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Enclaves

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A. Notion

1 An enclave in international law is an isolated part of the territory of a → *State*, which is entirely surrounded by the territory of only one foreign State—the surrounding, enclaving, or host State—so that it has no communication with the territory of the State to which it belongs—the mother or home State—other than through the territory of the host State. Seen from the latter's perspective, such territory is an exclave. Contiguous areas that are accessible only via the territory of another State notwithstanding their geographical connection to the home State—because of topographical factors such as insurmountable mountains, eg the Austrian Kleinwalsertal in relation to Germany and the Swiss municipality of Samnaun relative to Austria until 1913, or because the connection consists of a single point only, eg the Austrian community of Jungholz—may be termed 'quasi-enclaves'.

2 Territories that are separated from their home State, but may be accessed via the sea without passing through foreign territorial or → *archipelagic waters*—so-called 'separated territories', eg Spain's → *Ceuta and Melilla*, → *Gibraltar*, the Kaliningrad district, Cabinda on the Atlantic belonging to → *Angola*, → *Walvis Bay* in → *Namibia* until 1994—or which are surrounded by more than one neighbour State—such as the Azeri Nakhchyvan region between Iran and Armenia—are therefore not properly considered enclaves, even though they constitute exclaves from their home State's point of view and may raise similar legal questions (→ *Neighbour States*). Not enclaves but Enclaved States are States whose territory is completely encircled by one other State, such as Vatican City, → *San Marino*, Lesotho, and Swaziland. The situation of the western sectors of → *Berlin (1945–91)*, while in view of the particular situation of Germany not a true enclave, resembled in many aspects that of an international enclave.

3 In maritime settings, there may be island enclaves that are fully surrounded by the → *territorial sea* of the neighbour State, enclaves in the → *continental shelf* and/or the → *exclusive economic zone* ('EEZ') of a coastal State being the result of foreign → *islands* and their respective shelf or EEZ, such as the Channel Islands following the award in the → *Continental Shelf Arbitration (France v United Kingdom)* (→ *Channel Islands and Isle of Man*), and enclaves of the → *high seas* within one State's EEZ.

B. Historical Origins and Development

4 While enclaves have existed since biblical times, the origin of the enclave problem in modern international law may be traced back to medieval times in the → *Holy Roman Empire* (800–1806), Spain, France, Belgium, and the Netherlands in particular (→ *History of International Law, Ancient Times to 1648*). The emergence of so many enclaves was the result of a continuous process of cessions and acquisitions by → *conquest*, inheritance, marriage, or treaty—based on the feudal law concept that the ruler was in the position of a private owner and could dispose of his territory (→ *Cession*; → *Territory, Acquisition* ; → *Treaties*; see also → *Sovereignty*). More often than not, these historic borders continue to exist as delimitations of administrative units—including municipalities—or constituent territories of a federal State or previous colonies thereby creating 'internal' or 'administrative enclaves' (→ *Boundaries*; → *Colonialism*; → *Federal States*). Whatever their historic background, following the break-up of the respective State or colony some internal enclaves have become international ones (see also → *Decolonization*; → *State Succession in Other Matters than Treaties*; → *Uti possidetis Doctrine*).

5 Since the times of the French revolution and the advent of the modern nation State and industrialization, a tendency towards the absorption of enclaves can be observed. Nearly all have since become part of the former host State's territory, some by force—eg the Portuguese enclaves Dadra and Nagar-Aveli in India following an uprising of local insurgents in 1954 and Fort Ajuda in present Benin in 1961—but most of them peacefully—eg the former French enclaves in India and the Lithuanian enclave Pogiriay in Belarus (see also → *Baltic States*; → *Goa, Conflict*).

C. Current Examples

6 According to a 2002 survey, there exist currently about 250 international enclaves—including 32 counter-enclaves, ie enclaves within enclaves—of which some 200 are part of the Cooch Behar complex at the Indo-Bangladeshi boundary (see also → *Boundary Disputes in the Indian Subcontinent*).

7 In Europe, only a few enclaves of small size and population have survived the consolidation of State territory. The most complex constellation is the Belgian town Baarle-Hertog (Baerle-Duc) intermingled with Dutch Baarle-Nassau and consisting of 22 enclaves and seven counter-enclaves, parts of which were subject to the → *International Court of Justice (ICJ)* judgment in the → *Sovereignty over Certain Frontier Land Case (Belgium/Netherlands)*. Others include the German enclave Büsingen in Switzerland, the Vennbahn enclaves separated from mainland Germany by a Belgian former railway track, Campione d'Italia at Lake Lugano in Switzerland, some British territories on → *Cyprus*, and the Spanish town Llivia in the French Pyrenees (see also → *Railway Stations and Airports on Foreign Territory*).

