



**PILLAR II**  
**Administrative/Practical Cases**

*The Compulsory Jurisdiction of the International Court of Justice on Territorial Disputes*  
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**Abstract**

*The Jurisdiction of the International Court of Justice (ICJ) is important in the context of maintaining international peace and security. This is also the primary purpose of the United Nations (UN). The ICJ is the principal judicial institution of the UN which has jurisdiction to settle disputes between States that have consented to such jurisdiction. Therefore, this paper aims to shed light on the legally-binding character of the ICJ's jurisdiction. In addition, it examines the role of the state's consent in relation with ICJ's jurisdiction. This research also explains the ICJ's approach to the principle of uti possidetis as one of the nine categories on which the ICJ bases its arguments in its decisions for the recognition of a new independent state. By applying this approach, this paper analyzes the case of Kosovo in the light of the principle of uti possidetis.*

**Key Words:** International Court of Justice, Kosovo case, Jurisdiction, Dispute, *Uti Possideti*

**1. Introduction**

At the moment that there are different interests, there are also several disputes. States, as international subjects that aim to maximize their national interests,<sup>1</sup> may create several disputes with each-other. One of the most common disputes between states is about frontiers. In these cases, states might bring their disputes before the International Court of Justice (ICJ).

This paper studies the jurisdiction of the ICJ and the role of the State's consent. After given a general overview of the literature and briefly examined the Burkina Faso case, the paper focuses on the case of Kosovo by underlying the advantages of the legal doctrine that supports its independence. This

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<sup>1</sup> Weldes, Jutta. "Constructing national interests." *European Journal of International Relations* 2.3 (1996): : 275-318.



research consists of two sections. Section II describes the jurisdiction of the ICJ and the state's consent, as a form by which states recognize the Court's decision with a legally-binding force. Section III examines the ICJ's approach to the principle of *uti possidetis* and its argumentations. For the first time, the ICJ came up with the concept of *uti possidetis* on 22 December 1986, when states such as Burkina Faso and the Republic of Mali, through a Specific Agreement, referred to the ICJ to determine boundaries between them. In this decision, the ICJ expressed the inviolability of the territorial boundaries that existed before the creation of the new State and the declaration of independence. These borders would become officially recognized borders in the international community, in accordance with the principle of *uti possidetis*. This principle serves to constitute the new state within the same geographical area in which it existed before the declaration of independence. Therefore, the case of Kosovo's independence in this paper is in the light of the principle of *uti possidetis*.

In conclusion, this research synthetically summarizes the legal arguments and interpretations made by scholars in order to further clarify the binding nature of the ICJ's decision on territorial conflicts by focusing on the principle of *uti possidetis*.

## **2. The consent of the states: the compulsory jurisdiction**

The consent of the state is one of the most important principles of international law, by which a state cannot be bound by any kind of dispute settlement.<sup>2</sup> The ICJ is the principle judicial organs of the United Nations (UN) (Article 92, United Nations Charter - UNCh) dealing with the settlement of disputes at Inter-States level. This section examines the role of the ICJ by prioritizing the consent of the States. It discusses the compulsory jurisdiction as a means of underlining the uniformity of the international interpretation.

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<sup>2</sup> Nobrega e Silva Loureiro, Luciana. "Mutual Agreement Procedure: Preventing the Compulsory Jurisdiction of the International Court of Justice?." *Intertax* 37.10 (2009): 529-544.



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Many defenders of this institution claim that such an organ bring uniformity<sup>3</sup> to the international law. Moreover, the character of ICJ's decision is binding upon parties,<sup>4</sup> which is underlined by the consent of the states (Article 36(2) of ICJ's statute). It shall be mentioned that the consent of the State itself, is a way of how parties exercise their sovereignty. Therefore, all member states of the UN are at the same time members of the ICJ statute as enshrined in Article 93(1) of the UN Charter. This means that each member state of the UN must comply with the obligations arising from the ICJ ruling in each case to which they are parties.

The jurisdiction of the ICJ covers a wide scope and contesting parties could arise different questions on international law, such as the interpretation of a treaty, any fact which consists on a breach of an obligation due to international law, and the nature or extent of the reparation to be made for the breach of the international obligation (Article 36/2 of ICJ's statute).

