17th Neelan Tiruchelvam Memorial Lecture

Difficult Issues, Strategic Choices: Crafting a Coherent Sri Lankan Transitional Justice Process

by

Ronald C. Slye

Professor of Law at Seattle University School of Law

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It is one of the greatest honors of my professional life to be asked to deliver this lecture in honor of Dr. Neelan Tiruchelvam. Neelan embodied all of the virtues of what makes a great human rights advocate, lawyer and statesmen. In his life and work he straddled boundaries – boundaries between the academy and the street; between the law and other social sciences; between scholarship and activism; between the ideal and the pragmatic. He was deeply committed to and embedded in Sri Lankan society, but also contributed to and learned from experiences in other countries.

As a tribute to Neelan and his legacy, my lecture today draws upon both my academic reflections on, as well as my practical experience with, the field of transitional justice in a number of countries. As Neelan would have recognized, drawing solely upon academic reflection and scholarship risks missing the unique circumstances of a particular moment in time; while drawing solely upon experience risks acting without reflection, purpose or plan. Both risk irrelevancy. My intent is to channel Neelan and to draw upon both my academic reflections and experience to provide what I hope are helpful observations on some of the difficult questions facing Sri Lanka today. My hope is that what I have to say today will assist you in crafting a coherent, strategic, and comprehensive transitional justice plan that will ensure a more unified, pluralistic, just, and stable Sri Lanka.

I am a relative newcomer to the Sri Lankan context. I do not come here pretending to have answers for you as you navigate an important period in Sri Lankan history. Instead I come here to give you, I hope, some useful insights from the perspective of an outsider. While I am an outsider to the Sri Lankan situation, I am not an outsider with respect to transitions and transitional justice. I have worked directly with transitional processes in South Africa, Cambodia, and Kenya, and have been engaged with similar processes in other parts of the world, including Burundi, Rwanda, Tunisia, Colombia, and the United States. My most intensive and engaged experience was the four years I served as a Commissioner with the Kenyan Truth, Justice and Reconciliation Commission (TJRC). I will draw upon what I have learned from these experiences to make some observations about important issues that should be addressed in any transitional context, and to suggest some approaches to addressing those issues.

I. First, the importance of developing a transitional plan that is tailored to the needs of Sri Lankan society at this point in time.

Too often societies adopt a check-the-box mentality when navigating a transition – checking the box of creating a new constitution; checking the box of creating a special court to prosecute those responsible for gross violations of human rights; checking the box of creating a truth commission. In addition, too often societies look at what has worked in another country and assume that adopting the same approach will work in their own country. Taking an easy path, by unthinkingly checking boxes or blindly adopting what was used in other places, is almost always a recipe for failure, and may in more extreme cases risk disaster.

This is not to say that one should not look to, learn from, and even adopt approaches that have been used elsewhere. All of us have much to learn from the successes, and failures, of similar attempts in other places. The important point is to take the time to understand why something succeeded or failed someplace else, which will then allow you to better assess whether such an approach will work here, or more likely, which parts of such an approach might be more useful here if adapted to take into account local conditions. So the important question is not did South Africa adopt a truth commission and did it succeed? The important question is why did South Africa adopt a truth commission, and why did it succeed or fail?

Socio-Economic Rights

Let me draw upon two examples from Kenya to illustrate this point. Both involve improvements that the Kenyans made to their own transitional process. When Kenya was looking to create a truth commission, it looked (as many countries do) to the South African experience. One of the critiques of the South African experience was the failure to examine the socio-economic context, and thus the violations of socio-economic rights, under apartheid. The South African truth commission primarily focused on violations of bodily integrity rights, many of which were in fact illegal under the apartheid government. Some of my South African friends argue that this failure to look at the larger socio-economic context of the apartheid violations during the transitional period has now come back to haunt them as they continue to grapple with serious issues of economic disparity, race, and corruption. The Kenyans learned from that mistake and expressly included violations of socio-economic rights into the mandate of the Kenyan truth commission.

The inclusion of socio-economic rights into our mandate required us to innovate. Most of the standard mechanisms for

truth commissions have been developed to address violations of bodily integrity rights – killings, rapes, torture, etc. We learned that the traditional tool of statement-taking – that is, eliciting statements from individuals concerning their experience with human rights violations – was a poor tool for eliciting information about socio-economic rights violations. We thus designed what we called focus-group discussions to elicit information about socio-economic rights, and held over a 100 of these focus-group discussions throughout the country. As a result we collected a rich body of information concerning a wide variety of socio-economic rights violations, including access to housing, health care, education, food, and water, as well as land, economic marginalization, and corruption. This information helped us to both understand some of the causal elements of other violations within our mandate – killings, sexual violence, torture – and to capture a more nuanced, and accurate, picture of the type and extent of violations experienced by the average Kenyan.

