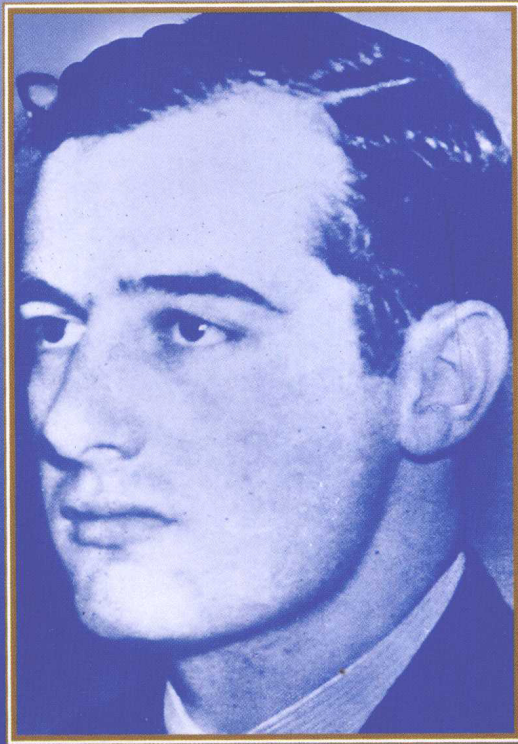


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The Concept of Group Rights in International Law

Groups as Contested Right-Holders,
Subjects and Legal Persons



By Corsin Bisaz

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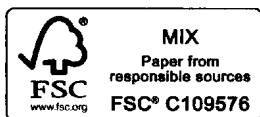
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Table of Cases

ACHPR

Centre for Minority Rights Development (Kenya) and Minority Rights Group
International on behalf of Endorois Welfare Council v. Kenya, 4 February
2010 123

CERD

Jewish Community of Oslo et al. v. Norway, 15 August 2005 77

ECtHR

Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009 207

Thlimmenos v. Greece, 6 April 2000 73, 189

HRCee

Ángela Poma Poma v. Peru, 27 March 2009 113, 114

Apirana Mahuika et al. v. New Zealand, 27 October 2000 114, 115

Chief Bernard Ominayak and Lubicon Lake Band v. Canada, 26 March 1990 112,
113, 115, 116

Ilmari Länsman et al. v. Finland, 26 October 1994 113

Jouni Länsman et al. v. Finland, 15 April 2005 113

Kitok v. Sweden, 27 July 1988 114

Marie-Hélène Gillot et al. v. France, 15 July 2007 63, 115

Sandra Lovelace v. Canada, 30 July 1981 114

IACmHR

Grand Chief Michael Mitchell v. Canada, 25 July 2008 113

IACtHR

Juridical Condition and Human Rights of the Undocumented Migrants, 17
September 2003, Advisory Opinion 69

ICJ

Accordance with International Law of the Unilateral Declaration of Independence
in Respect of Kosovo, 22 July 2010, Advisory Opinion 192

Accordance with International Law of the Unilateral Declaration of Independence
in Respect of Kosovo, 22 July 2010, Advisory Opinion: Koroma (Dissenting
Opinion) 192

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007 95, 96, 105, 106, 107

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 8 April 1993, Provisional Measures, Order: Weeramantry (Separate Opinion) 25

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 11 July 1996, Preliminary Objections 106

Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), 3 February 2006, Jurisdiction and Admissibility 97

Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain) Second Phase, 5 February 1970 53, 69

East Timor (Portugal v. Australia), 30 June 1995 51, 53, 64

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, Advisory Opinion 51, 53, 54, 64, 196

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, Advisory Opinion: Higgins (Separate Opinion) 51

Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, Advisory Opinion 37, 39, 130