Consent of the State can be represented in three manners: -*Ad hoc* when a State shows the consent for a certain issue with an identified State. The second option, which is the most common, is *ante hoc* where the State expresses its consent before the dispute has arisen. *Ante hoc* consent can be expressed in two ways. The first way is when a dispute occurs between the States party to a treaty, they agree to refer it to the ICJ.<sup>5</sup> The second way is when the parties accept the 'optional clause' provided by the Article 36(2) of the ICJ's Statute, *in which States parties to the present Statute could recognize as compulsory ipso facto and without special agreement, the jurisdiction of the ICJ in all legal disputes*. The third option is *post hoc* in which the party gives the consent after the dispute has been submitted to the Court.<sup>6</sup> As a consequence of the division into three manners of

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<sup>3</sup>*Ibid.*

<sup>4</sup>van der Bruggen, Edwin. "Compulsory Jurisdiction of the International Court of Justice in Tax Cases: Do We Already Have an International Tax Court?." *Intertax* 29.8 (2001): 250-267.

<sup>5</sup> See *supra* note 2.

<sup>6</sup> *Ibid.*



the ICJ's jurisdiction, it means that this division relates to the manner and time the parties refer to the ICJ for the settlement of the dispute, as in any event the decision of the court remains binding on each party.

The recognition of the jurisdiction of the ICJ as compulsory could be made simply through a unilateral declaration of a State, party to the Statute of the ICJ.<sup>7</sup> This unilateral declaration can establish relationships between the State and the Court based on the compulsory jurisdiction,<sup>8</sup> determining the restrictions on its application. However, it does not only recognize relationships between the State and the Court, but it also establishes the relationship between the declarant State and other States that have made the unilateral declaration through the 'optional clause.'<sup>9</sup> This principle is only a suggested form of the declaration by which States are permitted to express their approach to the jurisdiction of the Court.<sup>10</sup> Moreover, this expression should be at the moment of signing or ratifying the Protocol of Signature. This is a formalized act deposited to the General Secretary of the UN by which States share their will to be bound by the jurisdiction of the Court (Article 36/4 of ICJ's Statute). This official act is not merely a formalization, but also considered as an act that states could make reservations they consider relevant. Therefore, they can create the reciprocity principle, by which States undertake the same obligations and conduct the case only within the common ground between the declarations of each parties on the issue questioned.

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Judgment of Nov. 26, 1984 (Nicaragua v. United States) Schwebel, par. 5. In his opinion, Judge Schwebel quoted the following passage from the Permanent Court of International Justice by Judge Hudson: Clearly, the 'optional clause' does not stand on any independent basis; it is only a suggested form of the declaration which Article 36 permits to be made at the time of signing or ratifying the Protocol of Signature or at a latter moment. It is entirely subsidiary to the Protocol of Signature; a State cannot become a party to the optional clause unless it has become or becomes a party also to the Protocol of Signature, and a State which is not effectively a party to the latter does not make a binding declaration by merely signing the 'optional clause' even without conditions.



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The ICJ possesses two types of jurisdictions. First, the *Contentious Jurisdiction* involves States that submit the dispute by consent to the Court for a binding decision.<sup>11</sup> Second, the *Advisory Jurisdiction*, in contrast with the former, is not binding upon the parties rather than some legal advices given by the Court due to concerns referred to the Court by General Assembly, Security Council or other organs of the UN (Article 96 UNCh). In this division of jurisdiction, the distinction remains with the entities which invest the Court's involvement, making it clear that the Court's jurisdiction remains at the level of opinion when requested by one of the principal United National organs.

The decision of ICJ is binding upon the parties in a manner confirming with the Article 2 and Article 94(1) of the UNCh. These articles provide the purpose of the UN to maintain and ensure the international peace and security. All States members or non-members should act in accordance with these principles (Article 2/6 UN Charter), meaning that even the non-member States should not violate principles set by UNCh. Otherwise, at any case in which a party fails to perform any obligations arising by the decision of the Court, the other parties have the right to recourse to Security Council in order to give effect to the decision of the Court (Article 94/2 of UN Charter). Subsequently, it means that the principles of International Security and Peace give the compulsory character of the ICJ's decision which comes into force by any means if it is against Peace and Security (Article 94/2 of UNCh). At its core the UNCh has foreseen, in addition to the judiciary power represented by the ICJ, also the executive power represented by the Security Council. Consequently, this makes the ICJ's decision binding even in cases where a member State or not of the UNCh faces sanctions that constrain that State in order to fulfill its obligations under international law.

