would be in a better position to take a decision on the issue because by that time it would have adopted a complete liability regime together with a regime for prevention with specific provisions relating to the relationship between the two regimes. The Commission would also have received views of the Sixth Committee and perhaps written comments from Governments on the entire regime which would enable the Commission to assess the needs and preferences of Member Governments. The Working Group suggested that the list of activities that exist in a number of Conventions dealing with issues of environment particularly the Convention on Environment Impact Assessment in a Tranaboundary Context, 1991; the Convention on Transboundary Effects of Industrial Accidents, 1992; and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 1993 are useful and could provide the Commission with a general idea of the type of activities to which the present topic applies. The Group, therefore, recommended that the Commission must in its future work have a general idea of the kind of activities to which the draft articles are to apply. It took the view that the definition of the scope of the topic as provided in articles 1 and 2 may in itself be insufficient for the next stage of the work. It recognized that States may require specificity in the articles on the type of activities falling within the ambit of the topic and pointed out that specification would depend on the provisions of prevention and the nature of the obligations on liability which the Commission may develop. It recommended in this regard that one way of achieving that specificity would be to prepare a list of activities.

V. STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

The item 'State Succession and Its Impact on the Nationality of Natural and Legal Persons' was first included in the agenda of the Forty-fifth Session of the Commission in light of the situation then prevailing in Eastern Europe. The General Assembly at its forty-eighth session *inter alia* endorsed the proposal.[8] Thereafter, the Commission at its forty-sixth session, appointed Mr. Vaclav Mikulka, Special Rapporteur for the topic. The General Assembly at its forty-ninth session *inter alia* "endorsed the intention of the International Law Commission to undertake work on the topic on the understanding that the final form to be given to the work shall be decided after a preliminary study is presented to the General Assembly", and, requested the Secretary-General to invite Governments to submit relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

At its forty-seventh session, the Commission had before it the First Report of the Special Rapporteur, Mr. Vaclav Mikulka on State Succession and Its Impact on the Nationality of Natural and Legal Persons[9]. The First Report of the Special Rapporteur comprised an Introduction and seven sections, viz. (i) the current relevance of the topic: (ii) nationality—concept and function; (iii) the roles of international law and municipal law; (iv) the limitations on the freedom of States in the areas of nationality; (v) categories of succession; (vi) the scope of the problem under consideration; and (vii) continuity of nationality.

In the introduction to his report on State Succession and Its Impact on the Nationality of Natural and Legal Persons, the Special Rapperteur, Mr. Vaclav Mikulka furnished a historical review of the previous work by the Commission on the topic of State Succession and Nationality. The introductory part of the report also addressed four fundamental issues relating to (i) the delimitation of the topic; (ii) the working method; (iii) the form which the outcome of the work on this topic might take and (iv) the terminology used.

Delimitation of the Topic

As regards the delimitation of the topic, the Special Rapporteur expressed the view that "the task which the Commission has now undertaken differs from the Commission's work on State Succession in respect of matters other than Treaties in two respects i.e. (a) it does not refer to the issues

8. See GA Resolution 48/31 of 9 December 1993.
9. See A/CN. 4/467 dated 17 April 1995.

of Conventions of establishment; and (b) it encompasses the issue of the nationality of legal persons. He observed in this regard that the former viz. conventions on establishment had become anachronistic and that the latter i.e. the nationality of legal persons had not been mentioned explicitly in the work of the Commission on State Succession in respect of matters other than Treaties.

Seeking to substantively define the relationship between the current topic and those of State Succession and Nationality include Statelessness, he pointed out that Mr. Bedjaoui had observed that "in all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality. The successor State does not let the inhabitants of the territory retain their former nationality. This is a manifestation of its nationality." Having pointed out that, the Special Rapporteur Mr. Mikulka went on to state that..."the relation of the State to the individual which is covered by the concept of nationality excludes *a priori* any notion of 'substitution' or 'devolution'. Nationality, like sovereignty, is always inherent. By its nature, therefore, nationality is not a "successional matter" as for example, State treaties, property and debts are. He called upon the Commission to decide whether, and to what extent, the issue of continuity of nationality should be considered in the context of the present topic.

