INTERNATIONAL ENCLAVES AND THE QUESTION OF STATE SERVITUDES

THE purpose of this article is to discuss the international curiosity known as the enclave, and its relation to the oft-debated question of whether state servitudes can or cannot exist under international law. Recent events in India with regard to the Portuguese territories there have not only drawn attention to these enclaves but may be also said to have stimulated interest in the existence and legal status of international enclaves in general. Although of considerable historical and theoretical, as well as occasional practical, importance, the enclave has not been hitherto much studied by writers on international law.[1]

I

As an international phenomenon [2] the enclave must be admitted to have possessed a considerable historical importance, having served on a number of occasions as a *casus belli.* In the nineteenth century the rise of Prussia and the advance towards the unification of Germany were not unconnected with the large number of outlying portions of Prussian territory enclaved in the territory of other German principalities and vice versa,[3] together with the problems caused by the existence of highly involved enclave situations between, *e.g.*, the Thuringian duchies themselves. Such intricate political geography makes some sort of federation wellnigh inevitable.[4] Much of the complexity of Anglo-Indian administration was due to the presence as enclaves in British Indian territory of whole states or detached portions of states subject to princely and not imperial jurisdiction. There were also enclaves of British India surrounded by native states. Finally, there were a few minor

[1] The systematic index of the Peace Palace library and those of individual standard works disclose a remarkable lack of consideration of the subject. Calvo (*Droit International*, III, 356) and Reid (*International Servitudes in Law and Practice*, 168–70) give it some attention. *Cf.* Fiore, *Droit Int. Cod.*, s. 1095, p. 520; Twiss, *Law of Nations* (1884) I, 423; Klüber, *Droit des Gens*, pp. 185–6.

[2] It also occurs in local government law, an enclave of Flint (Wales) existing in Cheshire (England), and in canon law where one church jurisdiction may be enclaved in another; *e.g.*, Queen's College is an enclave of the province and diocese of York in those of Canterbury and Oxford respectively.

[3] Ancel, *Les Frontières* (1936) Receuil des Cours (Hague), I, 207, 238–9.

[4] As late as 1927 there were still about 196 enclaves between the different *länder* in Germany, notwithstanding a continuous series of absorptions from the commencement of the nineteenth century. The *länder* conference of 1928 arranged for the rest to be absorbed (*Der Grosse Brockhaus*, tit. " Enklave ").

enclaves of a truly international character,[5] *i.e.*, those of the Portuguese and French settlements, whose fortunes after the ending of the British *raj* have been the subject of world attention. With these historical situations (except the last mentioned) we are not here concerned. But the existence of such enclaves—not all of which are matters of history [6]—poses a number of theoretical questions which may be thought of interest both for themselves and for the light which they throw on the more general question of state servitudes. At present these problems are topical in considering Portuguese-Indian developments, and it is not impossible that at some future date (one hopes distant) the enclaves of the West in Berlin and Vienna, which are, of course, of highly special origin, may make them relevant on a more spectacular scale. Indeed the Russian blockade of Berlin has already done so once. We shall begin by attempting to define an international enclave, will then proceed to a detailed description of some particularly interesting examples still in existence, and will then consider the general problems to which reference has just been made.

II

An international enclave may be said to exist where territory of one state is entirely surrounded by the territory of another state. One must at once make a distinction between the case where the whole of state A's territory is surrounded by that of state B—a situation which is well exemplified by the position of the Vatican City State and San Marino as enclaves in Italian soil, and the case where it is only a detached portion of state A's territory which is enclaved in state B's. To this second situation the term "international enclave" is generally restricted. None the less, it is obvious that many of the problems posed by this type of enclave will also exist—possibly in an even more acute form—in the case of the whole state enclave. The essence of both is their "island" character.[7] Hence a piece of state territory which is entirely surrounded on the landward side by the territory of another state, but which has direct access to the sea (as in the case of Monaco, Kowloon or Northern Ireland), cannot be considered as being a true enclave. Communication with other states and, in the second

[5] The native states had sufficient international status to give their rulers sovereign immunity before the British courts (*Statham* v. *Statham* [1912] P. 92). Hence their enclaves had a quasi-international character.

