

## THE RIGHT TO TRUTH: “FORGET ME NOT” ENFORCED DISAPPEARANCE VICTIMS

For years, the victim's family of enforced disappeared have to endure slow and long last impacts after their loves one being arrested, kidnapped, or even tortured without knowing the truth whether they are still alive or not. Their whereabouts remain a mystery thus their presences slowly evaporating as time goes by. However, despite of becoming a target for harassment, intimidation, and other forms of threats, those victim's families never stopped asking for the victim's fate. Clearly, it is a State's responsibility to fulfill the victims' families' demand due to State commitment to protect, respect, and fulfill human rights as stated in Article 28I (4) The 1945 State Constitution of the Republic of Indonesia. Although, Indonesia Government has not yet ratified The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), the right to know the truth (hereinafter the right to truth) as explained in ICPPED, is an inalienable right that cannot be limited for any reason. As a result, it become a part of State obligation where it demands State to investigate revealing victims' of enforced disappearance fate.

### The Concept of Right to Truth

The right to truth originated from Article 32 of Protocol I to the Geneva Conventions.<sup>1</sup> Through years, the right to truth had been recognized in international treaties including in the Set of Principles For The Protection and Promotion of Human Rights Through Action to Combat Impunity (Set of Principles), Second Principle stated that right to truth is an inalienable right<sup>2</sup> and Fourth Principle which explained victim families also have the right to know the fate of victims.<sup>3</sup> According to the Report of the independent expert to update the Set of Principles to Combat Impunity, “*Truth is fundamental to the inherent dignity of the human person.*”<sup>4</sup> The right to truth itself has close relation with many fundamental rights including non-derogable right such as the right to life, right to not be subjected to torture or other cruel, inhuman or degrading treatment, or punishment, the right to liberty and security of person. Thus, the right to truth is an

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<sup>1</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. “*In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of family to know the fate of their relatives.*”

<sup>2</sup> UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to Combat Impunity*, 8 February 2005, E/CN.4/2005/102/Add.1, p. 7. “*Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations.*”

<sup>3</sup> *Ibid.* “*Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstance in which violation took place and, in the event of death or disappearance, the victim's fate.*”

<sup>4</sup> UN Commission on Human Rights, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, 8 February 2006, E/CN.4/2006/91, p. 15

inalienable right<sup>5</sup> that could not be subjected to limitations due to the nature of non-derogable prohibition.<sup>6</sup> The right to truth also an autonomous right since it created responsibilities for the State to provide effective remedy and reparation for victims including giving information about the fate and whereabouts of disappeared victims.<sup>7</sup>

ICPPED Article 24 (1) define victim as “..., “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.” The definition covered up victims of enforced disappearance families as “victims” because families are people who have the closest relationship and depend on victims in every aspect of life, financially or even emotionally. The loss of victims created emotional distress for families due to the uncertainty of victims’ fate. The agony and sorrow of victims’ families were recognized as psychological torture.<sup>8</sup> Consequently, ICPPED Article 24 (2) stated “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.” This means that States have the duty to provide families with complete information about the victims’ enforced disappearance fate. The right to truth has a vast scope that covered several elements to present families with comprehensive information about the victims, “...These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person’s victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.”<sup>9</sup> In order words, the right to truth demanded State to conduct effective investigation until it clarify victims’ fate and whereabouts, as ICPPED Article 24 (6) stated, “Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the

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<sup>5</sup> *Ibid.*, p. 12 – 13. “The inalienable character of the right together with its material scope militates against derogation in any circumstances. A large number courts at national and regional levels have characterized the State’s failure to inform the victims’ relatives about the fate and whereabouts of a victim of a disappearance as amounting to torture or ill-treatment, which is universally recognized as a non-derogable prohibition. One could also argue that the judicial remedies that protect fundamental rights, such as habeas corpus and amparo, which may also be used as procedural instrument to implement the right to the truth, have now come to be understood as non-derogable.”

<sup>6</sup> *Ibid.*, p. 2. “ The study concluded that the right to the truth about gross human rights violations and serious violation of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations, This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not subject to limitations.”