The Special Rapporteur pointed out that while the questions which the Commission must study in the context of the current topic are part of international law dealing with nationality, the scope of the present consideration is restricted, however, to changes of nationality resulting from State succession. He was of the view that changes of nationality should be considered exclusively in relation to changes of sovereignty or "collective naturalizations".

Terminology

As regards the use of terms or terminology employed, the Special Rapporteur recommended that in order to ensure uniformity of terminology, the Commission should continue to use the definitions it formulated in the context of the two Conventions on succession of States especially as regards the basic concepts. He accordingly proposed the following six terms:

— "succession of States" means the replacement of one State by another in the responsibility for the international relations of the territory;

— "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

— "Date of the succesion of States" means the date upon which the successor State replaced the predecessor State in the responsibility

for the international relations of the territory to which the succession of States relates;

— "newly independent State" means a successor State the territory of which immediately before the date of the succession of State was a dependent territory for the international relations of which the predecessor State was responsible;

— "third State" means any State other than the predecessor State on the successor State.

Relevance of the Topic

With the dissolution of the erstwhile Union of the Soviet Socialist Republics and other States in Eastern Europe the question of nationality has once again assumed significance. The emergence of new States has attracted the attention of a number of intergovernmental and non-governmental organizations alike and has placed in sharp focus the problems and issues relating to nationality of individuals. The process of succession of States and the related problem of Statelessness is a contemporary and practical problem confronting the international society. The focus of enquiry, therefore, is the branch of international law dealing with nationality rather than State succession. At the first blush, it may appear that the problem was somewhat similar to what the Commission had already dealt with in its consideration of the item "Nationality, including Statelessness". The topic of State Succession and its Impact on the Nationality of Natural and Legal Persons differed from the former item in two respects, viz. the scope of enquiry is much broader as it covered all issues resulting from changes of nationality and is not limited to the question of Statelessness. On the other hand, it must be recognized that the scope of the topic under consideration is restricted to changes of nationality resulting from State succession and such changes are *ipso-facto* of the nature of collective naturalizations.

The Concept and Function of Nationality

The second part of the Report of the Special Rapporteur dealt with the concept and function of nationality of both natural and legal persons. He rightly points out that the problem of nationality is closely linked to the phenomenon of population as one of the constitutive elements of the State for if a State is a territorial entity, it is also an aggregate of individuals. On the one hand, Statehood is contingent on the existence of a permanent population, on the other hand, nationality is contingent on decisions of the State and is zealously guarded by States because it is a manifestation of sovereignty.

The fundamental difference between the nationality of natural and legal persons is that while notionally all natural persons can possess the quality of a national, in fact some of them do not possess that quality in any country i.e. the stateless persons. Legal persons, on the other hand, being persons created by law are viewed as possessing a nationality. But the term 'Legal Persons' expresses "a concept which is profoundly different to the point where it has been denied that the term 'nationality' in this context has any value other than that of an image. Nevertheless, it continues to be used in positive law, but the subject-matter is too closely linked to the concept of legal personality for study of one to be dissociated from that of the other".

The notion of concept of nationality may be defined in different ways depending on whether the problem is approached from the perspective of internal or international law. The function of nationality is, in each case, different. Seen from the second perspective, to the extent that individuals are not direct subjects of international law, nationality is the medium through which they can normally enjoy benefits from international law. Only nationals automatically enjoy the advantages of the diplomatic protection and the set of rules—whether conventional or not—accepted by States in their mutual relations for the benefit to their nationals. Nationality is also a prerequisite for the full enjoyment of human rights.

Nationality of Legal Persons

There is a limit to the analogy that can be drawn between nationality of individuals and the nationality of corporations. Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals. These include the manner in which corporations are created, operate and are brought to an end; their development as legal entities distinct from their shareholders; the inapplicability to companies of the essentially personal conception of allegiance which underlines the development of much of the present law regarding nationality; the general absence in relation to companies of any nationality legislation to provide a basis in municipal law for the operation of rules of international law; the great variety of forms of company organization; and, the possibilities for contriving an artificial and purely formal relationship with the State of 'nationality'.