Women

The second example concerns the failure of most previous truth commissions to capture the experiences of women with respect to violations within their mandate. The large majority of those submitting statements or testifying before a truth commission tend to be men. In fact in Kenya the Government had established a task force, similar to what you now have, to explore public views on transitional justice mechanisms. That task force observed that participation by women in their process was low and noted the following in its report:

> It was observed that across the world it has been reported that it has been difficult for women and children to access truth commission processes in a meaningful way. Where women do indeed participate, they merely go through the motions and may not express their hurt. They will most

> probably talk about the suffering of their loved ones but not themselves. Truth commissions work in cultures that muffle women's voices most of the time and may, if not conscious of this limitation, alienate women from their processes. The truth commission should therefore go out of its way to design procedures and methods that make sure that women are heard.[1]

Feminist critiques of truth commissions tend to focus on two issues.[2] First, such commissions ignore or do not devote sufficient attention to systemic, structural, and institutional violence that tends to affect women disproportionately. Second, truth commission processes are not designed to encourage the participation of women, and thus perpetuate the silencing of women in those societies. The drafters of our enabling act were sensitive to some of these issues, requiring that there be gender balance among the Commissioners (we began with five male and four female commissioners); requiring that the Chair and Vice Chair be of opposite gender; including sexual and gender-based violence in the violations we were to investigate; and suggesting that we put into place special mechanisms and procedures to address the experiences of women. In fact during a good part of our operational period our CEO was a woman; and during

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1 Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (Government Printer, Nairobi) (August 26, 2003).

2 For a good introduction to feminist critiques and transitional justice, see Christine Bell and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," IJTJ (2007) 23. Bell and O'Rourke pose three sets of questions: 1) Where are women? (both representation and participation in transitional justice design and process); 2) Where is gender? (where are the voices and experiences of women with respect to conflict, human rights violations and justice); and 3) Where is feminism? (referring to the feminist critique of justice and its applicability to transitional justice). For another thoughtful discussion of feminist legal theory and transitional justice, see Fionuala Ní Aoláin, "Advancing a Feminist Analysis of Transitional Justice," in Martha Albertson Fineman and Estelle Zinsstag, *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* (Intersentia, 2013).

the fourteen months when we conducted most of our external activities (statement taking, public hearings, investigations, and other outreach activities), our acting Chair was a woman – in fact Tecla Wanjala was the first woman to serve as the Chair of a truth commission.

While we rightly point out in our Report that women made up fifty percent of our senior leadership team, a look at the substantive areas led by men compared to women replicates the gender representation of the professions not only in Kenya but in most parts of the world. For example the directors of our legal department, investigations, and research were all men. Women were directors of our media, special support, and administration and finance departments. This gendered distribution of leadership mirrored that found in the broader Kenyan society. For example, a chart we included in our Final Report shows, among other things, that the percentage of professionals in Kenya who are women is 13.3%, compared to 86.7 % men.[3] A women who participated in the women's hearing in Bungoma noted that "[i]f there is a seat being vied for, the one we can get is the position of Treasurer because they know women can take care of property. The men take the decision-making positions."[4] So while we can claim that we achieved gender parity with respect to our senior leadership team, a deeper look reveals a replication of gender-based stereotyping and exclusion with respect to our institutional structure.

We adopted specific mechanisms to increase the participation of women in our process; we dedicated specific parts of our statement-taking form to capturing the experience of women; trained our statement takers on gender sensitivity; and ensured a high percentage of female statement takers (43%).

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3 "Gender Disparities in Employment Opportunities," Table 1, TJRC Report, Vol. IIC, Ch. 1, p. 42.

4 Women's hearing, July 9 2011.

We also conducted thirty-nine of what we called women's hearings in each of the places where we held public hearings. Our challenge was not just to get women to participate and speak to the Commission, but also to get them to speak about violations and related issues experienced by them. The experience of previous truth commissions suggested that women who were willing to speak about past violations tended to speak as witnesses and observers concerning incidents that had happened to others, usually the male members of their family. The characterization of such testimony as indirect is itself problematic, as it tends to deemphasize the secondary effects of violations on family members and community members, and more fundamentally emphasizes the individualistic rather than community-oriented aspect of violations. While women may testify about what happened to others in their family or community because they are reluctant to testify about themselves, they may also focus on violations directly experienced by their family and community members because they see themselves as part of those larger social entities, and thus are more likely than men to see such violations of "others" as affecting them, their families, and their communities directly. Nevertheless, we were concerned that some women might feel reluctant to share their own direct experiences of violations out of fear rather than because of a more holistic approach to violations and their effects.

Our women's hearings – really more town hall-type conversations – were designed to provide a safe space for women to speak freely about their experiences with violations within our mandate. The hearings were women-only – only female Commissioners and staff were present[5], and only women were allowed to participate. These events were extremely popular –

5 This was not always strictly the case. In at least some cases men who operated our video cameras and male Hansard personnel were present. We have no reason to think that their presence silenced any woman in the room, but future truth commissions might ensure that they have adequate female staff to perform all of the functions required in holding such an event.

over 1,000 women participated in them throughout the country. They typically lasted the entire day. At these hearings women spoke quite candidly about violations they had experienced, including quite graphic and heart-breaking stories about sexual and other gender-based violence they had suffered. The Commissioners and staff who attended these hearings were often quite exhausted and even traumatized themselves by the end of the day, given the graphic and intense stories were related at the hearings. While I never attended these hearings, I often had the opportunity to hear immediately afterwards what had transpired from Commissioners and staff who had attended, and I was later able to read the verbatim transcripts of these discussions.