[6] See, *e.g.*, the examples in Part III, *infra*.

[7] The term is often loosely used of countries which have no sea coast. Thus Reid (*op. cit.*, *supra*, at pp. 152–3) calls Bolivia an "enclaved state." But it is submitted that such usage tends to confuse and that the term "landlocked" would be preferable.

type of case, with the main territory of the state, is not affected by the lack of land frontiers with more than one state. If ease of external communication is to be the test one might also ask whether countries like Nepal and Bhutan, which have the "wall" of the Himalayas obstructing their exit in every direction except in that of India, should not be considered as enclaves.[8] Perhaps the horrible term "quasi-enclave" would be thought by some to be appropriate. Then again, one may ask whether access to an international river or other waterway would not suffice instead of the sea to deprive an apparent enclave of its special legal position as such. A particularly interesting example is that of the principality of Orange, which was independent until 1713,[9] and which possessed the Rhone as its sole international link. It had frontiers not only with France but also with the papal territories of Avignon, but as the latter were also an enclave of France (till 1791) this fact alone would not, we consider, destroy the enclave character of Orange. A modern example is the Ladó "enclave" (always so called) of Belgian Congo territory in the Sudan, which also stood on an international river.[10] Presumably, as the essential fact about an enclave is its lack of free communication without passing over the enclaving state's territory, the presence of such a river is enough to deprive it of the character of a true enclave. On the other hand, the mere fact that, thanks to modern inventors, any enclave large enough to contain an air strip—or even a helicopter station—need not be actually isolated (as was dramatically demonstrated during the Berlin blockade) cannot be relevant to a discussion on the principles of whether a piece of land has the legal status of an enclave and, if so, what are the results of that fact in international law.

It must be clear from this discussion that the international enclave is an oddity not likely to be created as a result of deliberate action,[11] its administrative inconveniences being palpably obvious. None the less, through historical accidents of various kinds, many hundreds of them existed in Europe until quite recent times, and here and there in the world one may still discover a few survivors. We now pass on to consider this shrunken band of still existing international enclaves.

[8] "On admet généralement qu'on doit considérer comme enclavés, non seulement les fonds qui sont privés de tout issue sur la voie publique, mais encore ceux qui n'ont pas une issue suffisante pour leur exploitation" (Lagrésille in *La Grande Encyclopédie*, tit. "enclave").

[9] Overrun by the French in 1660, it was not absorbed *de jure* until the Treaty of Utrecht.

[10] It was ceded to the Anglo-Egyptian Sudan by the Treaty of Brussels, 1906. Where the river is only a national one, a true enclave exists, *e.g.*, the French one at Chandernagore on the Hoogly (now ceded to India).

[11] *Cf.* the Vatican City State, deliberately created, with many treaty safeguards, in 1929.

III

Of the full state enclave the only examples which exist have already been mentioned.[12] On one view the headquarters of the United Nations in New York might be considered a sort of special international enclave comparable with the Vatican City. The better view, however, is probably that it is only an extraterritorial building comparable with embassies, or still more cogently, with the palace of the Sovereign Order of Malta at Rome.[13] Already certain difficult questions have arisen as to the right of passage over United States soil authorised by the Headquarters Agreement comparable with those posed by true international enclaves.[14]

The other type of enclave, whereby a detached portion of one state's territory forms an island in that of another, is not yet extinct, but it has become steadily less and less common as considerations derived from the multiplicity of modern state controls and administrative " convenience " have gradually triumphed over local sentimental or historical traditions. Those enclaves which do survive do so probably in most cases because their area is so small as to cause purely local inconvenience, and to prevent their obtruding upon the rather myopic vision of Foreign Office officials. Strangely enough, the main exception to this is found, not in history-scarred Europe, but in Africa. The colony of Basutoland forms a considerable enclave of territory (11,716 square miles in extent) under United Kingdom sovereignty, entirely surrounded by Union of South Africa territory. Starting as a mere administrative enclave, Basutoland is now a true international enclave, even though both the international persons concerned are members of the Commonwealth. It is notorious with what sentiments the Union government regards this enclave, as well as the protectorates of Bechuanaland and Swaziland.[15] If India's actions in relation to the Portuguese enclaves (which will be discussed later) are held to be justified under international law, there may be thought to be a possible danger of events repeating themselves in South Africa. There are, or were until recently, other much smaller enclaves in

[12] San Marino and the Vatican City State. States which have land frontiers with two other states (*e.g.*, Andorra, Liechtenstein) cannot for that reason be considered as true enclaves.