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<sup>11</sup> Dispute Settlement – International Court of Justice, United Nations Conference on Trade and Development, New York and Geneva 2003.



To sum up, the consent of the State to recognize the jurisdiction of the ICJ as binding does not entirely establish the character of the ICJ as binding. This is because in itself the jurisdiction of the ICJ is binding whether or not recognized by the State (Article 94/2 of UNCh). The way States express their will to be bound by any ICJ decision is to show the State's willingness to recognize the jurisdiction of the ICJ. However, the ICJ has jurisdiction even in cases where a state which is not part of the UNCh violates the principles established by the UN (Article 2/6UNCh).

### 3. *Uti Possidetis* as one of the categories of territorial claim: the case of Kosovo

*Uti possidetis* is the doctrine under which “old administrative boundaries will become international boundaries when a political subdivision achieves independence.”<sup>12</sup> Such a doctrine is found among the nine categories, which competing international territorial claims are divided into. This division contains other categories, such as treaties, geography, economy, culture, effective control, history, elitism, and ideology.<sup>13</sup>

This section studies in more detail the principle of *uti possidetis*, taking into account the ICJ's decision in the *Burkina Faso vs the Republic of Mali* case. This section then analyzes the case of Kosovo in relation to the meaning that the ICJ gives to the principle of *uti possidetis*. The first implementation of such doctrine occurred on the case of *Burkina Faso vs Republic of Mali* on which the ICJ has ruled as it follows:

*“In these circumstances, the Chamber cannot disregard the principle of uti possidetis juris, the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the principle in matters of decolonization and its exceptional importance for the African continent, including the two Parties to this case. Although this principle was invoked for the first*

<sup>12</sup> Black's Law Dictionary 1544 (7th ed. 1999), p.1544.

<sup>13</sup> Sumner, Brian Taylor. "Territorial disputes at the International Court of Justice." *Duke Law Journal* 53 (2003)



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*time in Spanish America, it is not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. The fact that the new African States have respected the territorial status quo which existed when they obtained independence must therefore be seen not as a mere practice but as the application in Africa of a rule of general scope which is firmly established in matters of decolonization; and the Chamber does not find it necessary to demonstrate this for the purposes of the case.”<sup>14</sup>*

As it can be assumed, the ICJ has defined the principle of *uti possidetis* as determining factor on the territorial disputes regarding the intangibility of the frontiers at the moment of independence. Furthermore, *uti possidetis* principle serves as “photography of the territory”<sup>15</sup> at the moment of the creation of the new State.

*Uti possidetis* is often associated with self-determination concept.<sup>16</sup> Self-determination as a right of people does not mean a self-defined people creating the State from scratches; it rather predetermines the future independent State.<sup>17</sup> Both principles are linked with the territory of a State on which the State can exercise its sovereignty. The first implementation of such principle in a legal pattern was applied in the *Burkina Faso v. Mali* (Frontier Dispute case), where the International Court of Justice ruled as it follows:

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<sup>14</sup> *Supra* note 10, par.20.

<sup>15</sup> Hasani, Enver. "Uti possidetis juris: from Rome to Kosovo." *Fletcher F. World Aff.* 27 (2003)

<sup>16</sup> Oklopčić, Zoran. "Populus interruptus: Self-determination, the independence of Kosovo, and the vocabulary of peoplehood." *Leiden Journal of International Law* 22.4 (2009):

<sup>17</sup> Crawford, James. *The creation of states in international law*. Oxford University Press, 2006.



