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**WORLD POLITICS**

*power points*  
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# 1. A policy-oriented approach to international law (IL)

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- 1) *IL as a reflection and instrument of international politics*
- 2) *the zero-sum game between conflicting interests: the changing results of the search for the relative optimum in a changing non-legal framework*
- 3) *similarities between IL and International Relations*

## 2. Legal attempts to limit resort to force in three directions

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1. *restrict right to resort to force, in particular war = limit the jus ad bellum*
2. *limit means, methods (tactics), targets = jus in bello – law of war, international humanitarian law*
3. *reduce numbers of, completely eliminate certain weapons = disarmament, arms control*

### 3. The “long march” from the *jus ad bellum* to the *jus contra bellum*

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1. *Drago-Porter Convention (1907): no force for the recovery of debts*
2. *Bryan Treaties (1913/14): only procedural restrictions*
3. *League of Nations Covenant (1919): an incomplete ban*
4. *Briand-Kellogg Pact (1928): the renunciation of war as an instrument of national policy – but*
  - a) *no effective sanctions in case of non-compliance*
  - b) *no compulsory peaceful settlement regime*
  - c) *applicable only among the contracting parties*
  - d) *“reservations” by the U.S. and Great Britain*
5. *Stimson Doctrine (1932): non-recognition of the results of unlawful force as sanction*
6. *Article 2 (4) UN Charter (1945): the prohibition of the threat or use of force threefold progress:*
  - a) *force, not war outlawed*
  - b) *the “mere” threat of force also prohibited*
  - c) *not only inter partes: in their international relations*

## 4. Briand-Kellogg Pact Paris, 27 August 1928

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*Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty; ...*

### ***Article I***

*The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.*

### ***Article II***

*The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.*

## **5. Article 2 (4) UN Charter**

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*All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

## 6. Strengthening Article 2 (4) after 1945

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- 1) a jus cogens rule of universal IL
- 2) extension to de facto regimes
- 3) extension to armistice and demarcation lines
- 4) inclusion of “indirect aggression”
- 5) inclusion of political and economic pressure?

## 7. The lawfulness of assistance to parties to a civil war

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- 1) *only to the older, “legitimate” government*
  - *the only external representative of the state?*
  - *shortening the conflict, reducing the negative effects?*
- 2) *absolute non-interference*
  - *the exercise of the right of self-determination by force?*
  - *containing the conflict, reducing the negative effects but different State practice!*
- 3) *assistance to the party fighting for a “just cause”*
  - *the barrier of internal self-determination*
  - *the problem of international agreement on “just causes”*
- 4) *support to the party of one’s choice*
  - *the erosion of Article 2 (4) and non-intervention in internal affairs*

## 8. Four prerequisites for an effective collective security system and the UN

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1. *military: overwhelming deterrence potential + no (even) “benevolent” hegemon: 192 members*
2. *legal: clear prohibition of the use of force and obligation to impose sanctions: Articles 2 (4), 2 (5), 25*
3. *organizational: central sanctions institution: the “blank check” of the SC: whether, against whom, which sanctions, by whom, when?*
4. *political: genuine solidarity = indivisibility of peace + anonymity: Article 27 (3) and the “veto” problem*

## 9. Article 39 UN Charter

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*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.*

## 10. Article 2(7) UN Charter

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*Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

## **11. Article 41 UN Charter**

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*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*

## 12. Article 42 UN Charter

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*Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations.*

## 13. Article 43 UN Charter

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- 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.*
- 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.*
- 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.*

## **14. Article 48 UN Charter**

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- 1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.*
- 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.*

## 15. Article 27 (3) UN Charter

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*Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of article 52, a party to a dispute shall abstain from voting.*

## 16. UN collective security during the Cold War

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- 1. no obligatory military sanctions: Korea, the apparent, Southern Rhodesia the real exception*
- 2. non-military sanctions only against Southern Rhodesia and South Africa*
- 3. the major innovation: 1st generation peacekeeping operations (PKOs) and their legal basis*
- 4. attempts to enhance collective security: “Uniting for Peace” and the definition of aggression*

## **17. UN General Assembly** **Resolution 377 (V)**

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A

*Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.*

## 18. Article 24 (1) UN Charter

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*In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.*

**19. collective security**  
**military sanctions**

**cooperative security**  
**1st-generation PKOs**

*1. help victim against aggressor*

*2. extreme partiality*

*3. decision of Security Council*

*4. massive offensive force*

*5. legal basis: Chapter VII*

*1. help all parties to stabilise arrangement*

*2. impartiality*

*3. consent of*

*a) Security Council*

*b) all parties to conflict*

*c) contributing states*

*4. force in self-defence*

*5. a) implied powers*

*b) customary IL*

*c) argumentum a maiore ad minus*

## 20. UN Peacekeeping Operations during the Cold War

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*UN Truce Supervision Organization (UNTSO )1948 - Middle East*