Over 1,000 women participated in our women's hearings. It was an incredibly powerful event for the women who participated, and provided us with a rich body of testimony and information of and about the experiences of women in Kenya. The participants shared stories and narratives that were rarely discussed in public (and in some cases rarely discussed even in private), and thus shared stories about violations of which the men in Kenya were unaware, and, often, did not want to know (because they were complicit in or directly responsible for the violation). As one woman said at one of these hearings: "I wish men knew. We never forget. Children never forget."[6] Another women testified:

> We are grateful that you have separated us from men because yesterday we listened to what the men were saying and we could not talk. This is because you would say one thing and leave the rest as we were oppressed in very many things. We could be punished in many aspects. Thank you for the knowledge and the wisdom you used to decide that women should be separated in order for them to say their own things.[7]

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6 RTJRC 07.04.11 Busia Hotel (Public).

7 TJRC/Hansard/Women's Hearing/Kapsokwony/24 May 2011/ p. 7.

As a result of this outreach, we developed a comprehensive picture of the experience of women with respect to violations within our mandate. Our Report thus includes an analysis of gender-based persecution and systematic discrimination against women. (For example, the preference for the boy child in some communities, and the marginalization that is then created from birth for the girl child). We discuss the link between traditional practices (bride price, female genital cutting, early and forced marriage, and widow inheritance) and other rights violations such as poverty, illiteracy, reduced life expectancy, and reduced access to education. We devoted an entire section of our chapter on gender to the socio-economic status of women, where we discussed the feminization of poverty, disparities in employment (including disparities across different employment categories); work-place abuse, including sexual-harassment and violence; the lack of women's ownership or even co-ownership of land and the effect of this reality on other violations suffered by women; reproductive health and women's limited access to medical facilities and services; HIV/AIDs; leadership and political participation – that is, the link between systemic discrimination and the lack of female representation in government, and the effect of lack of female political leaders on perpetuating such systemic discrimination; women in armed conflict; and forced displacement and its impact on women and girls.

Sensitive to the common criticism of previous truth commissions that women were often portrayed as victims and not as agents in their final reports, we included stories of empowered women in the context of historical violations.[8] We also included discussion of the important role women have played in peacemaking in Kenya and the east African region.

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8 See for example Vol IIC, Ch.1, pp. 70-1, where we recount, in her own words from our women's hearings, the story of a woman who joined a public campaign against HIV/AIDs.

We were also sensitive to the tendency of previous truth commissions to reduce women's experience with human rights violations to gender-based and sexual violence. We deliberately created separate chapters for the discussion of gender discrimination and for gender-based and sexual violence. In fact the sexual violence chapter included information we had gathered concerning sexual violence against men, a phenomenon also commonly overlooked not just by truth commissions but by many institutions dedicated to documenting and preventing human rights violations.

These are just two examples (the inclusion of socio-economic rights, and a more thoughtful approach to capturing the experience of women) of how Kenya adapted what had been done in other countries to the Kenyan context. The point here is not that Sri Lanka should adopt these two innovations, nor that Sri Lanka should ignore them. My point is to encourage you to look critically at what has been done in other countries and adopt, reject, or change those approaches to fit the needs of present-day Sri Lanka.

II. Second, the importance of coordination and sequencing.

You in Sri Lanka, like many other societies undertaking a transition, are addressing a number of important and interconnected issues: constitutional reform; economic development; combatting corruption; military and security reform; demilitarization; providing justice for the disappeared and their families; providing psychosocial and other support to victims; preventing ethnic conflict and ethnic violence. These are all inter-related – in other words, failing to address one will make it harder to address the others. Consequently, addressing each will assist in addressing the others. For example, if a

new Constitution is created but nothing is done to address the violations of the past, then the prospects for constitutional legitimacy and stability are lessened. By the same token, if you address the violations of the past but do not change the institutions, systems and structures that allowed and even encouraged such violations to occur, then much of that work will be for naught.

Sequencing is sometimes viewed as pitting a political agreement or consensus against efforts to further justice. This is a version of the false choice some posit between peace and justice. The reality is that a political agreement must include an agreement on accountability or it risks alienating important constituencies and thus lessens its legitimacy. An emphasis on a political agreement today without addressing justice may have short-term appeal, but in the long-run will not be sustainable. Any political agreement today must take into account all elements of your transitional strategy. Sequencing is not a replacement for comprehensive and early planning. Decisions about the parts that make up the whole of the comprehensive plan need to be taken into account with each of the other parts in mind. In other words you need to have a plan for accountability at the same time that you are drafting the constitution – if only because you may need to include provisions in the constitution to support your accountability plan.

