CHAPTER VII

CONCLUSION

In closing the presentation, it is proposed at this point to recapitulate some of the principal themes that have emerged in the course of discussion.

In the introductory chapter it was observed that from a historical point of view rivers, notably the Nile in Africa, Euphrates-Tigris in the Middle East, the Indus in the Indian sub-continent, and the Hoang-ho in China, have played important roles in the evolution of modern civilization. This underlines the central function of fresh water resources in social and economic development.

Until recently inland water resources were assumed to be inexhaustible and logically, therefore, there was no need for their use to be regulated by law. That was so up to the nineteenth century. Henceforth, and especially after the Second World War, water resources have been subject to increasing stresses and strains on an incomparable scale. Due to the exponential population growth the world over, scientific and technological advances, spread of industrialisation and urbanisation, and increasing mastery over natural resources in general, international rivers have assumed significance to such a degree that the problem of their use has become
of topical importance. As long as the function of rivers was restricted merely to traditional uses - navigation, floatage, fishing, and limited irrigation - they were not of very much importance as an area of research. But as a result of the demands for hydro-electric power, for irrigation, industrial uses and municipal water supply, rivers have acquired an unprecedented interest. Instances such as the Indus Waters dispute, the Columbia River controversy, along with an impressive volume of treaties that have been concluded on the uses of shared rivers, is a reflection of this development.

Chapter 11 of this inquiry attempted an examination of a sample of treaties region by region. The main conclusion deriving from the conventional system is that it is difficult at the present stage to reach definite conclusions from these treaties as to the existence of customary rules of international law applicable on the subject. While the standard clause that a state proposing to undertake works that substantially affect the status quo of a shared river should do so with the prior consent of the other riparians could be deduced as a general principle, it is, however, not a statement of positive law binding on states without their voluntary consent. The conclusion
derivable from the clause is that each state has equal competence to a shared river, and this provision does not envisage conferring a veto upon objecting states so as to make perpetual deadlock at their option. However, two rules are deducible from the clause. The rule that states must give prior notice of proposed works to co-system states and that states must consult and negotiate with each other within a reasonable period of time. The requirement of prior consent, therefore, arises only when the effect of proposed works is of "substantial", "appreciable", or "serious injury"; and this must be determined under the doctrine of equitable apportionment. This aspect was dealt with at length in Chapter III.

This is but a recognition of the complexity of defining legal rights in shared water resources, and thus the need for international cooperation in the use of water resources. It is, for instance, difficult to establish uniform standards of order of priority of uses applicable to all water systems and at all times. Even in arid regions such as the Middle East where irrigation could be said to take precedence over all other uses, treaty practice reveals diversity of approaches and that no conclusion should be assumed. Moreover, within a given river there are often distinct
features which preclude generalisations. It could, for example, be difficult to fix an order of uses in a river system such as the Nile half of which flows through the Sahara Desert. Each watercourse has its own unique characteristics and each system state has its own developmental priorities. To balance these interests requires international cooperation between or among the states concerned.

The conventional system supports this conclusion in that nearly all the treaties establish river-basin agencies to facilitate cooperative development of shared water resources. Their powers and functions, however, differ from situation to situation. They may be consultative, planning, or operational agencies. Procedural law brings out one important conclusion, that issues posed by shared water resources are quite peculiar and complicated, and are best solved through a continuous negotiation machinery in the form of joint river commissions composed of technical and legal experts. This is also the approach adopted by the International Law Commission in its proposed Draft Convention. The proposed convention is a framework treaty which would guide states in concluding specific agreements relevant to particular circumstances within a given river system.
The convention envisages a situation in which joint commissions will play an important role in the development of shared water resources.

On the whole, treaty practice rejects traditional theories, epitomized in this case by the Harmon doctrine. Instead states recognize limitations on sovereignty and equality of right of access to shared water resources. Similarly, the concept of a river viewed in the context of navigation, has undergone progressive changes. Despite apparent hesitations by states, the idea of the unity of "water resources", and as a consequence their sharability, has gained a considerable degree of acceptability, at least, within the United Nations. Modern water treaties all over the world prefer this wider concept though the term "water resources" is not directly used. Other terms, such as "river basin" and "river system", are frequently used, but they nevertheless imply a departure from the old narrow navigational notion of a river as a mere pipeline.

In Chapter III an endeavour was made to discuss the conventional law vis-a-vis customary international law. The point of focus was on the notion of priority rights or protection of existing uses. As a general conclusion, it was found out that priority of uses is not a rule of international law much less a rule of
customary international law, but one of the factors to be given consideration in determining legal rights of riparian states concerned. Of dominant importance from the point of view of customary international law is the doctrine of equitable apportionment which may not be a customary rule of international law but a general principle based on reasonableness and good faith. Equitable apportionment has grown in response to the unusual issues posed by shared water resources, and is a rejection of the traditional doctrine. It is a principle predicated on the growing recognition of the fact that the world community is becoming increasingly interdependent, especially in the field of scarce natural resources. It attempts to set a framework within which varying and conflicting state interests could be reconciled to meet challenges of international cooperation or coordination for the optimum use of vital common resources.