Western Sahara, 16 October 1975, Advisory Opinion 64, 129, 130

ICTR

Prosecutor v. Clément Kayishema and Obed Ruzindana, 21 May 1999 93, 94

Prosecutor v. Georges Anderson Nderubumwe Rutaganda, 6 December 1999 94, 95

Prosecutor v. Jean-Paul Akayesu, 2 September 1998 90, 92, 93

ICTY

Prosecutor v. Duško Tadić, 7 May 1997 98

Prosecutor v. Goran Jelisić, 14 December 1999 96, 102

Prosecutor v. Milomir Stakić, 22 March 2006, Appeal Judgement 95, 96

Prosecutor v. Radislav Krstić, 2 August 2001 94

Prosecutor v. Radoslav Brđanin, 1 September 2004 95

Prosecutor v. Tihomir Blaškić, 3 March 2000 101

Prosecutor v. Vujadin Popović et al., 10 June 2010 95, 96, 207

Prosecutor v. Zoran Kupreškić et al., 14 January 2000 102, 207

PCIJ

Minority Schools in Albania, 6 April 1935, Advisory Opinion 44

Supreme Court of Canada

Reference re Secession of Quebec, 20 August 1998 57

Table of Treaties, Declarations and Other Documents

- Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), 8 August 1945 86
- Charter of the UN, 26 June 1945 45, 48, 49, 50, 51, 52, 53, 62, 70, 176, 182, 183, 185, 186, 196
- Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 68, 75
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 20, 86–97, 104–107, 129, 130
- Council of Europe
- Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 69
 - Framework Convention for the Protection of National Minorities, 1 February 1995 107, 117, 198
 - Protocol No. 12 to the ECHR, 4 November 2000 69
- European Union
- Conclusions of the Presidency of the European Council in Copenhagen, 21–22 June 1993 117
- Geneva Red Cross Conventions (I–IV), 12 August 1949 79–85, 92, 99
- ILC
- Draft Articles on Responsibility of States for Internationally Wrongful Acts, 12 December 2001 85, 197
- ILO
- Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989 121, 122, 123, 124, 125
 - Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957 121
- International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 65, 68, 73, 74, 75, 76, 77, 103, 185
- International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973 104

- International Covenant on Civil and Political Rights, 16 December 1966 49, 54, 60, 65, 68, 69, 75, 108, 109, 110, 112, 113, 114, 115, 116, 117, 119, 120, 125, 128, 156, 194
- International Covenant on Economic, Social and Cultural Rights, 16 December 1966 49, 54, 68, 71, 156
- League of Nations
- Covenant of the League of Nations, 28 April 1919 66
- Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966 62, 115, 116
- OSCE
- Conference on Security and Co-operation in Europe Final Act, Helsinki 1975, 1 August 1975 50
- The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, September 1999 189
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 July 1977 81
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 3 May 1996 82
- Rome Statute of the International Criminal Court, 17 July 1998 85, 86, 88, 92, 97, 99, 100, 102, 103
- UN GA
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006 195, 196
- Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, Res. 2625(XXV) 49, 50, 56, 62
- Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, Res. 1514(XV) 48
- Declaration on the Rights of Indigenous Peoples, 2 October 2007 121
- Declaration on the Rights of Persons Belonging to National of Ethnic, Religious and Linguistic Minorities, 18 December 1992 117, 118
- Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, 15 December 1960, Res. 1541(XV) 49
- Resolution on the Crime of Genocide, 11 December 1946, Res. 96(I) 88, 89
- Universal Declaration of Human Rights, 10 December 1948, Res. 217(III) 45, 70, 78, 104, 182
- Vienna Declaration and Programme of Action, 12 July 1993 56
- UN Security Council
- Resolution 217 (1965), 20 November 1965 196
- Resolution 418 (1977), 4 November 1977 196
- Resolution 1244 (1999) on the Situation Relating Kosovo, 10 June 1999 58
- Vienna Convention on the Law of Treaties, 23 May 1969 105, 109, 116

Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
art., arts.	Article(s)
CCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CETS	Council of Europe Treaty Series
CSCE	Conference on Security and Cooperation in Europe
ed., eds.	editor(s)
edn.	edition
et al.	and others
ETS	European Treaty Series
et seq.	and following
fn., fns.	footnote(s)
HRCee	Human Rights Committee
i.e.	that is
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Reports	Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organisation
NGO	non-governmental organisation
no.	number