Sequencing is important with respect to determining when various elements of your plan will be implemented, and therefore how they will relate to each other. It may be wise to initiate the process of creating a new constitution before undertaking accountability measures. Or the reverse may be better – initiating accountability prior to constitutional reform. I am not knowledgeable enough about the Sri Lankan context to make a recommendation over which process to emphasize first, or which ones should be undertaken simultaneously. That is a decidedly

political question that needs to be made with an appropriate risk assessment of the various alternatives. But what I can say is that it is a decision that needs to be made early, transparently, and with as much inclusive consultation as possible. It also must be followed with a nation-wide communication and messaging strategy that explains and justifies the adopted path.

With sequencing must come coordination. I have read that there are currently six government institutions or agencies working on reconciliation with limited coordination. While there may be good reasons to create different institutions to appeal to different constituencies, such an approach risks further confusion, conflict, and inertia unless combined with a clear strategy of coordination and collaboration. It is important to understand the separate purposes and functions of these institutions and how they relate to one another and to the broader transitional justice strategy, and then to communicate that understanding to the public. Such an exercise may reveal synergies among these different institutions, and uncover ways to make them more efficient and effective.

You are in the process of establishing an Office of Missing Persons, which is an important step towards providing justice for those who were disappeared. It is important to recognize that such an office can both assist and hinder other important efforts to further truth and accountability. It is thus important that the functions of this office be consistent with, and even support, the other important elements of your transitional justice strategy. For example, how will this office fit within the broader efforts to provide truth, reparations, and accountability? Will information provided to this office be admissible in a court of law in the context of a future civil or criminal case? There may be a tension here between furthering truth and furthering justice. If you want to further truth, and the recovery of disappeared persons, then you may want to provide immunity to those who provide information

to the OPM (or at least to those who provide information that leads to revealing what happened to an individual disappeared person). Doing so, however, means that such an individual may not be held accountable for his actions. On the other hand, if you don't provide immunity, then individuals may not come forward and reveal information that may facilitate the location of disappeared persons. There is no right answer to this dilemma. The answer requires a decision about how to balance competing values: truth, recovery, justice.

We faced a similar issue in Kenya. While information that an individual provided to the TJRC could not be used against that person in a court of law, it was not clear if the ICC was bound by this restriction. Our situation was complicated by the fact that we were operating under two different legal regimes – that of Kenya, and that of the ICC. While we could guarantee an individual that information they provided to us could not be used against them in a Kenyan court, we could not make the same claim with respect to the ICC. We contemplated approaching the ICC to see if they would agree to not use information provided to us in their ongoing cases. For a variety of complicated reasons we never entered into those discussions, and thus were unable to reach clarity on how the ICC would treat testimony and other information provided to us. As a result we were unable to provide adequate assurances to some Kenyans who had information related to the crimes the ICC was investigating. While we will never know, it is possible that we lost important information that we would have otherwise received if we had clarified the position with the ICC. The point here again is not that you should emphasize truth or accountability with respect to the OMP; the point is that you should make that decision consciously, balancing the risks and advantages of the one over the other.

III. Third, the importance of inclusion.

Inclusion is important as both a means and an end. First, transitional justice is ultimately a political process; inclusion of a wide range of stakeholders increases political support and thus makes it more likely that a transitional justice strategy will succeed. Inclusion is thus a means to that end. Second, inclusion contributes to the repairing of trust, both horizontally (i.e. between citizens) and vertically (between citizens and the state). Third, inclusion can be an end in itself. It provides a model for the unified, just, and pluralistic society that is the ultimate goal of undertaking these policies.

Inclusion must occur at two different levels: consultation, and representation. A broad range of stakeholders should be consulted with respect to which mechanisms to adopt, and with respect to their sequencing and coordination. Stakeholders who should be consulted include victims and their representatives, civil society, the business community, the military and security sector, the artistic community, the religious community, and the diplomatic community.

Representation on the various bodies created to implement the transitional justice strategy must reflect the major constituencies of Sri Lankan society. Kenya, like Sri Lanka, has a history of ethnic differences, conflicts, and violence. There are by some accounts over 42 ethnic groups in Kenya. It would have been unwise to have included a representative from each of these ethnic groups on the various commissions that were created. Yet due attention was paid to both the appearance and reality of representation, and in many cases the commissions reflected the broader Kenyan society. The six Kenyan Commissioners on the TJRC, for example, represented six of the largest ethnic groups within Kenya. They also represented other constituencies – the military, conflict resolution, etc. I do not know what the ideal composition should be in Sri Lanka, but I would urge you

to make sure that there is both the appearance, and reality, of inclusive representation on the various bodies and initiatives undertaken.

I want to make brief remarks about two issues related to inclusion. The first concerns the proper role of civil society. The second concerns the use of foreign nationals.