Roles of Internal Law and International Law

The third Chapter of the report of the Special Rapporteur addressed to the 'Role of Internal Law and International Law comprised three sections which dealt with (i) internal law; (ii) international law; and (iii) the principles of law generally recognised with regard to nationality.

Role of Internal Law

It was pointed out that it was generally accepted that the nationality of an individual is determined not in relation to or by international law but by reference to the internal law of a State. That principle is valid in cases of State succession. In sum, it was for the internal law of the predecessor State to determine who or which individual had lost its nationality following the change and conversely it was for the internal law of the successor State to determine who or which individual had acquired its nationality. The Special Rapporteur pointed out, however, that the opinion of some jurists that there could be exceptional cases where individuals might possess a nationality for international purposes in the absence of any applicable nationality law begged the question whether the existence of two distinct concepts of nationality viz. one under internal and another international law was acceptable. That question in the context of State Succession was significant and the Rapporteur asked the Commission to address itself to the question of the elements and function of the concept of nationality if the latter i.e. the concept of nationality, was to be considered as generally accepted.

Role of International Law

With regard to the role of international law, the point was made that role of international law with respect to nationality of persons was very limited. In principle States are subject to two types of limitations in the field of nationality. The first of these relates to the delimitation of competence between States whose non-compliance with the rules resulted in the non-enforceability against third States of the nationality thus conferred. The second type of delimitation was related to the obligation of States associated with the protection of human rights—whose non-observance entails international responsibility. Thus although international law intervened through both customary and conventional rules, it cannot be a substitute for the internal law of a State indicating who are not nationals of that State. This is by reason of the fact that sovereignty of a State in the determination of its nationals must be exercised within the limits imposed by general international law. The Special Rapporteur pointed out in this regard that the Hague Convention on Certain Questions Relating to the Conflict of Nationality Law, 1930 *inter alia* included the "principles of law generally recognised with regard to nationality" among the limitations to which the freedom of States was subjected in the field of nationality: but (that Convention) did not specify the precise content of that term.

Limitations on Freedom of States in the area of Nationality

The limitations on the freedom of States in the area of nationality are further elaborated in Part IV of the Report wherein the Special Rapporteur

discussed the principle of effective nationality and the protection of human rights.

(a) Effective Nationality

The principle of effective nationality is based on the concept of a genuine link between the State and an individual. It is a principle often quoted in the context of the decisions of the International Court of Justice in the Nottebohm Case. Although that judgement has evoked some criticism, the principle of effective nationality itself has never been challenged.

(b) Protection of Human Rights

As regards the obligation of States in the area of human rights and their protection which imposed limitations on the exercise of discretion of States in the matter of conferring or withdrawing nationality, it was stated that the significance of this limitation had increased after the Second World War. This limitation holds true both for naturalization in general and in the particular context of State succession. Citing the provisions of the Universal Declaration of Human Rights and the Convention on the Reduction of Statelessness, the Special Rapporteur called for consideration of: (i) the precise limits of the discretionary competence of the predecessor State to deprive the inhabitants, of the territory it had lost, of its nationality; and (ii) the question whether an obligation of the successor State to grant its nationality to the inhabitants concerned could be deduced.

Categories of State Succession

With regard to categories of succession dealt with in Part IV of the report the Special Rapporteur had *inter alia* for the purposes of the study of State succession and its impact on nationality, deemed it appropriate to maintain the three categories adopted for the codification of the law of succession in respect of matters other than treaties viz. (i) cases where part of the territory of a State is transferred by that State to another State; (ii) cases where a part of the territory of a State becomes part of the territory of a State other than the State which was responsible for its international relations; and (iii) cases where a part of the territory of the State separates from that State and unites with another State. It may be recalled in this regard that as regards the unification and separation of States the Commission had deemed it appropriate to distinguish between the "separation of part or parts of the territory of a State" and the "dissolution of States". In the opinion of the Special Rapporteur, the continuity or discontinuity of the international personality of the predecessor State in case of cessation or dissolution of States had direct implications in the areas of nationality. It was pointed out that the issues which arose in the first case were

substantially different from those which arose in the second case. In cases of unification a distinction needs to be made between a situation which a State united freely with another consequently disappearing as a subject of international law—the absorption hypothesis—and a situation in which two predecessor States united to form a new subject of international law and both disappeared as sovereign States. The Special Rapporteur has suggested that the nationality issues which had arisen during the decolonization process be studied, only in so far as such a study shed light on nationality issues common to all types of territorial changes and that the study should not deal with questions of nationality which might arise in cases of annexation by force of the territory of a State.