OSCE	Organisation for Security and Co-operation in Europe, former Conference on Security and Co-operation in Europe (CSCE)
p., pp.	page(s)
para., paras.	paragraph(s)
PCIJ	Permanent Court of International Justice
SC	Security Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN GA	United Nations General Assembly
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

Table of Contents

Acknowledgements	vii
Table of Cases	ix
Table of Treaties, Declarations and Other Documents	xi
Abbreviations	xiii
Introduction	1
1. Group Rights: Rights, Subjects and Legal Personality	7
1.1. Rights and Groups as Their Bearers	7
1.1.1. Defining and Delimiting Group Rights	7
1.1.2. Group Rights and the Concept of Rights	12
1.1.3. The Third-Party Beneficiary and the Criminal Law Problem	20
1.1.4. Rights as Rules and Principles	22
1.1.5. Rights and the Problem of Coercion in International Law	23
1.1.6. 'Group Rights' as a Legal Category – A Paradox?	26
1.2. The Subjects	28
1.3. The Concept of Legal Personality	33
2. 'Group Rights' in Contemporary International Law	43
2.1. Groups and International Law	44
2.2. Groups and the Concept of Self-Determination	45
2.2.1. Some Main Features	46
2.2.2. The Legal Right	51
2.2.3. The Subject	61
2.3. Groups and the Concept of Equality and Non-Discrimination in International Law	66
2.3.1. Some Main Features	67
2.3.2. The Legal Right	68
2.3.3. The Subject	70
2.4. Some Concrete Group Rights in International Law	77
2.4.1. Humanitarian Law and the Creation of States	78

2.4.2.	International Criminal Law	85
2.4.3.	Obligation to Prevent Genocide	104
2.4.4.	Rights of 'Minorities'	107
2.4.5.	Rights of Indigenous Peoples	120
2.4.6.	Protection of Family	125
3.	Features of Existing Group Rights and Discussions on Group Rights	127
3.1.	Observations Regarding Rights, Subjects and Legal Personality	127
3.2.	Group Rights in Philosophical Debates	132
3.2.1.	Romanticism/Nationalism versus Liberalism	134
3.2.2.	Collectivism versus Individualism	143
3.2.3.	Group Rights versus Individual Rights	149
3.2.4.	Group Rights, Fundamental Rights and Human Rights	153
3.3.	Concluding Remarks	157
4.	Reappraising the Concept of Group Rights in International Law	159
4.1.	Some Key Issues	161
4.1.1.	The Inadequacy of <i>A Priori</i> Approaches	161
4.1.2.	Exclusive Nationalism	163
4.1.3.	Group Rights and the Public-Private Distinction	165
4.1.4.	The Need for Locally-Designed Solutions: Political versus Legal Sphere	169
4.1.5.	The Limits of Norms on Group Governance in International Law	176
4.2.	Rights: Elements of a Principled Approach of International Law	178
4.2.1.	Principles on Substate Groups	179
4.2.2.	Equality and Self-Determination as Principles	182
4.2.3.	A Substantive Distinction of Claims	191
4.2.4.	The Lack of International Enforcement Mechanisms	195
4.3.	Subjects	198
4.3.1.	Categorising Groups or Claims?	198
4.3.2.	Claimant's Attributes Strengthening Its Claims	200
4.3.3.	Definition Requirements: Projected Groups and Identity Groups	201
4.4.	Legal Personality as Recognition	203
4.5.	Some Remarks on the Implications	206
4.5.1.	Implications for States and Groups	207
4.5.2.	Implications for the Legal Concept Itself	209
	Conclusions	211
	Bibliography	215
	Index	241

Introduction

Conflicts today are frequently connected with substate groups of different cultures, ethnicities, and/or religious beliefs and their claims. International law has for a long time tried to ignore such 'internal' matters of states. However, in the run of the 'human rights revolution' and in light of mass atrocities, as well as the experiences of spill-overs from 'internal' conflicts becoming severe threats of international peace and security, it has become obvious that international law's classical limitation to inter-state relations has become inappropriate in this field as well. Yet, international law still has to find its role in this context and an adequate approach to prevent and resolve 'internal' conflicts. Generally, conflict prevention and conflict resolution can be achieved through several political and legal instruments. Among others, 'group rights' are being propagated as a possible means for this purpose. However, this category of rights is highly controversial.