8 The disintegration of the Union of Soviet Socialist Republics ('USSR') in 1990 created several enclaves, among them one Russian enclave in Belarus—Sankovo/Medvezhe—and some in Central Asia, namely in Azerbaijan, Armenia, Uzbekistan, and Kyrgyzstan (see also → *Commonwealth of Independent States [CIS]*). Similarly, the dissolution of Yugoslavia created the Bosnian enclave Sastavci in → *Serbia* (→ *Yugoslavia, Dissolution of* ; see also → *Bosnia-Herzegovina*). There is a land enclave in the → *United Arab Emirates (UAE)* belonging to Oman—Madha, with a counter-enclave Nahwa—and in total four island enclaves: Malawi's Likoma and Chisamulo in Mozambique's part of Lake Malawi and the Argentinean islands of Apipé, in the Paraguayan waters of the Rio Paraná, and Martin Garcia, off Uruguay.

D. Legal Aspects of International Enclaves

1. Status under International Law

9 Enclaves form part of the home State in all respects. For the host State, an international enclave is foreign territory which is subject to the principally unrestricted territorial sovereignty of the home State. This has effect also for third parties. Thus, the Spanish enclave Llivia was not occupied by German troops in France during World War II in respect of Spain's neutrality (see also → *Neutrality, Concept and General Rules*). On the other hand, the German enclave Büsingen was occupied by France in 1945.

10 The home State is entitled, under international law, to establish and enforce its legal order throughout its exclave. The → *nationality* of the enclave's inhabitants is governed by the regulations of the home State; upon cessation of an enclave, nationals of the home State may have to select whether to retain their nationality or to acquire the former host State's nationality (→ *Option of Nationality*). Under international law, no distinction is made

between the home State's nationals residing in the main territory and those inhabiting the exclave.

2. Status under National Law

11 While the home State may be entitled under its own law to promulgate specific regulations for the exclave and its inhabitants, its national legislation including postal and tax law and customs regulations applies in principle in the exclave as in any other part of the country. The home State may, however, arrange with the host State that part of the latter's legislation would apply in the enclave as well. Thus, the Austrian quasi-enclaves form part of the German customs territory. Similarly, Swiss agricultural and health regulations apply also to the German enclave Büsingen. Occasionally, enclaves enjoy an exemption from duty, as in the case of the Swiss quasi-enclave Samnaun.

3. Access to Exclaves

12 The territories of the State surrounding the enclave are subject to its territorial sovereignty which has to be respected by the enclave's home State. On the other hand, free intercourse between the home State and its exclave is necessary, considering a State's character as a political and economic unit. Access through the territory of the enclaving State, including its territorial sea and → *airspace*, means thus transit over foreign territory for which a legal basis is required (→ *Transit of Goods over Foreign Territory*; → *Transit Passage*). The right to passage may constitute an international servitude in rem, provided it is clearly and durably established (→ *Servitudes*).

13 Such legal basis may be found in a treaty setting out, inter alia, the conditions and scope of a right to transit. Thus, with respect to Llivia, a 'neutral road' had first been established in 1660 by the Boundary Convention between France and Spain and confirmed in the 1866 Treaty on Boundaries between Spain and France from the Valley of Andorra to the Mediterranean. Indeed, access to most of the historic enclaves was regulated, one way or the other, by treaty. This practice has continued in the 20th century: the 1964 Treaty between the Federal Republic of Germany and the Swiss Confederation on the Inclusion of Büsingen am Hochrhein in the Swiss Customs Area (Vertrag zwischen der Bundesrepublik Deutschland und der Schweizerischen Eidgenossenschaft über die Einbeziehung der Gemeinde Büsingen am Hochrhein in das schweizerische Zollgebiet) regulates certain aspects of border-crossing, thereby implicitly recognizing a right to passage. And the 1954 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland (Acting on behalf of the Government of the Federation of Rhodesia and Nyasaland) and the Government of Portugal regarding the Nyasaland-Mozambique Frontier established an unrestricted and unconditional right of access to the enclaved islands in Mozambique's part of Lake Malawi.