<sup>7</sup> *Ibid.*, p. 12, “The right to the truth is closely linked to the right to an effective remedy, the right to legal and judicial protection, the right to family life; the right to an effective investigation, the right to a hearing by a competent, independent, and impartial tribunal, and the right to obtain reparation. The Human Rights Committee, ECHR, IACHR and the African Commission on Human and Peoples’ Rights have all considered that the failure to give information about the fate and whereabouts of disappeared persons or of the circumstances of an execution and the exact place of burial of the executed persons can amount to torture or ill-treatment. Nonetheless, the right to truth remains an autonomous right with its own legal basis.

<sup>8</sup> *Ibid.*, p. 9, “The Human Rights Committee has expressly recognized the right to the truth for families of victims of enforced disappearance, in connection with the right not to be subjected to torture or ill-treatment given the psychological torture which relatives of missing persons undergo.”

<sup>9</sup> *Ibid.*, p. 11.

*legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matter, family law and property rights.”*

The failure of fulfilling the right to truth means the State failed to fulfill its obligations toward human rights. Without the truth, families unable to receive proper remedy and reparation. Moreover, the truth itself is a crucial part of educating society to achieve a better understanding of how to prevent crimes reoccur in the future.<sup>10</sup> Despite great pressure on fulfilling the right to truth, some constitutional courts even recognized the importance of the right to truth as part of justice, clarification for historical events, individual and societal healing, and prevention of future violations along with impunity eradication.<sup>11</sup> The seriousness of State on realizing the right to truth can be an indicator of transparency and good governance which is an essential part of a democratic state<sup>12</sup> where it restores families and society faith in the State.<sup>13</sup> Embracing the right to truth will help the State to understand how to provide better treatment to victims and their families.

## Conclusion

The higher demand of uncovering enforced disappearance is understandable because enforced disappearance is a crime against humanity and an offense to human dignity that cannot be tolerant anymore. The right to truth has close relation with most non-derogable rights which influence the status of the right as a part of inalienable rights. As a result, State cannot put limitations on the right to truth on enforced disappearance cases. Instead, it demands the State to conduct an investigation and provide information about the victims' fate and whereabouts. The right to truth lays a strong foundation for families to receive an effective remedy and reparation. Although it may take years to truly know the fate of victims, as long as we always remembered them, their existences never disappear from history.

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<sup>10</sup> *Ibid.*, p. 15. “ *In cases of gross human rights violations – such as torture, extrajudicial executions and enforced disappearance... The right to the truth also has a societal dimension: society has the right to know the truth about the past event concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to committed, so that such event do not reoccur in the future.*”

<sup>11</sup> *Ibid.*, p. 8, “ *National courts at the highest level have also recognize the right to the truth. The Constitutional Court of Colombia and Peru, and the Federal Criminal Courts of Argentina have developed important jurisprudence recognizing and affirming the right to know the truth of victims of gross human rights violations. The Court of Argentina, in the so-called truth trials, has found that in cases of enforced disappearances the right to the truth is based on the right to mourning (derecho al duelo), and as one of the components of the right to justice, as well as the need for historical clarification, individual and societal healing and the prevention of future violation. The right to the truth has also been considered as a means to ensure a democratic State based on the rule of law. Courts have also noted the contribution of knowing the truth to eradicating impunity.*”

<sup>12</sup> *Ibid.*, p. 13. “*The right to the truth may also be linked to the principle of transparency and good governance adopted by some governments. IACHR has concluded that the right to know the truth is essential for the workings of democratic systems. In the same line, the Constitutional Tribunal of Peru has concluded that the right to the truth is a concrete expression of the constitutional principles of human dignity, rule of law and a democratic form of government.*”

<sup>13</sup> James A Sweeney, *The Elusive Right To Truth In Transitional Human Rights Jurisprudence*, International and Comparative Law Quarterly, 67(2), Cambridge University Press, 12 December 2017, p. 354, “*The inter-American Commission on Human Rights has stated that, ‘reaching at a complete, factual and impartial truth – reconstructed, shared and legitimized by society – is a fundamental factor in restoring citizens’ confidence in the institutions of the State’.*”