A Right to Truth in Customary International Law?

Nikki Edwards

A Right to Truth in Customary International Law?

Nikki Edwards

Nikki Edwards is a UNSW law student and research assistant at the Department of Indonesian Studies at the University of Sydney.

During seven months between 1965 and 1966, at least half a million 'communists' were murdered in Indonesia.[1] Under customary international law, these killings would now constitute crimes against humanity,[2] which occur, inter alia, when extrajudicial killing is 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[3] However, none of those responsible for the killings were investigated or punished at the time. On the contrary, the killings helped reinforce the army's political position during the ensuing 32 years of authoritarian government, during which time discussion of the violence was taboo.[4] Although Indonesia transitioned from authoritarianism to a more democratic order after 1998, there has still never been any formal public inquiry into the killings, let alone prosecution of those responsible.

To some extent the ongoing silence about this historical atrocity is remarkable, since it has become common for states undergoing political transitions to establish 'truth commissions' in an attempt to respond to the wrongdoings of predecessor regimes.[5] As Teitel explains, 'truth commissions' are often established 'to investigate, document, and report upon human rights abuses within a country over a specified period of time'.[6] Establishing truth commissions has become such a common practice in transitional contexts that Ben-Josef Hirsch et al. argue that truth commissions have 'emerged as an international norm'.[7] Some commentators even go much further, however, contending that states are now under a customary international legal obligation to guarantee the 'right to truth' about serious human rights violations.[8]

This article considers whether there is a 'right to truth' under customary international law that would obligate Indonesia to investigate the 'truth' about the commission of crimes against humanity during the 1960s. It argues that although the 'right to truth' may be crystalising into a rule of customary international law, there is not yet sufficient evidence of consistent state practice and *opinio juris* for 'the right to truth' to be considered a binding rule. The article begins with a general discussion of customary international law, then shifts focus to over-

view the sources which are said to give rise to a 'right to truth', before finally evaluating the current status of the right.

I. THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

Whereas states must expressly agree to enter into treaties in order for the obligations therein to be binding, all states will be bound irrespective of their direct consent where a rule of customary international law exists. For example, it is now widely accepted that certain fundamental norms, such as the prohibition on crimes against humanity and torture, are customary international norms that are binding on all states. Customary international law thus has a certain appeal for human rights activists, who can refer to customary norms in their attempts to compel states that have refused to enter into human rights treaty obligations to nevertheless respect fundamental human rights principles.

However, several scholars have warned that there is a tendency for activists to be too enthusiastic in their appeals to customary international law, with some commentators insisting that new human rights are emerging despite insufficient evidence. Alston has expressed 'serious concern' about the 'haphazard, almost anarchic manner' in which commentators have purported to expand human rights.[9] He notes that some rights 'seem to have been literally conjured up, in the dictionary sense of being "brought into existence as if by magic"'.[10] Similarly, Meron warns that the purported discovery of customary human rights norms in the absence of convincing evidence threatens to undermine not only state sovereignty, but also the credibility of the international human rights project.[11]

Yet in some cases, determining whether a norm exists or has merely been 'conjured up' is difficult because customary international norms emerge over time. Legal positivist scholars make an important distinction between *lex ferenda* – what may be the ideal legal position, which is currently in the process of evolving into a binding norm – and *lex lata* – the law as it currently exists and binds states, imperfect as it may be.[12] A norm can only be said to have crystalised into *lex lata* if the two part test in section 38 of the *Statute of the International Court of Justice* is satisfied and there is evidence of both a widespread and consistent general practice, and evidence that this general practice is accepted by states as law.[13] This test must be satisfied in order for it to be convincingly argued that there is a 'right to truth' in customary international law.

A. Evidence That There Is A Right To Truth

The strongest evidence of the purported 'right to truth' is the recent proliferation of human rights instruments that refer to the importance of truth, and may potentially constitute evidence of states' belief that such a right exists. One of the earliest instruments evincing this is the United Nations Commission on Human Rights (UNCHR) Resolution 2005/66, which stresses 'the imperative for society as a whole to recognize the right of victims of gross violations of human rights … to know the truth regarding such violations'.[14]

In the same year, the UNCHR published the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, which notes that '[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes'.[15] Then in December 2005, the General Assembly adopted a Resolution on *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*.[16] Principle 22 stipulates that victims of gross violations of international human rights law should be provided with full and effective reparation, which includes '[v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm'.[17] In December 2006, the General Assembly passed the first implicit reference to the right to truth in human rights treaty law, with the adoption of the *International Convention for the Protection of All Persons from Enforced Disappearance*.[18] Importantly, article 24 establishes that '[e]ach 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'.[19] Most recently, in 2008, the Human Rights Council adopted Resolution 9/11 on the 'Right to the Truth',[20] which encourages states to take steps to help victims know the truth about gross violations of human rights, including by establishing truth and reconciliation commissions.[21] There is thus ample evidence to show that many states have expressed support for the concept of the 'right to truth'.