Scope of the Topic

Rationae Personae

Having stated that the Special Rapporteur posed the question whether it would be useful to undertake the study of the impact of State succession on the nationality of legal persons parallel with the study concerning the nationality of natural persons and whether the same study of problems of nationality of legal persons has the same degree of urgency as the study of problems concerning the nationality of individuals. The Special Rapporteur recommends that the Commission separate the two issues and study first the most urgent one—that of the nationality of natural persons. Having thus established the *rationae personae* the Special Rapporteur observes in Part VI of the Report addressed to the question of the scope of the problem under consideration that while determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of a total State succession, determining the category of individuals susceptible of losing the predecessor State's nationality is quite complex in the case of partial State succession when the predecessor State survives the change. In the latter case, in the opinion of the Special Rapporteur, it would be necessary to distinguish among three groups of individuals possessing the nationality of the predecessor State:

(i) those born in the territory affected by the change of sovereignty and resident there at the date of the change;

(ii) those born elsewhere but temporarily or permanently resident in the territory affected by the change of sovereignty; and

(iii) those born in the territory of affected State by the change but temporarily or permanently absent at the date of the change. Here a distinction would require to be made between individuals residing in the territory which remains part of the predecessor State and those residing in a third State.

The Special Rapporteur rightly observes that the "delimitation of categories of persons susceptible of acquiring the nationality of the successor State is not less difficult". In the event of total State succession all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. The point to be noted is that the inhabitants of the territory subject to State succession include among others, stateless persons residing in that territory at the date of succession and that "stateless persons so resident there are in the same position as born nationals of the predecessor State. There is an inchoate right on the right of any State to naturalize stateless persons resident upon its territory".

Rationae Materiae

Having thus invited the Commission to delimit the scope of the topic in terms of its *rationae personae* the Special Rapporteur called upon it to consider the *ratione materiae* of the topic. It was recommended in this regard that future consideration of the topic by the Commission should deal with questions of the nationality of the predecessor State and the acquisition of the nationality of the successor State and with the question of conflict of nationalities susceptible of resulting from State succession i.e. statelessness and dual or multiple nationality.

Loss of Nationality of Predecessor State

As regards the loss of nationality, the Special Rapporteur was of the view that work of the Commission should aim at clarifying the extent to which the loss of the nationality of the predecessor State occurred automatically as a logical consequence of the succession of States. The extent to which international law obligates the predecessor State to withdraw its nationality from the inhabitants of its territory concerned or on the contrary, limits the discretionary power of the State to withdraw its nationality from certain categories of individuals susceptible of altering nationality.

Acquisition of Nationality of Successor State

As regards the acquisition of nationality, the delimitation of categories of persons susceptible of acquiring the nationality of the successor State was rather difficult. Here too in the event of total State succession, such as the absorption of one State by another State or unification of States, when the predecessor State or States, ceased to exist, all nationals of the predecessor State or States were eligible for the acquisition of the nationality of the successor State. But in the event of dissolution of a State, which ceased to exist, the situation was complicated by the appearance of two or more successor States. The range of individuals susceptible of acquiring the nationality of each particular successor State had to be defined separately.

Similar difficulties would arise in the determination of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of succession or transfer of a part or parts of the territory.

Conflict of Nationalities

As to the conflict of nationalities, the Rapporteur was of the view that the Commission could investigate whether the States concerned, namely, the predecessor State and the successor State or States, were required to negotiate and settle nationality questions by mutual agreement with a view to warding off conflicts of nationalities, especially statelessness.