[13] See my article " The Sovereign Order of Malta in International Law " [1954] I.C.L.Q. 217, especially n. 45 (cited with approval by a member of the Order, *The Times*, July 3, 1954).

[14] " The Question of Access to the United Nations Headquarters of Representatives of Non-Governmental Organizations in Consultative Status," Yuen-li Liang (1954) American J.I.L. 434–50.

[15] Bechuanaland having a frontier with the Federation of Rhodesia and Nyasaland, Swaziland with Portuguese East Africa, these are not true enclaves, though often spoken of as such.

Africa concerning the Belgian, Spanish, Portuguese and French territories, but we cannot consider them in detail.

The continent without a history—America—probably contains no true enclaves. The Panamanian cities of Panama and Colón are often stated to be enclaves in the United States Canal Zone,[16] but as they are ports it is manifestly impossible for them to be considered as international enclaves in the true sense of that term. In Asia the so-called enclave of Portugal at Ocussi-Ambeno in the Indonesian part of Timor, is also not a true enclave as it has access to the sea.[17]

Europe is, as might be expected, the natural home of the enclave. According to the strict letter of international law the most important contemporary example—West Berlin—is not *de jure* an international enclave, as only one State's (Germany's) territory is concerned. But, as everyone knows, there are two states *de facto*, and the Berlin situation poses all the problems of the enclave in their most acute form, being in deed if not in law the sole enclave of the Western World behind the Iron Curtain. For various reasons what could have been as extreme a situation in Vienna has never developed, mainly owing to the presence of a single Austrian government in control of the whole country, subject to certain limitations on its sovereignty, especially in the Russian zone of occupation.

Apart from these highly special cases the writer has been able to discover no less than some thirty-one enclaves still in existence in Europe.[18] The reader need not, however, despair, as all but one of them can be dealt with together.

The exception is Llivia, the ancient *Julia Livia*, a town of less than 1,000 inhabitants, which is a Spanish enclave in the French department of Pyrénées-Orientales. Its communication with Spain is safeguarded by the existence of a *chemin neutre* running about four miles over French territory between it and Puigcerdá, the nearest town in Spain. Laconically described by the guide books as "a favourite haunt of smugglers," [19] this enclave provides a livelihood for corps of French and Spanish customs officials almost as

[16] *e.g.*, in *Enciclopedia Universal Ilustrada*, tit. "Panama."

[17] I am indebted to Senhor F. Vaz Pinto of Coimbra University for this point (*pace Grande Enciclopedia Portuguesa Brasileira* (1949), tit. "Enclave").

[18] There may well be others. Since this article was written Senhor Vaz Pinto has drawn my attention to the German enclave of Büsingen in Swiss territory on the non-navigable part of the Rhine. He also mentions the enclaves of Campione, an Italian village near Lugano (also mentioned to me by Professor Wortley), and the Bolivian territory of Copacabana on Lake Titicaca. But as these stand on what are presumably international lakes they are probably not true enclaves, as Snhr. Vaz Pinto points out. Drummully is an enclave of County Monaghan (Irish Republic) in County Fermanagh (Northern Ireland).

[19] Muirhead's *Northern Spain* (1930 ed.), 61.