The debate on group rights in international law is not new. In fact, since substate groups have always had some importance in international relations and from the very beginning of the UN era, the topic of group rights existed; nevertheless, it was only in the 1970s and 1980s that it gained attention from political and legal scholars as well as legislators. Still, international law only rarely provides rights and/or duties to groups and often does so in a very cautious way. Although the topic of group rights is not new, it has turned out that there is considerable confusion with regard to what group rights are as well as an ideological bias towards the concept itself; as a result, a pragmatic use of this category of rights appears to be beyond what can be expected from the international community today. Overall, this means that international law might ignore a useful legal means to tackle problems between substate groups as well as between groups and states. In light of the importance of such conflicts, this is highly regrettable.

Interest in the Topic

The concept of group rights is strongly contested and has resulted in a huge amount of literature on the topic, mainly in the form of articles, and – this is also interesting – mainly in the field of (political) philosophy. There are admittedly

some monographs on group rights, some even in the field of legal science; however, already this first impression deserves attention as we are talking about an inherently legal category of remarkable complexity. Astonishingly, the literature often tackles the topic on a rather abstract level with few references to concrete examples in existing legal systems, although such examples exist and could add substantially to its understanding. More importantly, a very ideological way of arguing is widespread and reflects a dogmatic understanding of the topic which can be seen as one of the main reasons why international law has been very reluctant so far to provide group rights and to call them by their name.

Main Research Question

In order to elaborate a more consistent view of the concept and its reality in international law as well as to provide a more coherent approach of international law to substate groups, this work will tackle the following research question: is the reluctance to provide group rights in international law justified?

‘Justified’ shall mean for this purpose that the provision of such rights is made on the basis of a realistic evaluation of the problem which has to be handled by law, as well as a realistic evaluation of the legal means to do so. An evaluation is realistic when it is led by facts. In other words, when the provision or non-provision of group rights in international law is made without reasons or for reasons disconnected from concrete facts (this might be the case with ideologies), it is unjustified according to this understanding. In the following, this approach will be called ‘pragmatic’ as opposed to ‘ideological’.

It is argued that problems on a conceptual level are connected with three questions: First, can groups from a conceptual point of view be right-holders? Second, can groups be defined in a reasonably exact way? Third, are groups having rights and/or duties under international law legal persons? Therefore, throughout this work the issue will be discussed from these three different angles: groups as right-holders (connected with the concept of legal rights), groups as subjects (problems of definition), and groups as legal persons (connected with the legal concepts of subjectivity/personality/capacity). Of course, these three perspectives are strongly interconnected; it is nevertheless useful to take each of them into account as each of them includes an additional set of questions.

Aim of the Work

The aim of the work is to provide an overview of a substantial part of group rights in international law, *i.e.* group rights connected with the existence and cultural or political continuation of substate groups, to give an impression of how they are discussed in philosophy, and to outline a better approach for their understanding and use in international law. In other words, the work aims at unravelling the many layers of the topic and intends to provide a less ideological and more coherent understanding of the concept of group rights in order to allow legislators to

base their provision or non-provision of group rights on more rational grounds than is common today. This might enable legislators to provide group rights in cases where such rights more adequately address a situation than other forms of regulation. Overall, the scope of this work is broad and the aim is to build on the experiences of group rights in international law in order to strengthen the understanding of the concept and its use in international law.

Structure and Methods

This work consists of four main chapters. In chapter 1, the theoretical foundation of group rights will be laid out, the aim is to clarify definitions and concepts relevant to the topic. This discussion belongs to the realm of political and legal philosophy and provides an understanding of the concept of group rights and its related philosophical problems.