However, the customary international law test also requires consistent state practice in line with this belief. Arguably, the creation of truth commissions could be considered evidence of such state practice. Certainly, the creation of truth commissions has been widespread. Some 54 truth commissions have been established since 1979; as of 2009 there have been 18 in Africa, 17 in the Americas, ten in Asia, five in Europe, and four in the Middle East and North Africa.[22] However, while the practice of establishing truth commissions is widespread, in most cases there is no evidence that 'the establishment of these mechanisms flows from a sense of a legal obligation to provide the truth'.[23] The right to truth was only explicitly cited in the enabling legislation of the Peruvian and Guatemalan truth commissions, whereas there is no evidence that other truth commissions were created out of a sense of legal obligation to provide 'truth'.[24] Indeed, there is ample evidence that commissions are frequently established for reasons of domestic political expediency rather than out of any genuine desire to investigate the past.[25] These studies make it difficult to argue that states establish truth commissions because they believe

'To argue that the law already prescribes a "right to truth", despite inadequate evidence, threatens to undermine the credibility of human rights scholarship.'

that the provision of 'truth' is necessary to comply with international norms.

B. The Status of The 'Right To Truth'

Reflecting the as yet limited nature of this evidence for the 'right to truth,' the two commentators who have conducted the most extensive analyses of these developments concluded that the right is an emerging norm, which is increasingly gaining importance but is not yet binding on states. In 2006 President of the International Center for Transitional Justice, Juan Méndez, argued that the 'right to truth is an emerging principle of international human rights law'.[26] Similarly, in the same year, Naqvi argued that the right to the truth is emerging, and currently 'stands somewhere on the threshold of a legal norm and a narrative device'.[27] Naqvi contends that the right to truth cannot yet be considered to have hardened into a binding norm given the widespread instances of state practice which are inconsistent with such a right. These include the tendency for governments to claim that the protection of national security necessitates limiting publically accessible information about serious human rights abuses, and the practices of a small number of states like Algeria which have implemented amnesties that involve criminalising public discussion about historical conflict.[28]

In contrast, other commentators go further and argue that the right to truth has already hardened into a binding norm. Almost twenty years ago, Leandro Despouy, then Special Rapporteur for States of Emergency, argued that the 'right to truth' had crystalised into a rule of customary law.[29] He theorised that the right to truth originally had a treaty law basis, since it is fundamental to the rights of separated children to obtain information about absent family members, a provision that is enshrined in the *Convention on the Rights of the Child*.[30] He also recounted the Human Rights Committee's finding in *Rodriguez v Uruguay*, that the right to a remedy in article 2 of the *International Covenant on Civil and Political Rights* prohibits any amnesty that would purport to relieve a state of its obligation to investigate human rights violations.[31] In light of these developments, and noting also the existence of concurring jurisprudence in the Inter-American human rights system, Despouy concluded that there is a customary right to truth, without making any reference to the question of state practice.[32]

Other more recent scholarship is similarly hasty in concluding that there is already a right to truth in customary international law. Consider for example the 2013 book, *Seeking Human Rights Justice in Latin America*, in which Jeffery Davis purports to document the crystalisation of a *lex lata* right to truth in a single page.[33] Davis notes that Méndez charted the emergence of the customary right to truth in 1997, and observes that Naqvi similarly noted the development of a right.[34] Davis goes on to imply that, given the passing of time, this emerging right must now have hardened into a norm.[35] To support this suggestion, he notes that since 2006 forty nations have ratified the *International Convention for the Protection of All Persons from Enforced Disappearance*, and that there has been more concurrent jurisprudence in various regional human rights systems.[36] Yet his argument fails to directly address the state practice and *opinio juris* test, let alone satisfy it.