*UN Emergency Force I (UNEF I) 1956 - 67 Suez.*

*UN Emergency Force II (UNEF II) 1973 - 79 Suez*

*Opération des Nations Unies au Congo (ONUC) 1960 - 64*

*UN Force in Cyprus (UNFICYP) 1964 -*

*UN Disengagement Observer Force (UNDOF) 1974 - Golan Heights*

*UN Interim Force in Lebanon (UNIFIL) 1978 -*

## 21. The use of force in the post-Cold War system:

### 4 new developments

- A. *new possibilities for international security cooperation, in particular within the UN Security Council*
- B. *in a unipolar system, the West, above all the U.S., could also use legally dubious armed force with impunity*
- C. *the West was prepared to resort to force in order to promote its values*
- D. *international terrorism and the proliferation of WMD constitute the principal threats after the Cold War*

### 4 cases to which these new features were relevant

1. *“Operation Desert Storm” (1991): A*
2. *”Operation Allied Force” (1999): B+C*
3. *“Operation Enduring Freedom” (2001): A+ D*
4. *“Operation Iraqi Freedom” (2003): B+C+D*

## 22. UN collective security after the Cold War:

1. *still no obligatory military sanctions but authorization to resort to force without the consent of the target state: “Operation Desert Storm”*
2. *more frequent non-military sanctions: problems of effectiveness and the issue of legal limits to SC action: “targeted sanctions”?*
3. *2nd generation PKOs*
4. *“enforcement by consent”*  
*IFOR/SFOR/Althea, KFOR, INTERFET*
5. *return of the protectorate or trusteeship system:*  
*Cambodia, Bosnia-Herzegovina, Kosovo, Timor Leste*
6. *international criminal tribunals: ICFY, ICTR, Sierra Leone, Timor Leste, Cambodia, Lebanon*
7. *non-defensive force without SC authorization:*  
*“Operation Allied Force”: “humanitarian intervention”, “responsibility to protect”*
8. *”Operation Iraqi Freedom”: SC resolutions as sufficient legal basis?*

## 23. Operation “Desert Storm” SC Resolution 678 (1990)

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*The Security Council,*

.....

*Acting under Chapter VII of the Charter,*

.....

2. *Authorizes member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;*
3. *Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 above;*

## **24. Enforcing the flight ban over Bosnia Herzegovina**

### **SC Resolution 816 (1993)**

*The Security Council,*

.....

*Determining that the grave situation in the Republic of Bosnia and Herzegovina continues to be a threat to international peace and security,*

*Acting under Chapter VII of the Charter of the United Nations,*

.....

4. *Authorizes Member States, seven days after the adoption of this resolution, acting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures in the airspace of the republic of Bosnia and Herzegovina, in the event of further violations, to ensure compliance with the ban on flights referred to in paragraph 1 above, and proportionate to the specific circumstances and the nature of the flights;*

## 25. Economic sanctions

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***political problems:** sanctions may  
remain ineffective*

*hurt the wrong addressees – average citizens*

*be counterproductive – even strengthen regime of the target state*

*also hurt those adopting sanctions*

***legal problems:***

*unlimited powers of the UN Security Council?*

*Article 24 (2) UN Charter*

*“...the Security Council shall act in accordance with the Purposes and Principles of the  
United Nations...”*

*Article 1 (3) UN Charter*

*“...promoting and encouraging respect for human rights and for fundamental freedoms...”*

## 26. “Second-generation” PKOs

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- 1) *extended mandates:*
  - a) *armed force beyond self-defence*
  - b) *political-administrative tasks*
  - c) *humanitarian assistance*
- 2) *impartiality not always maintained, perception of partiality in eyes of parties to the conflict*
- 3) *consent of all conflicting parties not always obtained*
- 4) *force beyond self-defence without the necessary means*
- 5) *participation of P5*

UNTAC UN Transitional Authority in Cambodia  
UNPROFOR UN Protection Force (in the former Yugoslavia)  
UNOSOM UN Operation in Somalia

## 27. “Mission creep” in Bosnia Herzegovina SC Resolution 836 (1993)

*The Security Council,*

.....

*Determining that the situation in the Republic of Bosnia and Herzegovina continues to be a threat to international peace and security,*

.....