Civil Society

Civil society can and should play an important role with respect to your transitional justice strategy. Like the media, civil society can play an important role that complements the work of the various mechanisms adopted. It is important, however, for civil society actors to be clear about their role and goals. Civil society actors can engage with and assist the process, or they can monitor and critique the process. Both are needed, but performing both of these functions at the same time in one organization can lead to confusion and even conflicts of interest. In Kenya some civil society organizations tried to do both at the same time, which made them effective at neither, raised questions about their motives, and did not advance efforts to further truth, justice, or reconciliation.

In addition, many organizations in Kenyan civil society did not develop a comprehensive strategy with respect to the transitional justice mechanisms. Some threw all of their support into the ICC process – leading many of them to oppose the truth commission as, among other things, an institution that was designed, in their view, to hinder justice. This was unfortunate, as the ICC cases ended up providing little if any benefit to victims; in fact it endangered many of them. The TJRC in the meantime engaged in sustained activity with respect to victims and other stakeholders, providing a safe space for victims to tell their stories and to at least receive some acknowledgement of the wrongs they faced. The important point is not to identify

which process was better, the ICC or the TJRC; the important point is to recognize that both were designed to pursue important, sometimes separate and sometimes overlapping, goals. Strategically then, one should avoid reductionist or overly simplistic approaches to what are complex institutions and processes. Similar to my first point about critically learning from the experience of other countries, civil society (and other actors) should usually avoid blindly embracing or rejecting a particular institution or approach, and instead should identify those aspects that should be criticized, and those that should be supported. In other words, the approach should be based upon a sophisticated analysis of the strengths and weaknesses of each institution, and a strategy should be developed to address the weaknesses and enhance the strengths in a way that furthers the larger strategic goals of civil society.

To better understand the lessons that civil society here might learn from the Kenyan experience, it is important to understand one of the most serious challenges we faced as a Commission. The Chair of our Commission was a person who was linked to three human rights violations we were to investigate – including the worst massacre in the history of Kenya. He, remarkably, did not see this as a problem. He stubbornly insisted during much of the life of the Commission that he would neither leave the Commission nor recuse himself from those areas in which he had a conflict of interest or even those in which he was implicated.

The Commissioners were divided over how to address these serious conflicts of interest – in fact at times even differing over whether we should address them at all. I and some of the other Commissioners and staff felt strongly that we needed to address our Chair's conflicts of interest, as their presence (and thus the presence of our Chair) was seriously undermining the credibility of the Commission.

Civil society was less helpful than it could have been in pushing for something to be done about our Chair. Some organizations publicly rejected the Commission entirely because of the conflicts of our Chair. Some of those organizations, while publicly calling for us to be disbanded, privately worked with us, and in one case publicly called for us to be disbanded while privately seeking employment with us for their friends and relatives. The result was a set of mixed messages that undercut the legitimacy of both the Commission and many civil society organizations.

A few organizations were smarter and more strategic in engaging with us. Those organizations realized that the Commission, with all of its flaws, could be utilized to further their own agenda related to truth, justice, or reconciliation. As I tried to explain to many civil society leaders, they had allies like me within the Commission and with whom they could work to further those agendas. As I said to many of them – and as I often say to my students – do not let the perfect be the enemy of the good. The Commission was imperfect, but there was enough integrity and capacity within the Commission that we ultimately accomplished a great deal. Ironically at the end of the process many civil society actors took up our Report and demanded that the Government implement our recommendations fully. Unfortunately very few of our recommendations have been implemented by the Government. We will never know if the quality of our recommendations, or the political support they enjoyed, would have been enhanced by a more constructive and strategic approach to our work by much of civil society, but I do believe it was an opportunity lost. My point is less about which parts of your process should be supported or opposed – that is an assessment that I am not in a position to make. The important point is that such decisions should be made thoughtfully and critically, and should be part of an overall strategy that includes an assessment of short-term, medium-term, and long-term goals.

And what about our Chair? That is a long and complicated story involving suits and counter suits, resignations, political intrigue, and at one point the intervention of Archbishop Desmond Tutu. I am in the process of finishing a book that goes into all of the details of the challenges we faced because of our Chair, as well as other failures and accomplishments of the Kenyan Commission. Briefly, our Chair left the Commission for fourteen months, which is when we got most of our work done (and when we were led by the first woman to lead a truth commission). We recommended in our Final Report that he be investigated and, if the evidence warrants, prosecuted for his alleged involvement in the planning of the massacre in which he was implicated. We are the only truth commission to have ever included such a recommendation concerning one of our own.

International Involvement

I know that the use of foreigners in your processes is a controversial proposition here at the moment. I cannot say whether using foreigners would be helpful or not in the Sri Lankan context. I can, however, share with you two brief examples of the use of foreigners, one of which was positive and one of which was negative, and perhaps more importantly why their use was successful in the one case and a failure in the other.

In Kenya one third of all of the commissioners in each of the commissions established as part of their transitional process were foreign. I was thus one of three foreign commissioners on the nine-member TJRC. The three of us internationals did not have different powers than the Kenyans. We were each one among equals. The only exception was that the Commission could not make a decision without at least one international commissioner being present. This meant that the Kenyan commissioners could still outvote the three international commissioners, but

that they could not do so without the knowledge of at least one international commissioner.