“The maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who struggled for their independence, and to avoid disruption which would deprive the continent of the gains achieved by much sacrifice.”<sup>18</sup> Additionally, the ICJ describes the functions of *uti possidetis* which serves as a means of stability in order to achieve independence in all fields.<sup>19</sup> It was also defined as a principle that transforms former administrative borders created during the colonial period into international frontiers, meaning that this principle aims to freeze the ownership over the territory at the moment of independence.<sup>20</sup>

The Kosovo’s case could also be evaluated under the self-determination principle, which is one of the main rights that citizens have.<sup>21</sup> Kosovo has been recognized even when it was under the Socialist Federal Republic of Yugoslavia (SFRY) as an autonomous province.<sup>22</sup> Moreover, from 1999 to 2008, the main duty of the international civil presence in Kosovo was to provide the substantial autonomy and self-government.<sup>23</sup> This was also the result of the Arbitration Commission; a group of European jurists set up by the European Union in 1991. This commission based its own decision on the Burkina Faso vs Mali case<sup>24</sup> also to legitimize the further independence of Kosovo. As a result of this work the Commission stated that conflicts over the territory could be prevented only by the recognition of former administrative frontiers.<sup>25</sup>

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<sup>18</sup> *Supra* note 14, par. 23.

<sup>19</sup> *Ibrid*, par. 25.

<sup>20</sup> *Supra* note 15.

<sup>21</sup> Wolff, Stefan, and Annemarie Peen Rodt. "Self-determination after Kosovo." *Europe-Asia Studies* 65.5 (2013): 799-822; Charney, Jonathan I. "Self-Determination: Chechnya, Kosovo, and East Timor." *Vanderbilt Journal Transnational Law* 34 (2001):

<sup>22</sup> Resolution 1244 (1999) Adopted by the Security Council at its 4011th meeting, on 10 June 1999 (p.3)

<sup>23</sup> *Ibrid*, par.3.

<sup>24</sup> *Supra* note 20.

<sup>25</sup> *Ibrid*.





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The same legal argument have been used by both the ICJ and Commission. The Court's very definition of *uti possidetis* has defined itself as one of the most widely used principles, one of which is the protection and promotion of the independence of a new State.<sup>26</sup> Such principle has a formal character which is put in place to maintain the factual situation if a movement for self-determination and independence emerges. Consequently, if this movement is legitimated internationally, then the new state will exist within the recognized boundaries before it is declared independent.

To sum up, as it is clear from the ICJ ruling, that *uti possidetis* has legal effect as long as a new political formation arises. This principle has been used by the ICJ not to grant independence to the new state, but to exercise independence within the same territory as before. This means that *uti possidetis* does not determine the political or legal status of the new state, but merely it means that "as you possess, so you may possess".<sup>27</sup>

#### 4. Conclusion

The ICJ is the principal organ of justice in the UN. Therefore, this makes the jurisdiction of the ICJ a determining factor in maintaining international peace and security. The jurisdiction of the ICJ is exercised in accordance with the purpose set forth in the UNCh. Each member of the UNCh is automatically a member of the ICJ Statute. These countries may declare their consent to the jurisdiction of the Court as binding in all legal disputes concerning the interpretation of a treaty, a matter of international law or a breach of the obligations arising from international agreements.

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<sup>26</sup> *Supra* note 10, par.20.

<sup>27</sup> Reisman, W. Michael. "Protecting indigenous rights in international adjudication." *American Journal of International Law* 89.2 (1995) (p.352)



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UNCh' Member States have to comply with the Court's decision in any case where they are parties to the trial. This is a fact that makes the role of ICJ crucial in maintaining international peace and security. Consequently, this makes the decision of the Court binding in every case.

The case of Burkina Faso v. The Republic of Mali makes clear the meaning of the principle of *utti possidetis*, as a principle that serves to avoid frontiers disputes. Therefore, this principle serves to fix the boundaries before the creation of a new state. Consequently, what existed before will continue to exist in the same geographical space. Likewise, Kosovo exercises its sovereignty within the same borders as they were before when it was an autonomous province of the former Yugoslav Republic. As a result, the only change is the legal and political status of Kosovo, from an autonomous province to a new independent State.

In conclusion, the principle of *utti possidetis*, as also referred on the case of Burkina Faso, could also be applied in the case of Kosovo due to the similarities. However, *utti possidetis* should be considered as an accessory to the factual situation rather than a determinant of the legal or political question of the creation of a new state. As a result, the administrative borders of the previous unit could be the national borders of the new State.