numerous as the rest of its inhabitants. All round it, every little lane leaving the town is constantly patrolled, and travellers in the vicinity are liable to be stopped and examined several times over in the course of an hour. This almost Gilbertian situation is due to a remarkably casuistical interpretation of the Treaty of the Pyrenees, 1659, by which the Cerdagne was divided between France and Spain. Under its terms the "villages" of the Upper Cerdagne were ceded to France. Proudly styling itself a town (*villa*),[20] Llivia refused to fall under this ignominious classification, and has consequently remained Spanish ever since. Even more remarkable than its origin, is the fact that this tiny but expensive enclave has survived so many changes of régime in the two countries concerned. One might have expected that when the absolutist Spanish crown came to a French prince in 1701 he would have ended this anomaly in favour of its grandfather, Louis XIV. The French revolution proved fatal to almost all other foreign enclaves in France, its work being confirmed at the Congress of Vienna.[21] Napoleon's conquest of Spain and his brother's rule there also saw the status of Llivia unchanged. Modern regard for administrative reform and "efficiency" has been no more effective, despite the fact that Llivia is a financial liability to both states, both in loss of customs duties through smuggling and in the upkeep of the police cordons already mentioned. According to Spanish sources the population of Llivia is intensely patriotic, and when the French government proposed to Spain that the town should be given to France in exchange for the French co-suzerainty over Andorra they petitioned the Prince-Bishop of Urgel (Spanish co-suzerain of Andorra), affirming their fervent loyalty, and indignantly pointing out that the abandonment of a mere feudal right of suzerainty was no fair exchange for a surrender of actual *dominium*.[22]

The other thirty-odd enclaves which we wish to mention all lie in the Dutch village of Baarle-Nassau, with which the Belgian village of Baarle-Hertog is inextricably mingled. This is not just a case of the frontier line running through a village with inconvenient results.[23] The Belgian territory concerned is a true

[20] *Enciclopedia Universal Illustrada*, tit. "Llivia." It has never had as much as 1,000 inhabitants. It acquired the rank of *villa* (rather than *pueblo*) through having once been the capital of the Cerdagne, a distinction lost in 1177 (Muirhead *sup.*).

[21] First Treaty of Paris, 1814, art. 3, gave Avignon, the Comitat Venaissin and Montbéliard (formerly papal), as well as all former German enclaves, to France (which had already occupied them). The lands of the Sovereign Order of Malta had been taken over in 1792.

[22] *Op. cit.*, n. 20, *supra*.

[23] At Baarle-Hertog-Grens, the nearest point on the true frontier to the enclaves, the boundary line runs through the station refreshment room. The tribunal at Breda has several times held sittings there to interrogate witnesses not willing

international enclave or, rather, group of enclaves, the Dutch-Belgian frontier passing some five kilometres to the south. The enclaves total some 7·25 square kilometres and have about 1,742 Belgian inhabitants. They represent what is almost certainly the most complex enclave situation in the world. The two "villages," though often shown on maps as if they were distinct entities, are really only one village. One can see streets in which one side has two Belgian houses to every Dutch one, the other side, say, three Dutch to one Belgian. Only the numbers inform one when one is crossing an international frontier: the Dutch houses have them painted in white on black, the Belgian ones theirs in black on white. There are Belgian shops selling Belgian goods at Belgian prices, Dutch ones Dutch goods at Dutch prices. If one enters one of the churches, one is under the jurisdiction of the Belgian Archbishop of Malines, if the other, under that of the Dutch Bishop of Breda. There are two town halls, each with its own burgomaster, council and administrative staff.[24] There are two post offices, and one must take care to post letters with Belgian stamps on them at the Belgian one and vice versa, on pain of nullity. Half of the village is in the province of Antwerp and subject to Belgian law, the other half in that of North Brabant and under Dutch law. Thus *e.g.*, the playing of baccarat is lawful in one café, illegal in the next. When Holland still had rationing special buses ran from all over the country to Baarle-Hertog, where goods could be obtained on a ration-free Belgian basis. Differences in quality and price still make a visit there worth while for a Dutch housewife. Under old-established custom, confirmed by treaty,[25] goods coming from the main territory of Belgium to Baarle-Hertog are not subject to Dutch customs control. What happens to them afterwards can be imagined! Each state has a customs house in the Baarles, but no attempt is made to examine either incoming or outgoing traffic. Passports are not required, even for citizens of third States, who may thus, if visiting Holland, enter Belgium without formalities several times within an hour.

Some of the legal problems caused by this situation can be readily appreciated. The cumbersome process of extradition might be necessary if the criminal left his own house for the shelter of

to leave Belgium. The judges of course sit on the Dutch side of the room. I am indebted to my friend Judge W. Koole for this information, as well as for taking me on a conducted tour of the Baarles.