The international commissioners in the Kenyan TJRC added expertise and legitimacy, both domestically and internationally, to the process. Some Kenyans only wanted to meet with the international commissioners, as they did not trust the Kenyan commissioners. The reverse was also true – in other words, some only trusted the Kenyan commissioners, and were suspicious of the foreign ones. We adapted our work planto take into account these political realities.

Northeastern Province, for example, is a remote desert region that has been the subject of numerous massacres and other violations since Kenyan independence in 1963. In fact from 1964 to 1968 there was a full-scale armed conflict between the Kenyan military, the local Somali residents, and Somalia. The region has been habitually marginalized economically – to give one example, over forty-five years since independence there was not one paved road in the entire 50,000 square mile Province. This was the region in which the massacre occurred that implicated our Chair. Close to a thousand people were killed; every women and girl was raped; and all of the villager's homes and livestock were destroyed. While this was the worst such massacre, it was only one of many. Many of the residents of this region were skeptical of the Kenyan Government, and even of Kenyans from other parts of the country. They were thus more likely to speak to and trust the international commissioners. In fact a number of people with crucial evidence concerning the massacre would only speak with one of the international commissioners.

The presence of international commissioners thus contributed to building trust with parts of Kenya that had been marginalized. In those parts of the country where trust was low, the international commissioners played a more public role. In those parts of the country where foreigners were viewed with suspicion, the

international commissioners played a less public role. The Kenyan commissioners brought a level of understanding of the complex dynamics of Kenyan society and history that eluded the international commissioners. The international commissioners brought a level of objectivity and a fresh view from the outside that allowed us to see more easily certain dynamics that eluded the Kenyan commissioners. Neither was a better perspective. Instead each perspective strengthened and complemented the other, and resulted in a more sophisticated, nuanced, and effective approach that benefitted the process. At the end of the day it was a Kenyan-driven, and Kenyan-controlled, process.

Cambodia provides a very different example. The Khmer Rouge Tribunal includes both international judges and an international prosecutor who work besides Cambodian judges and a Cambodian prosecutor. While there are fewer foreign judges than Cambodian judges, the foreign judges have an effective veto over any decision made by the Tribunal. Thus a majority of Cambodian judges may be outvoted by the minority of foreign judges. There is a similarly complex relationship between the international and Cambodian prosecutors. This has proven to be an unwieldy system that has not served the purposes of the Tribunal well. It was motivated by similar concerns to those in Kenya – lack of trust both domestically and internationally. The solution, however, exacerbated rather than addressed these concerns. The dynamic was a complex one. On the one hand, there have been credible reports of corruption by some of the Cambodian judges and staff, as well as political interference by the Government through some of the Cambodian judges and staff. On the other hand, while the supermajority wielded by the foreign judges was designed to combat exactly that sort of dynamic, vesting control in foreigners created the appearance of a process that was not of or by Cambodians. The uneven power relationship between foreign and Cambodian judges reflects the uneven power dynamics of the international system, and thus

exacerbates an already entrenched dynamic of suspicion and mistrust.

If you do decide to include foreign nationals in some or all of your processes (and I do think there are some strong advantages to doing so), it is important that ultimate control of your process remain with Sri Lankans. In other words, foreign nationals should not be given super-majority powers over their Sri Lankan counterparts. Instead they should be added to increase legitimacy (both domestically and internationally), to increase technical and comparative expertise, and to increase transparency.

IV. Fourth, the importance of realistic expectations and a communications strategy.

It is important to identify the overall goals and aspirations of your transitional justice strategy, and then to be clear about how each mechanism created to pursue that larger strategy contributes to those ends. Without such clear road mapping, stakeholders may understandably assume that a body labeled a truth and justice commission will provide just that – complete truth, and complete justice. This is of course unrealistic. No one mechanism, or even set of mechanisms, will uncover all of the truth or provide justice for all wrongs. To suggest otherwise is to set those institutions, and the broader project, up for failure. What can be expected, even demanded, is that each individual piece – whether it be a truth commission, a special court, an office of missing persons – make a meaningful contribution to the overall goal, or at least not undercut the efforts of other mechanisms that are contributing to that goal. It can also be demanded that each individual element publicly explain its role and how its operations fit within the larger transitional strategy. These public explanations will allow better coordination and implementation of their individual mandates, and also provide

a set of criteria for evaluating the effectiveness of each element and thus how to modify them to better serve larger strategic purposes.

Let me make a brief observation about truth commissions. Truth commissions are best designed to:

- explore the root causes of violence and conflict;
- provide a safe space for different stakeholders, including victims, to describe their experiences, including the effect of violations on them and their community;
- provide a safe space for people to speak their own truths; and
- facilitate a national conversation about a society's past, present and future.