Right of option

Finally, the Commission, it was recommended, study the right of option, which was provided for in a substantial number of international treaties and had quite recently been envisaged by the Arbitration Commission of the European Community Conference on Yugoslavia.

Rationae Temporis

As regards the scope of the problem *rationae temporis*, is was proposed that since the topic was the question of nationality solely in relation to the phenomenon of State succession, the scope of the study excluded questions relating to changes of nationality which occurred prior to or following the date of the succession of States. The Special Rapporteur cautioned that in view of the fact that successor States took time to adopt their laws on nationality, there could be problems concerning nationality which deserved the Commission's attention even though they did not stem directly from the change of sovereignty as such.

Rule of continuity of Nationality

In the last part of his report addressed to continuity of nationality, the Special Rapporteur pointed out that the rule of continuity of nationality was a part of the regime of diplomatic protection. According to this rule, it is necessary that from the time of the occurrence of the injury until the making of the award, the claim belongs continuously and without interruption to a person having the nationality of the State putting such claim forward. The essence of the rule is to prevent the individual from choosing a powerful protecting State through a shift of nationality.

Continuity of Nationality: Relevance of

The Special Rapporteur pointed out, however, that neither practice nor doctrine furnish a clear answer to the question of the relevance of that

rule in the event of involuntary changes in nationality brought about by State succession. In his view, there are good reasons to believe that in the case of State succession the rule may be modified. Finally, he suggested that since the problem of continuity of nationality was closely associated with the regime of diplomatic protection, the question arose whether it should be brought within the scope of the current study. In his opinion, it would be beneficial to analyze the question of continuity of nationality in the present context.

Report of the Working Group

After a preliminary consideration of the First Report of the Special Rapporteur, the Commission established a Working Group and entrusted it with the task of identifying issues arising out of the topic, categorizing those issues and to guide the Commission as to which issues could be most profitably pursued given the contemporary concerns. The members of the Working Group, chaired by the Special Rapporteur, were Mr. Awn-Al Khaswaneh; Mr. D.Bowett; Mr. Salifou Fomba; Mr. Igor Lukashuk; Mr. Robert Rosenstock and Mr. Christian Tomuschat.

The Working Group, it may be stated, based its deliberations on the fundamental premise that in situations resulting from State succession every person whose nationality may be affected by the change in the international status of the territory has the right to a nationality and that States have an obligation to prevent statelessness. The Working Group addressed itself to the following categories of State succession viz. (i) Succession; (ii) transfer of part of a State's territory; (iii) unification including absorption; and (iv) dissolution. The Working Group concluded that States concerned i.e. the predecessor State and/or the successor State, have an obligation to consult in order to determine whether the change had undesirable consequences with respect to the nationality of persons. Where the answer to that question was in the affirmative they (the States concerned) had an obligation to negotiate in order to resolve such problems. Depending on the category of State succession, the Working Group agreed, an agreement should be concluded between the predecessor State and the successor State or States—where the predecessor State continued to exist—or between various successor States in case the predecessor State ceased to exist.

Considering that statelessness was the most serious and undesirable potential consequence of State succession, the Working Group concluded that States should be obligated to negotiate in order to prevent statelessness and recommended in this regard that States address the following potential effects of State succession during the negotiation:

(i) dual nationality;

(ii) the problem of the separation of families as a result of the attribution of different nationalities to their members; and

(iii) other issues, such as military obligations, pensions and other social security benefits and the right of residence.

The Working Group considered the effects of various types of State succession on the rights and obligations of States concerned with regard to the nationality of different categories of individuals and, as a result, formulated a number of principles to serve as guidelines for the negotiation between States concerned.

Withdrawal and granting of nationality

(a) Secession and transfer of part of a State's territory

Secession and transfer of part of a State's territory are cases of State succession where the predecessor State continues to exist. They, therefore, raise the questions whether the predecessor State had the right or, in some cases, the obligation, to withdraw its nationality from certain individuals, and whether the successor State has the obligation to grant its nationality to certain individuals. In this regard, the Working Group distinguished the following categories of persons:

(a) persons born in what had become the territory of the successor State;

(b) persons born in what remained as the territory of the predecessor State;

(c) persons born abroad but having acquired the nationality of the predecessor State prior to the succession by the application of the principle of *jus sanguinis;* and

(d) persons naturalized in the predecessor State prior to the succession[10];

(e) persons having the secondary nationality of an entity that remained part of the predecessor State; and

(f) persons having the secondary nationality of an entity that became part of a successor State.

