(1969 II, Part 1) 141–155; Annex XXIV, UN Doc. A/CN.4/217/ADD.2, YILC (1971 II, Part 1) 193–198.

J.B. MOORE, History and Digest of the International Arbitrations to which the United States has been a Party, Vol. I (1898) 495–682.

J.B. MOORE, A Digest of International Law, Vol. 7 (1906) 1059–1067.

L'Institut de Droit International, Devoirs internationaux des Etats neutres, AnnIDI, Vol. 1 (1877) 139–140.

Harvard Research in International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with Comment, AJIL, Vol. 33 (1939) Supp., 167–817.

T.W. BALCH, The Alabama Arbitration (1900).

K. STRUPP, Die völkerrechtliche Haftung des Staates insbesondere bei Handlungen Privater, Abhandlungen zur fortschreitenden Kodifikation des internationalen Rechts (1927).

C. EAGLETON, The Responsibility of States in International Law (1928).

A. ROTH, Das völkerrechtliche Delikt vor und in den Verhandlungen der Haager Kodifikationskonferenz 1930 (1932).

G. PERRIN, L'agression contre la légation de la Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission, RGDIP, Vol. 28 (1957) 411–477.

I. VON MÜNCH, Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft (1963).

F.V. GARCÍA AMADOR, L.B. SOHN and R.R. BAXTER, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974).

H.-J. SCHLOCHAUER, Die Entwicklung des völkerrechtlichen Deliktsrechts, AVR, Vol. 16 (1975) 259–262.

P.-M. DUPUY, Due Diligence in the International Law of Liability, in: OECD, Legal Aspects of Transfrontier Pollution (1977).

J. GOLDSCHMIDT, Das Problem der völkerrechtlichen Gefährdungshaftung unter Berücksichtigung des Atom-und Weltraumrechts (1978).

G. HANDL, State Liability for Accidental Transnational Environmental Damage by Private Persons, AJIL, Vol. 74 (1980) 525–565.

W. LANG, Haftung und Verantwortlichkeit im internationalen Umweltschutz, in: Ius Humanitatis, Festschrift für A. Verdross (1980) 517–565.

K. ZEMANEK, Schuld-und Erfolgshaftung im Entwurf der Völkerrechtskommission über Staatenverantwortlichkeit, in: Festschrift für R. Bindschedler (1980) 322–331.

J.-M. MÖSSNER, Privatpersonen als Verursacher völkerrechtlicher Delikte, GYIL, Vol. 24 (1981) 63–91.

W. RUDOLF, Haftung für rechtmäßiges Verhalten im Völkerrecht, in: Festschrift für O. Mühl (1981) 535–552.

HORST BLOMEYER-BARTENSTEIN

DUTCH TERRITORIES, DECOLONIZATION *see* Decolonization: Dutch Territories

ENCLAVES

1. Notion

An international enclave is an isolated part of a foreign State's territory entirely surrounded by the territory of only one other State (the surrounding State) so that it has no communication with the territory of the State to which it belongs (the mother or main State) other than through the territory of the surrounding State. The same territory is an exclave from the point of view of the mother State. If the two states form parts of a common → federal State, any enclaves will lack a foreign element and remain domestic in nature. Only a quasi-enclave arises if a part of a State's territory, despite geographical connection with its main territory, remains inaccessible by way of its own territory because of topographical factors (insurmountable mountains; e.g. the Austrian communities of Jungholz and Mittelberg in relation to the Federal Republic of Germany). No enclave is in issue where part of a State's territory is surrounded by that of another but enjoys direct access to the sea (e.g. Ceuta in relation to Spain). Whether West Berlin can be considered as an exclave of the Federal Republic of Germany depends on the interpretation of the legal status of → Berlin and its western sectors.

2. Past and Current Examples

A large number of enclaves (estimated in the thousands) existed in former times – above all in Europe following the decline of the Holy Roman Empire. Not only German States (in great numbers), but also Spain, France, Belgium, the Netherlands and other States possessed exclaves whilst themselves enclaving the territories of foreign States. Nearly all such enclaves became the territories of the surrounding States. Although in India, the British, French and Portuguese enclaves came to an end, there remained in existence in 1973 in Bangladesh some 116 Indian enclaves and in Indian West Bengal some 71 Bangladesh enclaves (the so-called Cooch-Behar enclaves).

Today only a small number of enclaves survive

in Europe: Baarle-Hertog, a Belgian enclave in the Netherlands; Büsingen, a German enclave in Switzerland which is entirely enclosed by the cantons of Schaffhausen, Thurgau and Zürich (by a treaty of November 23, 1964 entering into force on October 4, 1967 (German Bundesgesetzblatt, 1967 II, p. 2041) the other German enclave in Switzerland, Verenahof, was ceded to the surrounding State); Campione d'Italia, an Italian enclave in the Swiss canton of Tessin; and Llivia, a Spanish enclave in the French department of Pyrénées Orientales. These enclaves are characterized by the smallness of their populations and territories and their close proximity to the frontiers of their main States. Baarle-Hertog is a special case; it is composed of some 30 enclaves some of which surround Dutch enclaves; thus enclaves exist within other enclaves.

3. *Legal Status of Enclaves*

(a) Under international law

From the point of view of the surrounding State an (international) enclave is foreign territory, subject to the → territorial sovereignty of the mother State. Hence Llivia, the Spanish enclave in France, was not occupied by German troops during World War II because of its status as territory belonging to a neutral State. Under international law the main State is entitled to establish its legal order throughout its exclave.

The → nationality of the enclave's inhabitants is that of the main State, provided they are not → aliens. There is no legal distinction under general international law between the mother State's subjects in the main territory and those in the exclave.