24 Owing to some mistake a brother of one of the Hertog councillors sits on the Nassau council. As nationality under Dutch and Belgian law depends on the nationality of the father, not the place of birth, it seems impossible that both elections are valid. During the war, the Dutch town hall having been destroyed, the Dutch mayor moved his office temporarily into the Belgian one.

25 That of November 5, 1842 (discussed *infra*).

the café opposite to it. In a recent case a Dutch citizen had entered a shop in Tilburg (Holland), paying in Dutch money, and ordered a stove to be delivered to his home "in Baarle." When it was delivered there (in Baarle-Hertog) he was prosecuted for exporting goods without paying customs dues, convicted, and sentenced.[26] Had he lived in the next-door house, this could not have happened. Another villager, whose garden was being ruined by the roots of some large trees, cut them down, only to be prosecuted for destruction of Dutch State property. Most of his garden was, like his house, in Belgium. Under Belgian law they would have been his trees, but unfortunately the spot where the main trunks of the trees stood was beyond the edge of the enclave in question and so subject to Dutch law, under which this type of tree was national property.[27]

As at Llivia, the origin of these enclaves is strange, their survival stranger still. Their existence dates from the close of the twelfth century, being the result of a transaction between Hendrik I, Duke of Brabant and Godfried van Schoten, Lord of Breda. As compensation for a renunciation of certain claims by Godfried, the Duke extended the lordship of Breda by giving to it a considerable tract of land to the south of the town. He made, however, a reservation from this grant of those pieces of land held of him by unfree tenure, for which he had established special villein-courts (*laathoven*). These scattered holdings thus never became part of the lordship of Breda. Not only at Baarle, but also at several other places, they remained subject to the Dukes of Brabant: hence the name "Baarle-onder-den-Hertoge." The rest of Baarle passed, with the lordship of Breda, of which it had become an integral part, by sale and inheritance into the family of Nassau in 1403 [28]. This family, from which the name of the Dutch part of the village is derived, was destined to become the ruling family of Holland. Led by that family, the northern Netherlands achieved independence from Spain in the sixteenth century. The Duchy of Brabant was divided between the United Netherlands and the Spanish (later Austrian) Netherlands. The lordship of Turnhout (in which sub-division Baarle-Hertog fell)

[26] This case occurred in 1948. The fine was only a nominal one. I am indebted to Judge Koole for its details, as well as for n. 24.

[27] Having heard of this case only through a lay source, I cannot vouch for its details. It occurred in 1954.

[28] In 1350 Jan van Polanen I bought Breda from the Duke of Brabant (*Guide to the Grote Kerk at Breda*, 8). This suggests that at that date it had come back into the Duke's hands by some sort of escheat. It is odd that the enclaves were not then absorbed. From Jan it descended to his granddaughter, who brought it to her husband, Engelbert van Nassau, and his descendants.

went to the Spaniards, while that of Breda (including Baarle-Nassau) belonged to the United Netherlands. Hence the two Baarles found themselves on either side of a true international frontier—almost an "iron curtain," as it was also the frontier between the Reformed Religion and that of Rome.[29] By the Peace of Münster, 1648, this was confirmed and all the other enclaves except those of Baarle-Hertog were absorbed. They owe their survival to the work of the local *curé*, who saw that if absorption took place his parish would be dissolved and his flock exposed to the "persuasions" of the protestant authorities at Breda. Through his zeal the enclaves were allowed to remain and the population of that part of Holland, then, as now, staunchly Roman Catholic, flocked to the church of the enclaves to worship free from the control of the Dutch protestant authorities.[30] The conquest of both the Austrian and the United Netherlands by Napoleon failed to end the existence of the enclaves, even though the reign of Louis Bonaparte made the lot of Roman Catholics in Holland much easier and thus removed the *raison d'être* of their existence.[31] Strangely enough, nor did the union of the two countries under the Dutch crown from 1815 to 1830. Here, one would have thought, was the golden opportunity to absorb the enclaves into North Brabant. The treaty of November 15, 1831, between Holland and the new State of Belgium does not refer to Baarle-Hertog, but merely directs that the province of Antwerp is to go to Belgium.[32] This included, since nothing was said to the contrary, the enclaves of that province in North Brabant. This was made clear by the treaty of November 5, 1842, by which the boundary between the two countries was finally settled. It stipulated that "Le *statu quo* sera maintenu, tant à l'égard des villages de Baar-le-Nassau (Pay-Bas) et Baar-le-Duc (Belgique), que par rapport aux chemins qui les traversent."[33] The treaty also appointed boundary commissioners, who were directed to agree on a detailed description of the frontier

[29] Ancel, *Les Frontières* (1936) Receuil des Cours (Hague), I, 207, 224.

