

IS 101

Week 5: International Law and Human Rights

News this week IS 101

Headlines

Israel-Gaza war

Trump doubles down on Gaza takeover proposal despite bipartisan opposition

President says territory would be 'turned over' to US by Israel as it emerges idea was not discussed with aides

4h ago

● **Live** Trump's plan for Gaza would 'squash' ceasefire and 'incite return of fighting', Egypt says



'Worst nightmare' Egypt and Jordan put in impossible bind by Trump Gaza plan



Gaza Israel tells army to prepare plan for Palestinians to voluntarily leave



US foreign policy

Authoritarian regimes around the world cheer on dismantling of USAid

1h ago

Panama Panama accuses US of peddling 'intolerable falsehood' about canal

Is there any precedent?

Source: <https://thediplomat.com/2019/05/a-decade-without-justice-for-sri-lankas-tamils/>. You may use this source to supplement your review: <https://hir.harvard.edu/sri-lankan-civil-war/>

On May 18, 2009, the Sri Lankan government declared an end to a 26-year-long armed conflict after committing mass atrocities, including allegations of genocide. The atrocities are well-documented, and the military's intentional shelling of government-designated "No Fire Zones" (NFZs) alone was primarily responsible for killing 70,000–140,000 Tamil civilians, maiming another 25,000–30,000, and displacing at least 300,000.

A Decade Without Justice for Sri Lanka's Tamils

May 18 is an important reminder that while the country's armed conflict may have ended, the search for elusive justice continues.

By Anjali Manivannan

May 17, 2019



You may use these sources to supplement the video: <https://www.bbc.com/news/world-asia-india-67634689>
<https://commonslibrary.parliament.uk/kashmir-the-effects-of-revoking-article-370/>



Why should we study human rights and international law together?

Because we are studying how things work across the world. In the global system, one of the roles played by international law is to uphold human rights.

International law also protects other rights (in theory). For instance, if two states agree on a set of conditions under which trade will take place, they have agreed on a treaty. Maintaining the obligations listed under the terms of the treaty is a right protected by international law.

All of this sounds straightforward enough, but it is not. To understand why the implementation of international law can be quite complicated, I would like you to think about why the following slide has “in theory” written in brackets. What does this imply?

“International law also protects other rights (in theory)”


This statement implies that international law is intended to protect certain rights, but it is not always able to do so.

In order to understand how this global system of law operates, we now need to understand what international law is, what it is meant to do and why it is not always able to achieve its purpose.

What is international law? The UN describes it as a system that “defined the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries.” [source](#)

International law's domain encompasses a wide range of issues of international concern, such as human rights, disarmament, international crime, refugees, migration, problems of nationality, the treatment of prisoners, the use of force, and the conduct of war, among others.

International law also regulates the global commons, such as the environment and sustainable development, international waters, outer space, global communications and world trade.



We will begin by discussing the role of international law in the world today. We will do this by exploring the United Nations pages that discuss how the institution “upholds international law” You may read the entirety of this page [here](#) in your own time.

- To begin with, we will look at the preamble of the United Nations Charter. (This is different from the Universal Declaration of Human Rights). Think of this charter as a constitution of sorts explaining what the objectives and responsibilities of the UN are.
- In this preamble, pay particular attention to the wording. According to this statement, does it seem like the United Nations is able to enforce or even maintain international law? Do you think this wording is deliberate?

United Nations Charter (full text)

Preamble

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom,

It states that creating the “conditions” for maintaining international law is important, but crucially, skips saying that it can aid in “enforcement”. If we look further at the charter, this role becomes clearer:

Chapter I: Purposes and Principles

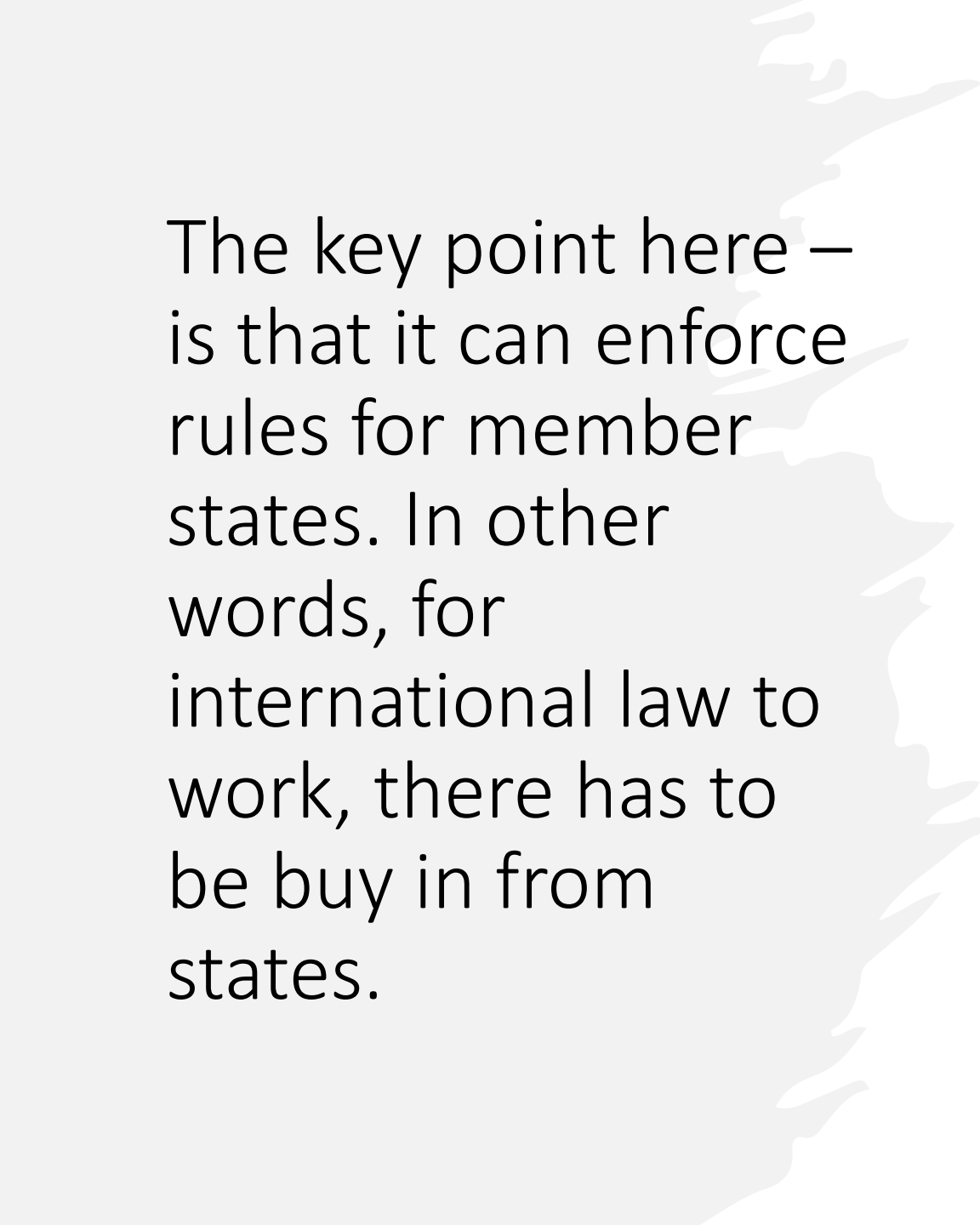
Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

So it is clear that one of the main roles of the United Nations is to maintain peace. This is a political role (which is why we discussed it under the session on political globalization). We also know it has evolved with the times (as seen by the example of its support for the 1960 resolution).

However, can an international organization that does not enforce law, ever be successful at maintaining peace?



The key point here –
is that it can enforce
rules for member
states. In other
words, for
international law to
work, there has to
be buy in from
states.

Think back to our discussion from last week about the UN bringing forth the 1960 resolution condemning colonialism. Why was “buy in” necessary for that? What makes this idea of “buy in” so crucially important for the application of international law?

The main issue for an individual country in the global system, is that international law should not impinge on their sovereignty.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