5. *Decides to extend to that end the mandate of UNPROFOR in order to enable it, in the safe areas referred to in resolution 824 (1993), to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground, in addition to participating in the delivery of humanitarian relief to the population as provided for in resolution 776 (1992) of 14 September 1992;*
9. *Authorizes UNPROFOR, in addition to the mandate defined in resolutions 770 (1992) of 13 August 1992 and 76 (1992), in carrying out the mandate defined in paragraph 5 above, acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys;*

## 28. Enforcement by Consent by IFOR in Bosnia-Herzegovina SC Resolution 1031 (1995)

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*The Security Council,*

.....

*1. Acting under Chapter VII of the Charter of the United Nations,*

.....

*15. Authorises the Member States acting under paragraph 14 above to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement, stresses that the parties shall be held equally responsible for compliance with that Annex, and shall be equally subject to such enforcement action by IFOR as may be necessary to ensure implementation of that Annex and the protection of IFOR, and takes note that the parties have consented to IFOR's taking such measures;*



## 29. The legal status of Kosovo SC Resolution 1244 (1999)

*The Security Council,*

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.....

*Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2.*

*Determining that the situation in the region continues to constitute a threat to international peace and security.*

*Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all habitants of Kosovo.*

19. *Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise.*

## **30. Humanitarian intervention**

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*The use of force by states in order to protect the inhabitants of another states, first and foremost the latter's nationals, from gross violations of their human rights, in particular genocide and "ethnic cleansing", by the authorities of that state*

## 31. Individual criminal responsibility under international law (IL)

*collective responsibility: one of the principal weaknesses of IL*

*ad hoc international criminal tribunals: ICTY, ICTR, Sierra Leone, Timor Leste, Cambodia, Lebanon*

+ *jurisdiction based on UN Security Council resolution binding on all member states*

*primacy over national courts*

– *limited to a specific conflict: geographical and time limits*

*the International Criminal Court (ICC)*

+ *permanent court*

– *jurisdiction limited to parties to ICC Statute*

– *subsidiary jurisdiction*

*jurisdiction limited to serious violations of international humanitarian law and law of war: 4 Geneva Conventions of 1949, law of war, genocide, crimes against humanity*  
*the official position of a person including that of head of state or government does not relieve of criminal responsibility nor mitigate punishment*

## 32. Courts and tribunals or truth commissions: justice vs. reconciliation?

*courts and tribunals: perpetrators punished*

- + *justice served*  
*satisfaction for victims and relatives, supporters*  
*deterrence: special and general prevention*
- *possibly divisive – conflicts not solved, exacerbated*  
*deterrence, prevention not foregone conclusion*  
*backward-looking*  
*retributive*

*truth commissions: perpetrators admit facts + express*

*regrets, ask for forgiveness – victims have a voice and audience*

- + *reconciliation*  
*integrative*  
*forward-looking*
- *victims may not be satisfied*  
*future perpetrators encouraged*

## 33. “Operation Iraqi Freedom”: the Legal Dimension

### **SC Res. 678 (1990):**

*The Security Council...*

*“2. Authorizes Member States co-operating with the Government of Kuwait,...to use all necessary means ...to restore international peace and security in the area.”*

### **SC Res. 687 (1991):**

*inter alia, formal cease-fire and ban on weapons of mass destruction imposed on Iraq at the end of “Operation Desert Storm”*

### **SC Res. 1441 (2002):**

*The Security Council...*

*“4.. Decides that false statements or omissions in the declarations by Iraq pursuant to this resolution and failure by Iraq to at any time to comply with, and cooperate fully in the implementation of this resolution shall constitute a further material breach of Iraq’s obligations and will be reported to the Council...”*

*“13. Recalls, in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations;”*

1. need for specification of “serious consequences” by SC in another resolution?
2. may individual member states or only the SC suspend the cease-fire after a material breach of Res 687 by Iraq?
3. may the authorization in Res 678 be reactivated by individual member states?

## 34. The UN Security Council: The recent record

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- *Nuclear North Korea: toothless targeted sanctions*
- *Iran's nuclear programme: toothless targeted sanctions*
- *the “non-genocide” in Darfur: ineffective targeted sanctions and a crippled hybrid peace operation (UNAMID)*

## 35. Self-defence under Article 51 UN Charter: 6 issues

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1. *lawfulness of anticipatory self-defence*
2. *definition of an armed attack*
3. *targets of armed attacks entitling to self-defence*
4. *necessity and proportionality still required?*
5. *wars of liberation as a form of self-defence?*
6. *self-defence and great power zones of influence?*