[30] This account is based on Hoornweg *De Belgische Enclaves van Baarle-Hertog* (Mensch en Maatschappij (1946), 218, 220–1); see also van de Perren, *Historische schets van Baarle-Hertog*, The Hague, 1915–18.

[31] Many churches seized by the protestant government were restored to the Roman Catholics at this period, notably *e.g.* the Cathedral at 's Hertogenbosch. The inhabitants of Baarle-Nassau, as well as those of Baarle-Hertog, have always remained Roman Catholic.

[32] Art. 1. Its Art. 4 deals with the former Dutch enclaves in Limburg, some of them being given to Holland, some to Belgium. This shows that the possibility of enclaves was in the mind of the draftsmen and the omission to absorb Baarle-Hertog thus appears to have been deliberate.

[33] Art. 14. (Garcia de la Veja, *Traités et conventions concernant la Belgique*, I, 237.)

line and to prepare maps. They did the former for every part of the line except that "arrivée aux dites communes de Bar-le-Duc et Bar-le-Nassau, la limite est interrompue par suite de l'impossibilité de l'établir entre ces deux communes, sans solution de continuité." They left it to the mayors of the two villages to describe the almost indescribable.[34] As to maps the commissioners were also forced to make very special arrangements.[35] Although two special treaties were made in the late nineteenth century in an attempt not to abolish, but merely to simplify the enclaves and the problems, such as those of nationality, which they caused, they were revoked by the Dutch Government before ratification.[36] During the First World War Baarle-Hertog had the distinction of being the only Belgian soil not occupied by the Germans. German conquest of both countries in World War II did not affect the status of the enclaves, which was respected by the occupying Power.[37]

Thus these Belgian enclaves remain in being, a nuisance for the administrator,[38] but an interesting survival for the international lawyer.

[34] Art. 90 du procès-verbal descriptif contains the result. (Lagemans, *Receuil des Traités et Conventions conclus par le royaume des Pay-Bas . . . depuis 1813 jusqu'à nos jours*, XII, 289–301.)

[35] Boundary Convention of August 8, 1843, Art. I (Garcia, *op. cit.*, 351). The scale was to be one ten-thousandth, but for two portions of the villages a scale of one two-thousand-five-hundredth was found to be necessary. No map showing the detailed frontiers of the enclaves has ever been published. The tribunal at Breda, which has jurisdiction over Baarle-Nassau, but not of course over Baarle-Hertog, relies on a single MS. map prepared by a local police officer. Through the kind assistance of Judge Koole the same officer has prepared another for the author.

[36] Convention of July 11, 1892, concerning the frontiers between Baarle-Nassau and Baarle-Hertog (Lagemans, *op. cit.* XI, 204) and Declaration of December 21, 1892 additional to the above (*ibid.*, 237). The former contained (art. 6) very interesting provisions as to nationality in the case of occupiers of land ceded during the process of consolidating the enclaves. They were given the option of changing nationality with their lands within one year of the date of cession. The two agreements not having been ratified, the Dutch Government withdrew by letter September 17, 1897.

[37] Belgium's head of State having surrendered, it was subject to German civil administration; Holland's not having done so, military administration prevailed. Collaborators, being excommunicated in Holland, but not in Belgium, often used the church of Baarle-Hertog.