To do the latter (facilitating a national conversation) requires the involvement and cooperation of the media, civil society, government, and other important stakeholders. The success of a truth commission is both a function of its own design and capacities, but also of the broader context in which it operates. This is equally true for the other elements of a transitional justice process.

The media and other forms of outreach are thus an important component of this process. The media is an important avenue for stakeholders to engage with a national transitional justice process. There is an old philosophical question: if a tree falls in the forest and no one is there to hear it, does it make a sound? If a body is established to further reconciliation, or truth, or accountability, but few are aware of its existence, or what it does, then has it made any contribution? It is thus important to include a sophisticated media and outreach strategy both with respect to each element, but also with respect to the overall national program. Such a media and outreach strategy must not

only explain what and how these mechanisms will operate, but also how they will complement each other. It is also important for the media to make its own contribution through critical, but constructive, engagement with the process. South Africa provides a positive example of this, where both the national radio and television stations covered extensively the constitutional debates, the truth commission hearings, and other parts of the transitional justice process.

V. Fifth, amnesty.

I understand that amnesty has been discussed as part of the Sri Lankan transitional justice process. Let me in closing make a few brief remarks about amnesties as part of a transitional justice strategy.

First, and most importantly, amnesties are an exceptional measure. They temporarily suspend the rule of law by protecting individuals from accountability for their actions. Such an extraordinary benefit should not be given lightly. Amnesty should not be an end in itself, but rather a means to a larger, and important, end. It thus should be used to further important strategic goals of a transitional process, such as peace, stability, trust, and even truth and accountability. If it is not, then an amnesty may undermine the overall transitional justice process by distorting the rule of law and accountability, and thus risking the legitimacy and acceptance of the entire project. If amnesty is viewed as solely a get out of jail free card for the powerful and well-connected, then it will be viewed as an act of great injustice and undermine efforts to apply the rule of law equally to all citizens regardless of their position, ethnicity, religion, or other characteristic. If amnesty applies unequally to one group over another, then it will lessen rather than strengthen trust, and plant the seeds for further conflict in the future. It will risk further entrenching impunity.

In South Africa amnesty served two important purposes. First, it was part of the political agreement between the outgoing apartheid government and the anti-apartheid forces that resulted in the creation of a power-sharing government and the country's first democratic elections. Amnesty was thus used as a means to further a peaceful resolution of the conflict and to establish democracy. It was enshrined in the new South African constitution (thus underscoring again the importance of coordination and planning).

Second, amnesty in South Africa was used as a means to reveal truth, and to further accountability. The South African amnesty was administered by a truth commission. Individuals who sought amnesty were required to make full disclosure of the crimes they had committed. This led to some powerful revelations, but also to some painful ones.

Let me share two brief examples of painful revelations made through the South African amnesty process. The first concerns a young man named Sicelo Dlomo, who was killed in 1988. His mother, Sylvia, had always assumed that the police had killed her son. That was in fact her truth, which she shared in her public testimony before the South African truth commission. A few years after she had given her testimony, Sylvia learned that four former friends of Sicelo's – friends who had worked closely with him as part of the youth wing of the ANC opposing the apartheid government – had applied for amnesty for his killing.[9] It turns out that Sicelo's four friends had suspected him of being an informer, and had thus killed him. They were now applying for amnesty for his killing. Up until that moment all, including his mother, had assumed that the police were responsible.

Second, a man named Gerry Thibedi listened to police officers explain how they had firebombed his home with the intention of

9 The four youth were granted amnesty for the killing of Dlomo. AD 2000/019.

killing him and anyone else in the house (including his wife and young daughter). He was then allowed to testify, and openly discussed his own mixed reaction to their testimony:

> I must say that firstly this is the most emotional day of my life, having to sit inside this room together with people who, nine years ago, threw a bomb into my own house. I must say that after listening to what they have to say, indicating that they have actually identified me as a trouble-maker, I find it very difficult to accept that their final decision was to wipe me out, with my entire family. For the mere fact that it took me exactly nine years, nine solid years to know who did that, is a source of relief, at least I know who did it.[10]

Mr Thibedi's testimony appears contradictory: in some places decrying, and other places, embracing, the revelations he heard that day. Those apparent contradictions underscore the complex nature of processes like this. They are painful and difficult at times – witness Mr Thibedi and Mrs Dlomo – but they are also necessary. They are necessary not for closure (for I am not sure that closure is possible), but necessary for moving forward constructively to build a better future. It is generally the case that individuals and communities who have suffered serious violations of their rights are less likely to be reconciled with each other if there is not some form of justice. Impunity breeds distrust and sows the seeds for future conflict. One cannot begin to provide some form of justice unless there is a consensus about what had happened in the past – this is the truth function of transitional justice mechanisms. For Mrs Dlomo and her community, there was a genuine belief that the security forces were responsible for the death of her child. That death, as well as many others, created a chasm of mistrust between her community and the police. Yet that death was not

10 1999.04.06-22 (Pretoria[Nietverdiendt 10,Ribeiro Murders,Piet Nt]: 990415PT. The police officers were granted amnesty. AD 1999/0272.

the direct responsibility of the security forces, as the confessions of Sicelo's killers made clear. Without that revelation, the death of Sicelo would be a contested truth between the community and the security forces, and thus a barrier to rebuilding trust between the two. Even with the revelation, of course, there were still enormous barriers to rebuilding that trust given the enormity of the crimes committed by the security forces in the name of apartheid. But those barriers cannot be addressed if there is no consensus about what they are; and disagreements about the truth based upon false assumptions only exacerbates this problem. Knowing the truth of what happened does not guarantee justice or reconciliation; but without that knowledge neither is possible.