Nor is this kind of undeveloped argument — where a right to truth is asserted by a transitional justice scholar, despite a lack of convincing evidence — unique. Several other commentators assert that there is now a customary right to truth without providing any reasoning or evidence at all. Escudero does not discuss the possible sources of a right to truth, but merely asserts that '[u]nder international law, the judiciary has the obligation to satisfy the right to truth that belongs to victims of alleged or established human rights violations'.[37] Similarly, Landel contends that the 'right to truth is a fundamental right of the individual'[38] which, he argues, thereby gives rise to a binding obligation for the United States in re-

gard to torture.[39] Yet this kind of scholarship is troubling because no matter the volume of commentary, if these scholarly claims about the existence of a right are not based on evidence of consistent state practice, accepted as law, then they are incapable of proving the existence of a customary norm.

II. CONCLUSION

This article has considered whether the lack of formal inquiry into the 'truth' about the 1960s Indonesian killings is a violation of Indonesia's obligations under customary international law. It considered the sources that are said to give rise to a 'right to truth', arguing that although there has been progressive development of the concept in international law, its proponents have not convincingly demonstrated the widespread and consistent state practice or *opinio juris* necessary to prove that the right has already hardened into a binding norm. This means that although a wide variety of commentators have rightly condemned Indonesia's failure to investigate the truth about the killings,[40] this lack of inquiry is not a violation of customary legal obligations.

As such, this article has highlighted two problems: a gap in the reach of international human rights law, and the tendency for some human rights commentators, who believe that something *ought* to be the law, to argue that this is the case even when there is little convincing evidence. In regard to the first of these concerns, this article has demonstrated that international law permits silence in the case of the 1960s Indonesian killings. While this is clearly a gap in the human rights protection offered by international law, this lacuna is primarily limited to historic atrocities committed in states that have not signed relevant treaties. As more states ratify treaties, the cases in which international law will tolerate a state's failure to inquire will decrease. Moreover, as argued above, the right to truth can convincingly be said to be emerging in customary law and may crystalise into a hardened norm with time. As such, although it is problematic that international law currently permits silence in regard to the 1960s Indonesian killings, the law is already evolving – through both treaty law and potentially emerging customary norms – towards requiring greater accountability.

The second and more worrying problem with which this article has grappled with is the tendency for proponents of transitional justice to argue that there is a legal obligation to provide truth despite a lack of convincing evidence to support their claim. While there is clearly a moral imperative that the public know the truth about past atrocities, to argue that the law already prescribes a 'right to truth', despite inadequate evidence, threatens to undermine the credibility of human rights scholarship. As Schwarzenberger warns, '[n]othing has brought the doctrine of international law into greater disrepute than the proneness of individual representatives to present *desiderata de lege ferenda* in the guise of propositions *de lege lata*'.[41] This article has demonstrated that those scholars who claim there is already a customary 'right to truth' are doing precisely this – conjuring up mythical creatures that only believers can see.

REFERENCES

1. Robert Cribb, 'Genocide in Indonesia, 1965–1966' (2001) 3 *Journal of Genocide Research* 219, 219; Cf Matthew Draper, 'Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia' (2001) 40 *Columbia Journal of Transnational Law* 391, 412.
2. Mark Leon Goldberg, *Human Rights Wonks Discuss "The Act of Killing"* (1 March 2014) UN Dispatch, <http://www.undispatch.com/human-rights-wonks-discuss-the-act-of-killing>; Komnas HAM 2012 Pernyataan Komisi Nasional Hak Asasi Manusia (Komnas HAM) Tentang Hasil Penyedikan Pelanggaran Ham Yang Berat Peristiwa 1965–66, Jakarta: Komnas HAM; Suzannah Linton, 'Accounting for Atrocities in Indonesia' (2006) 10 *Singapore Year Book of International Law* 199, 227.
3. *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1).
4. Cribb, above n 1, 236.
5. Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, 78.
6. Ibid.
7. Michal Ben-Josef Hirsch, Megan MacKenzie and Mohamed Sesay, 'Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global "Success" of TRCs in Local Perspective' (2012) 47 *Cooperation and Conflict*386, 386.
8. Terence S Coonan, 'Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable' (1996) 20 *Fordham International Law Journal* 512, 547; Jeffrey Davis, *Seeking Human Rights Justice in Latin America: Truth, Extra-Territorial Courts, and the Process of Justice* (Cambridge University Press, 2014), 106–7; Leandro Despouy, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, ESC Res 1985/37, UN ESCOR, 47th sess, Agenda Item 10(a), E/CN.4/Sub.2/1995/20,; Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain'(2014) 36 *Human Rights Quarterly* 123, 125; Morgane Landel, 'Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11' (2010) 16 *ILSA Journal of International and Comparative Law* 115, 120; Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 *Third World Quarterly* 275, 275.
9. Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607, 607.
10. Ibid.
11. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989), 81; see also Georg Schwarzenberger, 'The Province of the Doctrine

of International Law' (1956) 9 *Current Legal Problems* 235, 244.