[38] An additional difficulty has just come to light. A Belgian purchaser of a row of houses up to now believed locally to be in Baarle-Nassau has claimed that they are in fact in Baarle-Hertog. Since Belgian rents are about twice those in Holland he claims to be able to eject the Dutch tenants, a process impossible in Holland. The Belgian court at Turnhout has held Belgian law to apply, as the houses are shown as being Belgian in the mayoral survey (n. 34, *supra*) confirmed in the 1843 convention. The Dutch Government contends that local usage clearly proves them to be Dutch and that the mayors must have made a mistake on this point. Diplomatic conversations are in progress. Meanwhile a fatal motor accident has taken place in the disputed street. No proceedings against the driver can be taken until it is settled which state has jurisdiction there, as the Belgian traffic laws are much laxer than the Dutch ones. Moreover, a gaming club has been opened in one of the disputed houses. This is absolutely illegal in Holland and frowned on in Belgium as being in com-

IV

Enough has been written to show that the international enclave is not entirely a thing of the past. Moreover, as we have already said, the existence of such enclaves has an important bearing on the more general question of whether true servitudes can or cannot exist under international law. The continued recognition of the special position of Llivia and Baarle-Hertog by such invaders as Napoleon and Hitler demonstrates clearly that even a military occupying Power feels that it must respect the rights implied in the existence of such enclaves. The most important of these implied rights we believe to be that of free transit and communication with the main territory of the state or, in the case of the full state enclave, with other states. It is of course true that in many cases [39] express treaty provisions have been made as to this right of communication, but it is submitted that even if no such treaty exists a "general principle of law recognised by civilised states" [40] requires the enclaving state to allow the free passage, both of persons and things, to and from the enclave. The way of necessity is not a peculiarly English idea.[41] It lies in one of the basic principles of justice—*cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa non potuit.*[42] The law would not recognise the right of state A to a detached piece of its territory enclaved in state B's unless it were possible for state A to use that right. The existence of a right implies its exercise: without a right of free communication the rights of a state to its exclaves [43] would be incapable of exercise and therefore nugatory. Hence there is no need for an express treaty between the two states concerned to give such a right: it is implicit in the very existence of the enclave. If a treaty is made, it may well regulate the exercise of this international way of necessity: but in its absence the right of way will still exist, for the necessity is still in being. These propositions seem to us so self-evident, as they did to Calvo,[44] that we cannot follow Reid [45] in seeming to treat the matter as an open one.

petition with those at Spa and on the Belgian coast. Yet it cannot be dealt with till it is known which court has jurisdiction. I am indebted to Judge Koole for this note.

[39] Notably in the Lateran treaty, Arts. 12 (correspondence and diplomats), 19 (people), 20 (goods) and 21 (cardinals to conclave).

[40] Statute of the International Court of Justice, Art. 38 (c).

[41] *Cf.* Arts. 628 *et seq.* of French Civil Code; Art. 2309 *et seq.* of the Portuguese Civil Code; etc.

[42] 11 Rep. 52; Broom, *Legal Maxims*, 10th ed., 309.

[43] German writers have pointed out the logical force of using this term when looking at the matter from the main territory's side. (*Der Grosse Brockhaus*, tit. "Enklave.")

[44] "La necessité crée une servitude de passage." (*Le Droit International*, III, 356.)

[45] *International Servitudes*, 168–9.

If these propositions are accepted, it will at once become clear that the existence and juridical possibility of international state servitudes can no longer be denied.[46] All attempts to argue—as Brierly does [47]—that the rights claimed as servitudes are merely contractual arrangements must fail, for the existence of the enclave, which is protected by international law as are all rights to territorial sovereignty, implies that its subsidiary servitude of way is binding not merely on the now-enclaving state (with which treaty arrangements may or may not have been made), but on any international person whom it may directly or indirectly concern.[48] So that if, for example, the right of communication of the Portuguese enclaves in India was the subject-matter of treaty arrangements with the British, the new state of India is equally bound to recognise that right as to recognise, *e.g.*, the frontiers of Burma or Nepal. The question of state succession to the treaty liability of the British may be treated as irrelevant, for the Portuguese right exists apart from any treaty.[49] Hence if it be true (as has been alleged in the press) that the Indian authorities have cut off at certain times the entire communications of the enclaves of Dadrá and Nagar Aveli with the main Portuguese territory of Damao, this action cannot be anything but an international delict. It could be wished that the International Court of Justice had jurisdiction in the matter.[50]