14 Another legal basis may be → *customary international law*. In its judgment in the → *Right of Passage over Indian Territory Case* ('*Right of Passage Case*') concerning the denial of access to the enclaves Dadra and Nagar-Aveli by India, the ICJ held that Portugal could rely on a long-established local custom as a basis for the free passage of private persons and goods. However, this right did not extend to military personnel or armed police for their passage had always been subject to prior approval. Local custom is said to have existed also with respect to other enclaves, eg Baarle-Hertog.

15 Whether or not a right of passage to and from enclaves exists under → *general international law* has long been discussed, the problem being in particular that each enclave has been subject to a specific legal regime. Some writers attempt to deduce the existence of such a right from the mere existence of an enclave and its recognition by the surrounding State or from the *droit de voisinage*—neighbourhood law. But it is doubtful

whether the mere existence of an enclave implies a restriction of the surrounding State's territorial sovereignty. Likewise, the *droit de voisinage* is too vague to create such a right absent any specific arrangement.

16 The ICJ in the *Right of Passage Case* did not pronounce on general customary law in view of its finding on the existing bilateral practice. However, based on a thorough assessment of the practice with respect to the different enclaves, there are good reasons to assume that there now exists in principle a right of free passage for private persons and goods, subject to any special customs rules. Some authors would extend this right to civil officials and police in the exercise of their normal duties where these transits are necessary for the maintenance of normal life in the enclave. No established customary law exists, on the contrary, for the transit of military forces or passage through the airspace.

17 Some authors further argue that a State's right of access to its enclaves derives from → *general principles of law*. While the private law of many States indeed accepts a compulsory right of way in case of necessity, it is doubtful whether this principle may be applied to international enclaves where a considerably different situation prevails (→ *Necessity, State of*).

18 Where no express agreement has been concluded, the host State may under certain conditions be obliged, by virtue of the principle of → *estoppel*, not to restrict hitherto free passage. Similarly, disallowing a specific transit could amount to an abuse of rights by the enclaving State—at least where this rejection is not based on the host's own legitimate interests but is meant to hinder the exercise of the home State's sovereign rights (→ *Good Faith [Bona fide]*).

19 Finally, a legal basis for a passage even for military personnel may be created by a mandatory resolution of the United Nations Security Council ('UNSC') under Chapter VII → *United Nations Charter* (→ *United Nations, Security Council*). Thus, by reference to the authorization in the UNSC Resolution 1264 (1999) of 15 September 1999 the Internation-al Force for East Timor ('INTERFET'), established to restore peace and → *security* in East Timor, required Indonesia to keep the air corridor over the latter's territorial and archipelagic sea to the separated territory of Oecussi-Ambeno unconditionally open.

20 In any event, individuals and officials of the home State are, during the passage to and from an exclave, subject to the laws and administrative power of the host State, including as to the conditions of the passage, unless it has been agreed otherwise.

E. Evaluation

21 Notwithstanding the appearance of new enclaves following the break-up of the USSR, international enclaves are in the decline. They may be considered 'more of a liability than an asset' (Krenz 16) and hardly ever include strategically or economically important places, though this may be different with separated territories having access to the sea. In view of the generally minor importance in terms of population and territory, there is a clear trend that enclaves have been and continue to be absorbed by the host State. In most cases, they have been either ceded to the host States—often in exchange for other land—or became subject to an overall boundary revision (see also → *Territory, Abandonment*). The enclave situation may also be remedied by their inclusion in the customs area, the lease of a corridor or the construction of specific transit routes—eg direct train connections, bridges, or tunnels. The remaining instances are subject to more or less extensive bilateral arrangements. The trend to avoid the emergence of enclaves can occasionally be observed in the international adjudication of boundary disputes, too. In the European Union ('EU'),

many enclave-specific problems have disappeared with the free circulation of goods and persons (→ *European Integration*); the same may develop in → *free trade areas* in general.

22 Hence, international enclaves and access thereto are not likely to present many problems under international law in the future. It is, however, evident that similar issues have arisen with respect to separated territories, such as the problem of transit between → *Russia* and the Kaliningrad district shows. In preparation for Lithuania's accession to the EU and European Community and following extensive negotiations, Russia and the EU issued a Joint Statement on Transit between the Kaliningrad Region and the Rest of the Russian Federation on 11 November 2002 regarding the means to facilitate the transit of persons and goods. The real problems of international enclaves, and separate territories, today concern not so much questions of access for military forces, but lie in the quest for pragmatic arrangements facilitating the unimpeded transit of people and goods so as to best overcome the geographical separation of enclaves and their inhabitants from the home State.

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