12. Hugh Thirlway, 'Reflections on Lex Ferenda' (2001) 32 *Netherlands Yearbook of International Law* 3, 4; see also Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *The American Journal of International Law* 413, 421.

13. James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012), 23.

14. United Nations Commission on Human Rights, *Human Rights Resolution 2005/66: Right to the Truth*, CHR Res 66, UN ESCOR, 61st sess, 59th mtg, Agenda Item 17, E/CN.4/RES/2005/66 (20 April 2005).

15. United Nations Commission on Human Rights, *Impunity: Report of the Independent Expert Diane Orentlicher Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN ESCOR, 61st sess, E/CN.4/2005/102/Add.1 (8 February 2005).

16. United Nations General Assembly, *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*, UN GAOR, 60th sess, Agenda Item 71(a), GA Res 60/147 (21 March 2006).

17. Ibid 7.

18. *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, 2716 UNTS Doc.A/61/448 (entered into force 23 December 2010).

19. Ibid art 24.

20. Elchin Amirbayov, *Organizational and Procedural Matters: Draft Report of the Council*, HRC Res 9/11, UN GAOR, 9th sess, 22nd mtg, Agenda Item 1, A/HRC/9/L.11 (9 October 2008).

21. Ibid 45.

22. Kathryn Sikkink and Hun Joon Kim, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations' (2013) 9 *Annual Review of Law and Social Science* 269, 274.

23. Yasmin Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?' (2006) 88 *International Review of the Red Cross* 245, 261.

24. Ibid.

25. See, eg, Claire Moon, *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission* (Lexington Books, 2008); Claire Moon, 'Healing Past Violence: Traumatic Assumptions and Therapeutic Interventions in War and Reconciliation' (2009) 8 *Journal of Human Rights* 71; Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (Cambridge University Press, 2001).

26. Juan Méndez, 'The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling' in Tristan Anne Borer (ed), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (University of Notre Dame Press, 2006) 116; see also Juan Méndez, 'Accountability for Past Abuses' (1997) 19 *Human Rights Quarterly* 255, 261; Juan Méndez, 'An Emerging Right to Truth: Latin-American Contributions' in Suzanne Karstedt (ed), *Legal Institutions and Collective Memories* (Hart Publishing, 2009).

27. Naqvi, above n 23, 273.

28. Ibid 265–6.

29. Leandro Despouy, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, ESC Res 1985/37, UN ESCOR, 47th sess, Agenda Item 10(a), E/CN.4/Sub.2/1995/20 (26 June 1995) 54 [1]–[2].

30. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 9(4).

31. Human Rights Committee, *Views: Communication No 322/1988*, 51st sess, UN Doc CCPR/C/51/D/322/1988 (9 August 1994) 54 [2] ('*Rodriguez v Uruguay*') citing the *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2.

32. Despouy, above n 29, 54 [2].

33. Davis, above n 8, 106.

34. Ibid.

35. Ibid 107.

36. Ibid 107, citing *International Convention for the Protection of All Persons from Enforced Disappearance,* opened for signature 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010).

37. Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain' (2014) 36 *Human Rights Quarterly* 123, 125.

38. Landel, above n 8, 120.

39. Ibid 120–2.

40. The International Centre for Transitional Justice laments the 'continued reign of impunity, denial of victim's rights, and preservation of structures that have enabled... mass atrocities to be repeatedly committed': ICTJ and Kontras, 'Derailed: Transitional Justice in Indonesia Since the Fall of Suharto' (Report, ICTJ and Kontras, March 2011) 84. Similarly, *The Economist* warns that 'Indonesia's own failure even now fully to confront events still shrouded in mystery, ignorance and fear' casts the country 'in a bad light at a time when it hopes to be cheered as a model emerging democracy': The Economist, 'The Year of Killing with Impunity', *The Economist* (online), 1 March 2014 < http://www.economist.com/news/asia/21597928-massacres-nearly-half-century-ago-still-haunt-indonesia-year-killing-impunity>.

41. Schwarzenberger, above n 11, 244.