It is obvious that certain ancillary questions remain to be discussed. Assuming that this international way of necessity exists, we may ask: for whom does it exist? Clearly the ordinary civilian resident and the state official or policeman on duty in the enclaves must enjoy full and free rights of exit and return. More difficult is the question of troops, more especially in time of war when the neutrality of the servient state might be thought to be compromised

46 For the arguments for and against, with full citation of authorities, see Oppenheim-Lauterpacht, I. 7th ed., 487 *et seq.* The concept was heavily criticised in the *North Atlantic Fisheries Arbitration* (1910) on grounds now fairly generally accepted to have been incorrect. One was that the concept was only truly found in the Holy Roman Empire, where conditions such as the frequency of enclaves made it essential. We have demonstrated here that neither enclaves nor the servitudes of way to which they inevitably give rise were in any way peculiar to that empire, but are a general international phenomenon.

47 *The Law of Nations*, 4th ed., 159 *et seq.*

48 The Statute on Freedom of (Land) Transit annexed to the Barcelona Convention of April 20, 1921, expressly excludes enclaves, but adds "the states concerned, however, will apply in the cases referred to above a régime which will respect the principles of the present statute and facilitate transit and communications as far as possible" (Art. 14).

49 There seems, however, little ground for India's claim that no state succession has taken place. It is precisely treaty obligations of this local character which are most often transferred by succession.

50 India has signed the optional clause of the Statute of the International Court, but with reservations which prevent Portugal taking this case before it.

by their passage.[51] Calvo appears to have considered that in time of war the right of way was suspended, but he was probably contemplating the possibility of a war between the enclaving and the enclaved state.[52] Crusen, on the other hand, takes it for granted that troops may use the right of passage. Dealing with Germany in 1806 he wrote: "Même les pays les plus grands ne se composaient pas d'un territoire cohérent, mais étaient divisés en parcelles minimes. Il en était ainsi par exemple du Wurtemberg qui avait plusieurs centaines d'enclaves. Pour se rendre d'une telle enclave dans une autre il était nécessaire d'avoir des droits de passage, *servitutes itineris*, pour des buts paisibles en temps de paix, pour le transport de troupes et de munitions en temps de guerre." [53] There are a number of treaties which expressly give the right of passage to troops in time of war.[54] Possibly the better view is that such passage need not be allowed in the absence of such express provisions, but that if the enclaving state does allow it, this does not amount to a breach of neutrality. The enclaving state can scarcely owe a duty to examine all travellers to and from the enclaves to see if they are soldiers.[55] On the other hand, there must obviously be a duty to allow the passage of troops to suppress a revolution or civil disturbance in the enclaves, for such matters clearly do not involve any risk of breach of neutrality. Again on the assumption that press reports are correct, the Portuguese authorities have a good ground of complaint, it being alleged that India has refused their troops and police access to the enclaves for this very purpose.[56]

These are only a few of the questions raised by the continued existence of international enclaves. Although it has been suggested that "le sort inévitable des enclaves est d'être absorbées" one may hope that at least those at Llivia and Baarle-Hertog may

[51] *Cf.* Oppenheim-Lauterpacht, I, 7th ed., 494 (dealing with rights of passage in general, not ways of necessity).

[52] "La guerre peut bien suspendre l'exercice de ces sortes de servitudes, mais elles revivent de plein droit avec le rétablissement de la paix, à moins que la modification des circonscriptions territoriales n'en ait alteré les conditions essentielles" (*Le Droit International*, III, 356).

[53] *Les Servitudes Internationales* (1928) Receuil des Cours (Hague Academy), II, 14.

[54] *e.g.*, the treaty of March 29, 1815, gave Genevese troops a right of passage between Geneva and the jurisdiction of Jussy.

[55] "A neutral can be asked to bring the wheels of its governmental machinery into full play in order to maintain its neutrality; it cannot be reasonably expected to modify its governmental organisation in order to serve the interests of another power." (Count Sclopis, presiding arbitrator, in 1 *Alabama* (Proceedings), pp. 168, 170.)

[56] *A fortiori* if the enclaving state has itself been responsible for the outbreak of the disturbances.

always remain in being. The existence of enclaves makes certain acts of international co-operation inevitable. Hence they may be said to have played a small part in the development of international understanding, as well as of international law.

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