This does not mean that the principle of equitable apportionment is a complete system of positive law. Customary international law on shared water resources is still fragmentary. Nevertheless, equitable apportionment reflects modern trends on the subject. As a general principle based on reasonableness and good neighbourliness, it cannot claim to be so comprehensive
as to render push-button solutions to a variety of problems on so diverse and sensitive a field as that of water resources. Its main objective is to erect pillars upon and around which specific rules of cooperation could progressively be built. Under the doctrine of equitable apportionment the notion of prior appropriation or protection of existing uses loses its dominant importance as a rule of customary international law, and can be recognized only as one among many factors to be considered in an equitable utilisation of shared water resources. To raise the notion of prior appropriation to the level of a general principle of international law could produce intolerable inequities on later users, since the first user states could easily have preempted the rights of the new users.

It is this principle that underlines the ongoing work of the International Law Commission in its efforts to systematise the law of water resources into a general convention.

Part II of this study was addressed to the problems of the Nile River and also to illustrate some of the problems involved in the use of international rivers. It was seen in Chapter III that the notion of priority of rights in the use of shared water resources does not exist as a rule of general international law or a
customary practice. But if that be the case, on international plane could it have developed into a local custom peculiar to the Nile River?

As it was shown in Chapter IV and also in Chapter V large scale development of the Nile River started on its lower sections i.e., first in Egypt and later in the Sudan. Due to the arid conditions in Egypt to the extent that this state is entirely dependent on the Nile River, Egypt has asserted the concept of natural and historic rights to waters the Nile. This in essence is the extreme natural flow theory which finds little support in international law. However, this theory was accepted in practice in the 1929 Nile Waters Agreement between Egypt and Great Britain. This agreement, as it has been shown in Chapter V, was rejected by the Sudan and a new agreement was concluded in 1959 between the Sudan and Egypt. There is no evidence that the other States - Ethiopia, Uganda, Tanzania, Kenya, Zaire, Burundi and Ruanda - have accepted the doctrine of natural and historic rights as the applicable law on the Nile River. It was also shown that historic and natural rights doctrine was an outcome of political expediency rather than an expression of legal rights. In any case, circumstances now obtaining in the Nile River system have changed so much that what was appli-
cable in 1929 when Great Britain ruled almost the entire Nile system, can no longer determine the way in which the Nile water resources are to be used among the nine riparian states. The general conclusion arrived at in Chapter IV is, that protection of existing uses or natural and historic rights has not hardened into a local customary rule of law in the Nile River system.

In view of the uncertain state of affairs in the Nile River system a variety of difficult issues and challenges come out. The Nile has the potential both to unify the system states or be a source of perpetual discord among them. It is almost certain, as shown in Chapter VI, that the use of this river by the Sudan and Egypt, the two lowermost riparians, has reached its marginal stages. While it cannot be stated with certainty as to whether these two states have exceeded their equitable shares, vis-a-vis the other seven states - an amount yet to be determined - it would not be too speculative to say that hydraulic works upstream by the other seven system states are bound to affect substantially existing uses downstream. Even between Egypt and the Sudan alone, a redivision of water, thus calling for revision of the 1959 Agreement, is a matter of conjecture. Under these circumstances and in the absence of
a general Nile system agreement, a complex scenario is slowly unfolding. Thus the need for a Nile agreement.

In addition to the suggestions made in Chapter VI an equitable distribution of the Nile waters would have to consider the special case of the land-locked system states - Burundi, Ruanda and Uganda - a fact recognised by the Law of the Sea Conference. A possible adjustment in case Egypt and Sudan have exceeded their equitable rights may have to be made on the basis of downstream-benefit-sharing principle. This is the formula generally applied and it has worked satisfactorily between the United States and Canada in containing the Colombia River controversy. India and Nepal have also adopted the same approach on their section of the Ganges River system. The smooth application of the principle, of course, depends on the needs of the upstream states. Where water is essential to their well-being, these states may not be willing to loan out their water rights to other states. And this could create intractable problems. The other alternative would be for Egypt to finance agricultural projects in some of the upstream countries instead of developing marginal desert lands. A sharing ratio in this regard could be mutually determined. In general, a global approach along these lines
would be more beneficial than assertion of archaic principles of priority of appropriation or natural and historic rights which no longer serve the requirements of the Nile community.

Shared water resources stand among the most fascinating areas of study and raise some of the most intricate and challenging legal issues in contemporary times. The legal regime of water resources has developed through a long and chequered history. While there is optimism over a general convention by the International Law Commission codifying applicable rules of conduct in the use of shared water resources, international rivers present unusual and delicate issues, the solution of which depends on cooperation by the concerned riparian states.