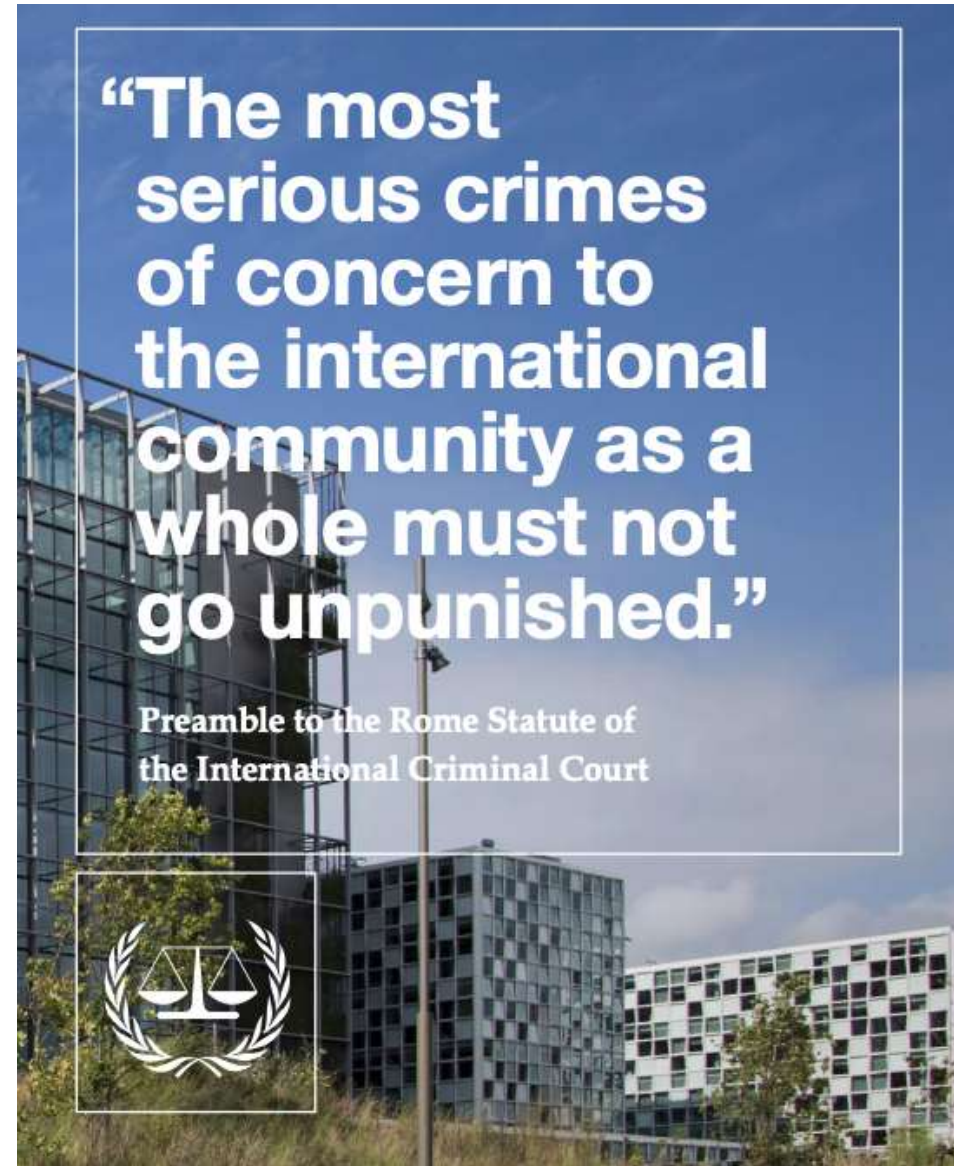
- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions 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.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

The international law system and its attendant institutions took a long time to develop. Some of what is described in the next few slides comes from the documents produced by the International Criminal Court (ICC) which you can read [here](#).

The picture on the right refers to the Rome Statute which was discussed in 1998 and came into force in 2002. Signatories to the Rome Statute accepted the jurisdiction of a permanent international criminal court to prosecute those who committed **the most serious crimes**.





Explainer – what are “the most serious crimes”?

They include:

Genocide, crimes against humanity and war crimes.

What is genocide?

According to the Rome Statute, “genocide” means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

What are war crimes?

“War crimes” include grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict and in conflicts “not of an international character” listed in the Rome Statute, when they are committed as part of a plan or policy or on a large scale. These prohibited acts include:

- murder;
- mutilation, cruel treatment and torture;
- taking of hostages;
- intentionally directing attacks against the civilian population;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals;
- pillaging;
- rape, sexual slavery, forced pregnancy or any other form of sexual violence;
- conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

What are crimes against humanity?

“Crimes against humanity” include any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
- enforced disappearance of persons;
- the crime of apartheid;
- other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.

After 2017, the ICC's jurisdiction also included "crimes of aggression" (when a state plans, prepares, initiates or executes an act using armed force against the sovereignty, territorial integrity or political independence of another state).

Does this mean that the ICC has jurisdiction for all of these 4 types of crimes?

No.

The state has to have accepted the jurisdiction of the court.

This then is the central point and we will use the introduction from your reading (by Klabbers) to make this point:

"Since states are considered to be sovereign, it follows that there is no authority above them; and if there is no authority above them, it follows that law can only be made with their consent...Hence, international law is often said to be a consent based system."

The formation of international military tribunals to try war criminals led to the Nuremberg and Tokyo trials after WWII.

- who provided prosecutors and judges?