Each of these categories was further subdivided according to the place of habitual residence of the individual concerned, namely, the predecessor State, the successor State or a third State.

10. In the case of persons who, prior to the succession, were nationals of a federal State and had been granted a secondary nationality of a component unit, the Working Group considered it useful, in addition, when appropriate, to distinguish two other categories.

(i) Obligation of the predecessor State not to withdraw its nationality

The Working Group concluded that a number of the above categories of individuals were not affected by State succession as far as nationality was concerned. It was of the view that, in principle, the predecessor State should have the obligation not to withdraw its nationality from the following categories of persons: (a) persons born in what remained as the territory of the predecessor State and residing either in the predecessor State or in a third State; (b) persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of *jus sanguinis* and residing either in the predecessor State or in a third State; (c) persons naturalized in the predecessor State and residing either in the predecessor State or in a third state; and (d) persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence.

(ii) Right of the predecessor State to withdraw its nationality-obligation of the successor State to grant its nationality

The Working Group concluded that the predecessor State should be entitled to withdraw its nationality from the following categories of persons: (a) persons born in what had become the territory of the successor State and residing in the successor State; and (b) persons having the secondary nationality of an entity that became part of a successor State and residing either in the successor State or in a third State, provided, however that such withdrawal of nationality did not result in statelessness.

The Working Group considered that the corollary of the right of the predecessor State to withdraw its nationality should be the obligation of the successor State to grant its nationality to the above categories of persons. However, until a person had thus acquired the nationality of the successor State, the predecessor State should have the obligation not to withdraw its nationality from such persons, so that the person would not become stateless.

(iii) Obligation of the predecessor and the successor States to grant a right of option

The Working Group concluded that the following categories of individuals should be granted a right of option between the nationality of the predecessor State and the nationality of the successor State: (a) persons born in what had become the territory of the successor State and residing either in the predecessor State or a third State; (b) persons born in what had remained as the territory of the predecessor State and residing in the

successor State; (c) persons born abroad but having acquired the nationality of the predecessor State on the basis of the principle of *jus sanguinis* and residing in the successor State; (d) person naturalized in the predecessor State and residing in the successor State; and (e) person having the secondary nationality of an entity that became part of the successor State and residing in the predecessor State.

The Working Group considered that, on the one hand, the predecessor State should have the obligation not to withdraw its nationality from an individual unless he/she had opted for the nationality of the succesor State and until he/she had acquired such nationality. On the other hand, in the case where an individual had opted for the nationality of the successor State, that State should have the obligation to grant its nationality to, and the predecessor State the obligation to withdraw its nationality from such individual.

(b) Unification, including absorption

Unification, including absorption, is a case of State succession in which the loss of the predecessor State's nationality is an inevitable result of the disappearance of that State. Here, the main question is whether the successor State has the obligation to grant its nationality to all individuals affected by such a loss.

The Working Group considered that the successor State should have the obligation to grant its nationality to the following categories of persons: (a) nationals of a predecessor State—no matter how that nationality had been acquired—residing in the successor State; and (b) nationals of a predecessor State residing in a third State, unless they also had the nationality of a third State. (The successor State could, however, grant its nationality to such persons subject to their agreement).

(c) Dissolution

Dissolution is a case of State succession where the predecessor State ceases to exist and therefore the loss of such State's nationality is automatic. It raises, however, the question whether, and if so, to which individuals affected by the change, the successor States has the obligation to grant their nationality.

(i) Obligation of the successor States to grant their nationality

The Working Group concluded that each of the successor States should have the obligation to grant its nationality to the following categories of persons: (a) persons born in what became the territory of that particular successor State and residing in that successor State or in a third State; (b) persons born abroad but having acquired the nationality of the predecessor