In chapter 2, existing group rights in international law connected with self-government in a broader sense will be searched for and analysed with a special focus on issues connected with the concept of rights, as well as with the 'group' as subject and its contested legal personality. It is based on the previously introduced conceptual framework and focuses in its legal analysis of group rights in international law on the issues which were considered important according to the analysis in chapter 1. Moreover, this legal analysis of contemporary international law serves as a factual point of reference for the theoretical discussion as well as for legislation confronted with issues concerning groups. The idea is that existing examples of group rights in international law could clarify the strengths, weaknesses, dangers and chances of group rights and indicate if, when, and how such rights could be useful and therefore justified in international law.

In chapter 3, the main findings of the previous inquiry will be presented and contrasted with common arguments in the debate on group rights. It presents some traditionally important arguments of the philosophical discussion and confronts them with the findings of the legal analysis in chapter 2. This part can mainly be attributed to the realm of political philosophy as it challenges classic positions mainly found in the political philosophy discourse on the issue.

Chapter 4 aims at a reappraisal of the concept of group rights in international law which allows for a more pragmatic understanding and use of such rights. It introduces a *de lege ferenda* approach of international law to group rights and touches upon all previously applied disciplines, namely international law, legal philosophy and political philosophy.

The perspective from which this inquiry will be undertaken is conceptual. In other words, the legal concept of group rights is at the centre of interest of this inquiry and the legal application of it in international law only an example, a case study. The reason for taking this perspective is that the categorisation of rights as group rights has turned out to be a reason for supporting or opposing them. This means that the problem can be solved neither by showing what courts have decided regarding groups nor by simply referring to the existence of such rights

in reality. Supporters and detractors of the concept cannot be convinced by the arguments of the existence or non-existence of such rights. Indeed, the dispute of group rights is highly political and it is a challenge not to become political when discussing the topic scientifically.

The issue of group rights cannot be 'solved' on a theoretical level; in fact, it will be shown that many of the theoretical disagreements are based on differing conceptualisations of the concept of 'group rights' itself as well as underlying concepts like the concept of 'rights'. Hence, some issues will be solved by clarifying the concept while most will remain a matter of personal belief and inclination. Nevertheless, a theoretical discussion will be crucial to isolate questions which cause the dispute from the many instances where the topic causes no reasonable objection. The theoretical discussion of the concept will thus help to reduce the complexity of the many arguments implicitly and explicitly used for and against the concept. The result will be a clearer understanding of the concept as such as well as its main potential weaknesses. Yet, keeping the inquiry on this theoretical level, its results would remain detached from reality; therefore, to be able to evaluate the importance of the weaknesses and strengths connected with the concept as well as to assess the function of such rights in international law, the application of the concept of group rights in international law will also be investigated. Hence, by approaching this topic both dogmatically and as applied, a more solid ground for the provision of group rights in international law will be laid out which, in turn, could result in an enhanced capacity of solution-finding based on international law.

How this could be reached is discussed in the concluding reassessment of the concept and its potential role in international law. It will again be made from a conceptual perspective and be based on the main principles which underlie group rights in contemporary international law. The aim there will be to build on uncontested territory and provide a more coherent vision of international law's approach to groups and their rights.

It might be argued that the weight given to the rather philosophical conceptual discussion of group rights is inadequate as it is not concepts but reality which matters. Apart from the fact that reality is taken into account, as just discussed, the importance of concepts in law should not be underestimated. In fact, the changing view of legal concepts is one way in which law, its application, development and accordingly also reality is being changed.¹ This is also, if not even more so, true for such a contested concept like group rights.

1 In this sense there is reason to believe that legal concepts generally differ from the concepts Derek Parfit discusses when he argues: "We are discussing cases where, relative to the facts at some lower level, the higher-level fact is, in the sense that I have sketched, merely conceptual. My claim is that such conceptual facts cannot be rationally or morally important. What matters is reality, not how it is described." D. Parfit, 'The Unimportance of Identity', in H. Harris (ed.), *Identity: Essays based on Herbert Spencer Lectures given in the University of Oxford* (Clarendon Press, Oxford