Australia, India, Canada, China, France, the Netherlands, New Zealand, Soviet Union, Philippines, UK, United States

The International Court of Justice was formed after WWII. Its precursor was the Permanent Court of International Justice (formed in 1920). It was established by the UN Charter in 1945. States have to accept its jurisdiction.

It dealt with public international law. Let's look at what this means by analyzing your reading.



Klabbers – what was the importance of the Lotus (1926) and Wimbledon (1921) cases?

They showed that states have to consent to international law and that rules (made by states) then decide what is or is not allowed.

The main takeaway from these two cases is this: “in a horizontal order of sovereign equal international law is by no means impossible”. *Try and say this in your own words. If you are able to follow this you have gotten to the main point.

Main themes in this reading:

- 1. International law and what it is**
- 2. How sovereign states may have disagreements with the system of international law, but ultimately international law and state sovereignty are considered to be mutually compatible.**
- 3. How laws are made in international law and how customary law was decided.**

On customary law: there must be a general practice AND that general practice must be accompanied by a sense of legal obligation.

This sounds very complicated, but can actually be worked out in practice.



Customary law and Pacquete Habana (1898)

During the Spanish-American war the US seized two Cuban fishing vessels.

Owners claimed that the US had no right, even in times of war.

The court, in studying the case, found that orders given by the English King, Henry IV in the 15th century, had said that fishing vessels were not to be seized in wartime. *Is that sufficient to make a case?*

So at the end of your main reading, let us sum up what we need to know about the sources of international law. [Source](#)

Where does international law come from and how is it made ? These are more difficult questions than one might expect and require considerable care. In particular, it is dangerous to try to transfer ideas from national legal systems to the very different context of international law. There is no “Code of International Law”. International law has no Parliament and nothing that can really be described as legislation. While there is an International Court of Justice and a range of specialised international courts and tribunals, their jurisdiction is critically dependent upon the consent of States and they lack what can properly be described as a compulsory jurisdiction of the kind possessed by national courts.

The result is that international law is made largely on a decentralised basis by the actions of the 192 States which make up the international community. The Statute of the ICJ, Art. 38 identifies five sources:-

- (a) Treaties between States;
- (b) Customary international law derived from the practice of States;
- (c) General principles of law recognized by civilised nations; and, as subsidiary means for the determination of rules of international law;
- (d) Judicial decisions and the writings of “the most highly qualified publicists”.

This list is no longer thought to be complete but it provides a useful starting point.

Example of how international law is decided in the more contemporary context: the case of expulsion of aliens (an issue raised in the 78th session of the sixth committee which was held on the 5th of September 2023). First – what is the sixth committee?

Main UN bodies and international law

THE SECURITY COUNCIL AND INTERNATIONAL LAW

Some of the action of the Security Council have international law implications, such as those related to peacekeeping missions, ad hoc tribunals, sanctions, and resolutions adopted under Chapter VII of the Charter. In accordance with Article 13(b) of the Rome Statute, the Security Council can refer certain situations to the Prosecutor of the International Criminal Court (ICC), if it appears international crimes (such as genocide, crimes against humanity, war crimes, the crime of aggression) have been committed.


THE GENERAL ASSEMBLY AND INTERNATIONAL LAW

The UN Charter gives the General Assembly the power to initiate studies and make recommendations to promote the development and codification of international law. Many subsidiary bodies of the General Assembly consider specific areas of international law and report to the plenary. Most legal matters are referred the Sixth Committee, which then reports to the plenary. The International Law Commission and the UN Commission on International Trade Law report to the General Assembly. The General Assembly also considers topics related to the institutional law of the United Nations, such as the adoption of the Staff Regulations and the establishment of the system of internal justice.

GENERAL ASSEMBLY - SIXTH COMMITTEE (LEGAL)

The General Assembly's Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. All UN Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly.

The discussion description is below, but it does not give us enough information to understand why this issue has not had codified law made for so long. What is the disagreement about? Can you guess?



Expulsion of Aliens (Agenda item 81)

- Authority: [resolution 75/137](#)



Documentation

- [Draft articles on the expulsion of aliens, and commentaries](#)

Summary of work

Background (source: [A/78/100](#))

At its sixty-ninth session, in 2014, the General Assembly, under the item entitled "Report of the International Law Commission on the work of its sixty-sixth session", considered chapter IV of the report of the Commission, which contained the draft articles on the expulsion of aliens together with a recommendation, in paragraph 42, that the Assembly: (a) take note of the draft articles on the expulsion of aliens in a resolution, annex the articles to the resolution and encourage their widest possible dissemination; and (b) consider, at a later stage, the elaboration of a convention on the basis of the draft articles. The Assembly welcomed the conclusion of the work of the Commission on the expulsion of aliens, expressed its appreciation to the Commission for its continuing contribution to the codification and progressive development of international law, took note of the recommendation of the International Law Commission contained in paragraph 42 of its report and decided to include in the provisional agenda of its seventy-second session an item entitled "Expulsion of aliens" (resolution [69/119](#)).