(b) Under national law

In principle, the nationals in the exclave have the same duties and rights as nationals in the main territory. The mother State may be entitled under its own national law to subject its nationals living in the exclave to special laws enacted to take account of the exclave's special situation.

Treaties between States may bind the States to introduce such differences into their legal orders. On the basis of a treaty between the two States concerned, the surrounding State may be entitled to include the enclave or quasi-enclave into its own customs territory (→ Customs Frontier) and currency area.

4. *Legal Relations between States*

Any two States concerned with enclaves are bound in their mutual relations by international law; each must respect the territorial sovereignty of the other. Thus the mother State is allowed access from its main territory to its exclave through the territory of the surrounding State only within the limits imposed by international law. Officials of the mother State must not carry out → acts of State during their transit through the territory of the enclaving States (→ Transit over Foreign Territory).

With enclaves, the most important problem in the relations between two States concerns the transit between the main territory and the exclave through the territory of the enclaving State (including its → territorial sea and airspace). The political and economic unity of the mother State's territories is only possible with continuous and comprehensive communications with its exclave. The enclaving State, however, will tend to aim to protect its own territorial sovereignty by restricting the other State's passage over its territory.

As a basis for the right of passage there may be treaties between the two States regulating the conditions of transit. In the absence of such treaties particular rules of → customary international law serve – if applicable rules exist – as the basis for the right of passage. Such bilateral customary law was applied by the → International Court of Justice (ICJ) in its judgment in the → Right of Passage over Indian Territory Case.

General customary international law contains rules on the right of passage. Between the interested States rules have developed over the years, allowing free passage to exclaves for private persons, civil officials and armed police in the exercise of their normal duties, but only to the extent necessary for the continuous maintenance of normal life in the exclave. These rules are to be applied by analogy in cases of quasi-enclaves. As to military forces and to the right of passage through the airspace of the surrounding State, general rules of customary law have not developed.

The duty of the surrounding State to tolerate a

right of passage charges the respective sovereign of the transit territory like an international → servitude. However, if no special treaty exists constituting the right of passage in favour of the respective mother State and charging the respective enclosing State, the above-mentioned duties and rights cannot be characterized as an international servitude, so much as special (mostly bilateral) customary law.

The same rights as described above can be deduced, as some authors have done, from the recognition by the enclaving State of the mother State's exclave. The construction put upon this recognition is that the recognizing (enclaving) State has consented to a reduction of its own territorial sovereignty by granting free passage for the purposes of enabling the mother State to fulfil its normal duties *vis-à-vis* the exclave and its people, to exercise its somewhat reduced territorial sovereignty over the exclave. The so-called *droit de voisinage* (→ Neighbour States), the principle of → good faith and other general principles of international law are ultimately too vague to allow the deduction of specified rights of passage.

Inasmuch as rules constituting rights of passage and balancing the interests of the two States concerned exist in general customary law, an inquiry under Art. 38(1)(c) of the ICJ Statute is not required. Authors denying the existence of such rules have to investigate the systems of internal law. A compulsory right of passage (easement of necessity) is expressed by statute or case-law as an idea of justice in the legal orders of a great number of representative States (see Rheinstein). Whilst some authors (e.g. Auhagen and Krenz) deny the applicability of these rules between States, others (e.g. Rheinstein) affirm their applicability.

There is, however, no general customary law regulating free passage for the enclaving State through the enclave existing in the midst of its territory. Special rules of customary law sometimes exist (e.g. as to Baarle-Hertog in the Netherlands) and treaties between the two States concerned may regulate the matter (e.g. as in the case of Llivia in France).

C. D'OLIVIER FARRAN, International Enclaves and the Question of State Servitudes, ICLQ, Vol. 1 (1955) 294–307.

M. RHEINSTEIN, Etudes comparative sur le droit d'accès aux domaines enclaves, ICJ Pleadings, Oral Arguments, Vol. 1 (1960) 714–752.

F.E. KRENZ, International Enclaves and Rights of Passage (1961).

H. AUHAGEN, Die völkerrechtliche Stellung der Enklaven und Exklaven, Thesis, University of Göttingen (1967).

M. CATUDAL, The Exclave Problem in International Law, Revue de Droit International, Vol. 50 (1972) 20–36.

R.E. SCHERRER, Der Zollanschluß der deutschen Enklave Büsingen an die Schweiz, zugleich ein Beitrag zur Lehre von der Gebietshoheit, Thesis, University of Zürich (1973).

O.L. BRINTZINGER, Versuch über Exklaven und Enklaven, in: Festschrift für E. Menzel (1975) 487–515.

GERHARD HOFFMANN

ENEMY STATES CLAUSE IN THE UNITED NATIONS CHARTER

1. *The Enemy States Clauses of the UN Charter*

(a) Origin

From as early as the → Atlantic Charter of August 14, 1941, a distinction was drawn between "enemy States" and "peace-loving States". Despite its striving towards universality, the world organization conceived by the victorious coalition of World War II held fast to this distinction.

At the Conference between the → Great Powers at → Dumbarton Oaks held in the autumn of 1944, agreement was reached on a draft charter for the future world organization, which contained an enemy States clause in the transitional provisions. This "enemy States clause" was adopted unchanged as Art. 107 of the → United Nations Charter at the United Nations Conference on International Organization at San Francisco on April 25, 1945.

In San Francisco, on the initiative of France and the Soviet Union, the sole competence of the → United Nations to prevent → aggression was taken away from the organization with respect to the enemy States. This occurred by means of a special provision which was attached to the regulation of enforcement measures by regional agencies in Art. 53 of the Charter. In the opinion of the United States, the United Kingdom and China, the restriction of the competence of the → United Nations Security Council should be