a potential shift of well-established powers between the Security Council and the General Assembly.

40. The foregoing suggests that in theory and in practice the Security Council may continue to function notwithstanding the fact that it is not legally constituted.

41. In conclusion, while the failure of the General Assembly to elect a non-permanent member of the Security Council would be inconsistent with Article 23 of the Charter, such an act of omission could not produce legal consequences for the functioning of the Security Council, which is the organ primarily responsible for the maintenance of international peace and security. In such a situation, it would be the view of the Office of Legal Affairs that decisions of the Security Council taken in accordance with the relevant provisions of Article 27 of the Charter would constitute valid decisions. This is not to say, however, that the exceptional situation created by such a failure on the part of the General Assembly is either legally or constitutionally desirable. But in the interests of maintaining the authority of the Security Council and the balance of powers between the General Assembly and the Council it is essential that the General Assembly should fulfil its obligations and responsibilities under the Charter.

42. That was the legal opinion that I submitted to the President of the Assembly a few weeks ago in view of the difficult position in which the Assembly found itself.

43. Mr. B. C. MISHRA (India): I should like it to be recorded that at this moment the Assembly is neither accepting nor rejecting the opinion of the Legal Counsel.

44. Mr. FERNANDES (Guinea-Bissau): We are somewhat confused about what the opinion of the Legal Counsel is at this moment. I wonder if we could get some sort of statement—very brief, two, three or four sentences—as to whether the Council can function—yes or no—with 14 members. If not, what would be the minimum requirement? How about 13 members?

<sup>1</sup> United Nations publication, Sales No. E.67.V.3; see chap. VI, para. 7.

Or 12, or 11, or 10, or 9 or only the 5 permanent members? I do not know if my delegation will be happy with this kind of ruling. I am really confused. Could I get some kind of clarification? As of now the Assembly is neither accepting the opinion nor rejecting it. Is there any way that we could get, in two sentences, an answer to the question: Can the Security Council function or not? If possible, can we find out the minimum requirement?

45. Let me give a practical and specific example. Let us assume that within the next 10 days the Council meets with 14 members and agrees to impose an embargo, or whatever, on any Member State. Would it be legal, or would it be illegal? Would that Member State have any kind of obligation or any kind of duty to obey the decision of a Council with 14 members? Yes or no? I would appreciate some specific ruling on that matter.

46. Mr. SHUSTOV (Union of Soviet Socialist Republics) (*interpretation from Russian*): I do not want to comment in any way whatsoever on what was just said on behalf of the United Nations Secretariat with regard to the constitutionality of the Security Council. We object in general to consideration by the General Assembly of the question of the activities of the Security Council. Whatever the substance of the conclusion just stated, it can have no legal or political significance since it lies beyond the functions established for the Secretariat of the United Nations and the General Assembly.

47. In accordance with the Charter of the United Nations, only the Security Council itself can solve matters concerning its activities. No other organ, including the General Assembly, the Secretariat or its officials, is empowered to do so. The task of the General Assembly, according to the Charter, is to elect all the non-permanent members of the Security Council to be elected at a given session. Therefore the General Assembly should now focus its efforts, as you yourself said, Mr. President, on fully carrying out its task under the Charter of electing the non-permanent members of the Security Council. To that end, it should continue its work, as you yourself have said, Sir.

48. The PRESIDENT: I shall now call on the Legal Counsel. But in doing so, I should like to make it clear that all we are asking of him is an opinion. I do not think that the Legal Counsel is in any position to give a ruling. I do not think that anybody has asked him to give a ruling. Unless a Member State wants him to give a ruling, I think that it is an opinion that we are seeking.

49. Mr. SUY (Under-Secretary-General, the Legal Counsel): Mr. President, that was precisely the point I wished to make at the very outset. It was upon the request of the delegation of the United States that you asked me to read out the legal opinion. I wish to confirm that it is not a ruling or a decision; it is just an opinion of the Office of Legal Affairs. I can easily summarize it in a few lines.

50. The first point is that it is the absolute obligation of this Assembly to elect the non-permanent members of the Security Council. Secondly, if this Assembly

is not in a position to elect a fifteenth member of the Security Council, the Council will not be constituted in accordance with the Charter but, nevertheless, this inability of the General Assembly cannot paralyze the functioning of a major organ of this Organization that is in charge of the maintenance of international peace and security.

51. I do not think I have to go into further details about what could happen if and when the Security Council were to take a decision under these circumstances. That is a matter that could be considered later by the Security Council itself. Now, in order for the record to be complete, I wish to add that in the first version of the legal opinion I have read out today, there was a slight change in the concluding paragraph. For the benefit of all the members and in order to set the record straight, I wish, with your permission, Mr. President, to read out the first version of the concluding paragraph I had submitted to you:

“In conclusion, the failure of the General Assembly to elect a non-permanent member of the Security Council would violate Article 23 of the Charter. Such an act of omission, however, could not produce legal consequences for the functioning of the Security Council, which is the organ primarily responsible for the maintenance of international peace and security. In such a situation, it would be the view of the Office of Legal Affairs that decisions of the Security Council taken in accordance with the relevant provisions of Article 27 of the Charter would constitute valid decisions. However, this would be an undesirable situation from the legal and constitutional points of view. Legally, the binding nature of decisions taken by the Security Council may be challenged, while from the constitutional point of view it may affect the balance of powers in the area of maintenance of international peace and security as between the General Assembly and the Security Council. It is essential, therefore, that the General Assembly should fulfil its Charter obligations and responsibilities.”