The Assembly has had the item on its agenda triennially since its seventy-second session (resolutions [72/117](#) and [75/137](#)).

At its [seventy-fifth session](#), the Assembly allocated the item to the Sixth Committee, where statements in the debate were made by 13 delegations (see [A/C.6/75/SR.16](#)). The Assembly decided to include the item in the provisional agenda of its seventy-eighth session, with a view to examining, inter alia, the question of the form that might be given to the articles or any other appropriate action (resolution [75/137](#)).

In order to understand the issue, we can go to the discussion. You can read the full version [here](#). We will compare some of the statements made by officials representing Singapore, the US and El Salvador respectively.

To understand Singapore's perspective we need to know what "non-refoulement" is in international law

66. **Ms. Tan** (Singapore) said that the topic of expulsion of aliens had been difficult because of the complex and sensitive interface between a State's sovereign right to expel aliens from its territory and that State's obligation to comply with applicable international human rights law, the rights and obligations of receiving States and those of individuals. The progressive development of laws and practices applicable to the expulsion of aliens must be approached with caution.

67. Singapore had made its views on the topic very clear at previous debates and continued to have concerns about the content of the draft articles and the extent to which the International Law Commission had sought to progressively develop the law through them. It also had concerns about the lack of distinction between codification and progressive development in the draft articles and the commentaries thereto. Her delegation had consistently disagreed with the expansion of the principle of non-refoulement articulated in paragraph 2 of draft article 23, which was not reflective of customary international law, since under that law, a State that had abolished the death penalty was under no obligation not to expel a person to another State where the death penalty might be imposed.

69. **Ms. Grosso** (United States of America) said that her Government continued to question the wisdom and utility of seeking to augment well-settled rules of law that existed in broadly ratified human rights and refugee conventions, which already provided the legal basis for achieving the key objectives of the draft articles. Furthermore, key aspects of the draft articles risked being confused with existing rules of law, because the Commission had combined in the same provision elements of existing rules with elements that represented proposals for the progressive development of the law. Accordingly, her delegation did not believe that it was appropriate to elaborate a convention on the basis of the draft articles.

Now we will compare these two statements with the statement made by Ms. Gonzalez Lopez of El Salvador and ask whether you can see why these issues have taken so long and what the main issue of contention is.

Excerpts from paragraph 73 and 74 containing the statements of the El Salvadore delegation. This was clearly responding to international issues such as the treatment of children at the US border.

73. The draft articles did not, however, make any distinction between persons subjected to a detention process. In that connection, it was important to take into consideration advisory opinion OC-21/14 of the Inter-American Court of Human Rights, where the Court noted that States might not resort to the deprivation of liberty of children who were with their parents, or those who were unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings. Some of the draft articles needed to be amended in light of the aspects that had already been consolidated in international human rights law and

74. Her delegation welcomed the modalities adopted in the current draft articles, but believed that a technical update was the best course of action to ensure continuous discussion of the draft articles, because although six years had passed since the conclusion of the work of the International Law Commission on the topic, the issues concerning the treatment of migrants and refugees remained and had been exacerbated by the COVID-19 pandemic.

So what can we learn from this case study?

1. The issue of the power of the international system versus the sovereignty of the nation-state is a crucial one in international law. (We also discussed this issue in the module on “political globalization”).
2. International law is a progressive system. It develops and changes over time and requires international consultation. As a result of conflicting priorities in this process, the codification of international law is a very difficult, long process.
3. International law is a responsive system. It changes depending on global challenges and political events. From your reading: “International law does not have a specific document specifying how it is made” Both the sources and principles of international law develop and adapt to the international context and the priorities of states. *As such, discussion, inclusion and investment in maintaining the system is crucial for it to work.*

(1) Which human rights are threatened or violated by violence and state inaction described in “Rainforest Mafias”?

(2) What are the most promising or constructive steps that international actors can take to protect the rights that are at stake in this case?

(3) Make one policy suggestion that, based on the readings and lecture, would make international law more effective in Brazil

- In tutorial we watched the video linked in your canvas and then divided into groups to try and answer these questions in order to apply the principles of international law, (as discussed in the lecture) to the real life case study of the Brazilian rainforest crisis.