Folkerett

2. Folkerettens metode

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Folkerettens metode

- **ICJs statutt artikkel 38**
- Rettskilder og rettskildefaktorer
- Hierarki blant rettskilder?
- Traktater
  - Hva er en traktat?
  - Kategorier
  - Forhold til sedvanerett
  - Avgrensning til internasjonal privatrett
- Folkerettslig sedvanerett
  - Statspraksis **Germany v. Italy (2012)**
  - *Opinio juris* **Kontinentalsokkel (1969)**
Creation of Customary International Law

- Article 38(1) (b)
  - General Practice = State Practice
    - Consistency / Uniform
    - Generality
    - Duration
  - As accepted as law
    - Opinio Juris
Folkerettens metode

- Alminnelige rettsgrunnsetninger
- Rettspraksis
- Rettslig teori
- Ensidige erklæringer Prøvesprengningssaken
- Vedtak av internasjonale organisasjoner
  - Bindende vedtak
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- Jus cogens Art. 53, 64, 66 (a), 71 VCLT
Artikkel 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
Germany v. Italy (ICJ 2012)

• 55. … In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. Opinio juris in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.
“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.”

"... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character."

Barcelona Traction [(Belgium v Spain) (Second Phase) ICJ Rep 1970 3 paragraphs 33, 34]
‘Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. … The States concerned must feel that they are conforming to what amounts to a legal obligation.’

(North Sea Continental Shelf cases, ICJ Rep., 1969, p. 3 at 44)
Legal consequences of the construction of a wall in the Occupied Palestinian Territories” 2004

“155. The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature “the concern of all States” and, “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.” (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33.) The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.”