## 36. Anticipatory (pre-emptive, preventive)

### self-defence lawful?

**YES!**

#### **a) legal arguments**

1. “inherent” right: reference to GPL, customary IL – “Caroline” 1837: self-defence against “instant” attack included
2. travaux préparatoires: intention of authors of Article 51 to safeguard regional self-defence system, not change existing IL
3. “if”, not “if, and only if” = logical reading
4. definition of aggression in GA Res 3314 (XXIX): first use of force only prima facie act of aggression
5. *in dubio mitius*: restrictions on state sovereignty not presumed

#### **b) non-legal arguments**

1. in political and military reality, prohibition reward for aggressor: “sitting duck” problem – aggressor can choose optimal time and location for attack
2. preventive self-defence necessary against rogue States and terrorists: cannot be deterred – ready to strike, use WMDs

**NO!**

#### **a) legal arguments**

1. ordinary meaning “occurs”: Article 31 VCLT textual interpretation
2. teleological interpretation: main objective of UN Charter limit resort to force
3. context of the treaty; “threat” mentioned in Articles 2(4) and 39, not 51
4. restrictive interpretation of exception to the rule in Article 2 (4)
5. UN practice rather in this sense
6. treaties on collective self-defence (NATO etc) refer to armed attack, not imminent armed attack

#### **b) non-legal arguments**

1. state which feels threatened can prepare defence, turn to UN, regional IGOs, allies
2. in line with deterrence strategy of nuclear Great Powers: 2nd strike capabilities = can wait for 1st nuclear strike

## 37. “Classical” definition of the requirements of self-defence

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*U.S. Secretary of State Daniel Webster after the “Caroline” incident of 1837:*

*...”the necessity of self-defence is instant, overwhelming, leaving no choice of means, and no moment for deliberation.”*

## 38. “Operation Enduring Freedom” as self-defence: 6 issues

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1. *hijacked airplanes as instruments of an armed attack?*
2. *self-defence against a non-State transnational actor?*
3. *self-defence against a State accused of sheltering terrorists?*
4. *self-defence against a completed armed attack?*
5. *proportionality and necessity?*
6. *self-defence after measures taken by the UN Security Council?*

## 39 . The main methods for the peaceful settlement of international disputes

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1. *direct negotiations between the conflicting parties*
2. *good offices: negotiation facilities and communication channels offered by a third party*
3. *enquiry, investigation, fact-finding: clarification of facts by a third party*
4. *mediation: comments and non-binding proposals offered by a third party*
5. *conciliation: institutionalised weak mediation*
6. *arbitration and adjudication: a decision by a third party binding on the parties and based on international law*

## 40. Four possible contributions of mediation

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1. *help the conflicting parties save face*
2. *the mediator's political capital of higher trust*
3. *the intellectual input: solutions overlooked by the parties in the "heat of the dispute"*
4. *the material input: carrots and sticks*

Figure 20. Where are the two ladies?



Picture designed by the American psychologist E.G. Boring.

# 41. The advantages of arbitration and adjudication

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1. *a settlement based on the law binding on the parties irrespective of their power – Is the law always just and not shaped by power? Is a “winner-takes-it-all” solution which is not favoured by all civilizations always satisfactory?*
2. *a legally binding settlement – the problem of enforcement*
3. *arbitrators and judges are impartial – the influence of political, ideological, cultural factors on all human beings*
4. *the voluntary recognition of the jurisdiction of international courts and tribunals in advance as a manifestation of sovereignty – free choice of means for every dispute?*
5. *the obligatory jurisdiction of courts and tribunals reflects a higher degree of integration of the international community – a still heterogeneous international society?*
6. *arbitration and adjudication fill gaps in international law – no law-making by judges and arbitrators, gaps left deliberately open by sovereign states?*

## 42. The right of self-determination of peoples: 5 questions

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1. *legal right or political principle?*
2. *self-determination of all or only some peoples?*
3. *contents of the rights: only internal or also external self-determination = each people entitled to a State of its own?*
4. *lawful means to enforce self-determination: armed force also permitted?*
5. *who is a people? ethnic/cultural similarities vs. “uti possidetis”*

## 43. The Kosovo conundrum

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1. *self-determination vs. territorial integrity: the fundamental dilemma*
2. *the Kosovars – a people entitled to self-determination? The limits of uti possidetis in the former SFRY*
3. *Security Council Resolution 1244 – a sufficient legal basis for independence?*
4. *secession – a factual, not a legal phenomenon: neither permitted nor prohibited by international law*
5. *the recognition issue – is the Kosovo government effective?*
6. *the advisory opinion of the ICJ: avoiding issues of substance*
7. *Kosovo – a unique case, not a precedent?*
8. *EULEX KOSOVO – the EU skating on thin legal ice?*