52. The PRESIDENT: I should like to make one small clarification. As President of the Assembly I had requested the Legal Counsel, about a month ago, to provide me with a legal opinion. It was provided on 27 November. The opinion which the Legal Counsel has just read out is the one I had before me for the entire duration of my consultations. The slightly revised opinion which was subsequently submitted by the Legal Counsel was given to me on 27 December. I think it is important for the record to reflect that.

53. Mr. MUWAMBA (Malawi): I had wished to speak long before the representative of the Soviet Union, simply because I wanted to find out from the delegation of India why it was necessary for it to make the suggestion that in fact we neither accept nor reject the legal opinion that has been advanced. Indeed, from the very outset I had thought we were being given a legal opinion—subsequent to the President's recommendation that we should adjourn and reflect on the problem—as to what might happen if we delayed in providing the remaining non-permanent member. But now it appears as if the delegation of India is suggesting that a legal ruling has been given which this Assembly

should accept or reject. That means we are now compounding issues. I would request that, if it is not asking too much of the representative of India, he should withdraw his suggestion. I do not think that the legal opinion that has been handed down should be removed from the records of this Assembly, because it will help us in reflecting on the deliberations of the entire Assembly. When we reconvene next week we shall know exactly where we stand. So I plead with you, Mr. President, to ask the delegation of India to withdraw its suggestion.

54. The PRESIDENT: I am quite sure that there has been some misunderstanding. The representative of India did not suggest the deletion or retention of the opinion given by the Legal Counsel. All he said was that the opinion was before the Assembly but he wanted it to be understood that the Assembly was neither accepting nor rejecting the opinion. This does not mean, therefore, that the opinion is obliterated from the records of the Assembly. In any case, the representative of India has asked to speak, and I now call on him.

55. Mr. B.C. MISHRA (India): I am grateful to you, Mr. President, for clarifying the issue for the representative of Malawi.

56. I should like it to be recorded that the second version of the summary of the opinion, just read out by the Legal Counsel, is not being accepted or rejected by the Assembly.

57. Mr. ROA KOURÍ (Cuba) (*interpretation from Spanish*): I should like to state that it is my delegation's considered view that, regardless of the legal opinion which might ultimately be deemed valid with regard to the legality, legitimacy or constitutionality of the Security Council, the mere fact of the Council, as the organ with primary responsibility for the maintenance of international peace and security, not being constituted in accordance with the Charter would reflect negatively on the political and moral authority of its decisions and on its own work.

58. In my delegation's view, this is not merely a legal or a constitutional problem, but also and basically a political one.

59. Mr. BOUAYAD-AGHA (Algeria) (*interpretation from French*): I wish to ask two questions. First, could we be told the reasons behind the revision of the first legal opinion? Secondly, which of the two opinions is favoured by the Legal Counsel?

60. The PRESIDENT: I call on the Legal Counsel.

61. Mr. SUY (Under-Secretary-General, the Legal Counsel): I should like to reply first to the second question put by the representative of Algeria: I prefer the version that I read out first.

62. With regard to his first question—that is, why the conclusion was changed—I would reply as follows.

First, there were some linguistically unclear formulations in the earlier version. For instance, in the sentence beginning "However, this would be an undesirable situation", the word "this" is unclear; as is the word "it" in the phrase of the next sentence reading "from the constitutional point of view it may affect".

63. The second reason why I produced a revised conclusion was that in one sentence I said that "it would be the view of the Office of Legal Affairs that decisions of the Security Council taken in accordance with the relevant provisions of Article 27 of the Charter would constitute valid decisions", and then in a subsequent sentence I said that "legally, the binding nature of [these] decisions may be challenged". This was a contradiction, and therefore in the final version we left out the reference to the possibility of challenging the decisions of the Security Council. That does not mean, however, that we exclude that possibility.

64. The PRESIDENT: I want once again to thank the Legal Counsel for his opinion. Quite frankly, the little discussion we have had here has all the more emphasized the inescapable responsibility of the General Assembly to discharge its responsibility under the Charter, and the importance that it do so.

#### *Statement by the President*

65. The PRESIDENT: Since we shall not be meeting for a few days, I should like to make a few remarks.

66. First of all, let me express my appreciation for the co-operation and support I have received from the Assembly, and in particular for all the efforts that have been made over the last few days in an attempt to resolve the present deadlock. This has been a very trying session. I know that everyone is tired. I should like to pay a particular tribute to the tellers, the representatives of the Byelorussian Soviet Socialist Republic and of Turkey, and to the members of the Secretariat who have so ably and patiently assisted the Assembly in this exercise that we have been going through. Even though we have not yet completed our work, I believe it is a tribute to the dedication and commitment of members that we have had such a high level of participation in all our meetings, even now during the holiday season. I also particularly appreciate the dignity with which the Assembly has approached the problem before us.

67. Therefore, as you leave this evening let me extend to each and every one of you best wishes for a happy reunion with your families and, one may hope, for a good rest. I would add the hope that the new decade, which is beginning in only a few hours, will bring you all health and happiness and that the new year may even bring a new spirit to our own deliberations so that we can close the thirty-fourth session before the year is too far advanced.

*The meeting rose at 6.35 p.m.*