These two stories – that of Mrs Dlomo and Mr Thibedi – and the trauma their retelling created, also underscore the importance of approaching these processes carefully and with sensitivity, and with support for all of those who participate, especially victims.

Finally, one last example. Jeffrey Benzien was a policeman in the Western Cape. He was famous for employing a notorious method of torture then known as the "wet bag," which consisted of placing a wet cloth bag over the victim's head for prolonged periods of time. It was very similar to what we now know US security forces used in interrogating terrorism suspects: waterboarding. Benzien stated during his amnesty hearing that his wetbag method was foolproof and resulted in his victims talking within thirty minutes.[11] One of the victims he tortured, Tony Yengeni, questioned Benzien in great and graphic detail about his torture, culminating in Yengeni asking Benzien to demonstrate the use of his wet bag method on a volunteer from the audience so he could see for the first time the technique that

11 1997.07.14-16 (Cape Town) Benzien1, 60-61.

had been used on him.[12] During the demonstration Yengeni asked Benzien for specific details about victims subject to this treatment – how their bodies moved, when they screamed, etc.

The scene of a torture victim questioning his torturer in such great detail – in effect forcing him to recreate his role as a torturer – was a powerful one that was covered thoroughly by the national and international media.[13] It created a form of poetic justice, reversing the roles of the torturer and the tortured. Traditionally the torturer controls the body of the tortured, and uses that control to turn the body against its owner through pain. In this case, the tortured was placed in control of the body of the torturer, forcing him to do things that exposed who he really was, and what he had done. The truth commission thus became a mechanism that reversed the power dynamic between perpetrator and victim – not for the purpose of vengeance, but for the purpose of truth, accountability, healing, and ultimately reconciliation.

What about amnesty in Kenya? The Kenyan truth commission's mandate included some powers related to amnesty, but those powers were much weaker than those given to the truth commission in South Africa. In fact the amnesty provisions of our legislation were mostly taken directly from the South African legislation with little attention to the different context in Kenya – so another example of my first point about learning from other places but not adopting foreign methods uncritically. The amnesty provisions in Kenya did not serve any purpose. Because of effective lobbying by civil society, we were empowered only to recommend, not grant, amnesty. More importantly, we could not recommend amnesty for any violation that qualified as a gross violation of human rights. This meant that there were very few acts that would fit within our mandate – and thus very few acts

12 Id. at 67 – 70.

13 Benzien was granted amnesty. AD 1999/0027.

that we would be investigating – for which we could recommend amnesty. While our amnesty powers were weak, the amnesty provisions of our legislation were extensive – as I said, they were taken almost *verbatim* from the South African legislation. The large amount of space devoted to amnesty in our legislation created the impression for some that we could and would grant amnesty for a wide variety of crimes, notwithstanding the fact that the language was clear that we could only recommend, and that we could not recommend for anything that qualified as a gross violation of human rights. In fact one of the Kenyan commissioners (a lawyer no less) had written a public opinion piece in which he claimed (incorrectly) that we had extensive amnesty powers. The amnesty provisions thus served to lessen our legitimacy without giving us any significant powers in that area. It would have been far better if the amnesty provisions had never been included in our legislation. We ended up not using them at all.

There is a growing jurisprudence on amnesties at the international, regional, and national levels. This jurisprudence provides limits on what may be viewed as not only a legal but also a legitimate amnesty. It was in part because of that jurisprudence that civil society organizations in Kenya lobbied to have the amnesty provisions in our legislation weakened. A few years ago I joined a group of other international lawyers to formulate guidelines to assist those crafting amnesties in a transitional setting. The guidelines set forth the different choices involved in crafting an amnesty, and which choices are more likely to result in an amnesty that is viewed as both legal and legitimate. The guidelines have been published as the Belfast Guidelines on Amnesty and Accountability (http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf). They set out criteria for determining the legitimacy and legality of an amnesty, including the requirement that an amnesty must be evenly applied and not made available

to just one side or constituency of a conflict. If an amnesty only applies to one party to a conflict, it is more likely to be viewed as an illegitimate partisan advantage rather than a legitimate means towards peace and justice. The guidelines were developed to provide a road map for those who both want to evaluate an existing amnesty or to craft an amnesty that is more likely to be viewed as legitimate and legal. They include guidance on how to link an amnesty to accountability mechanisms; what criteria should be used to identify those individuals who are eligible for amnesty (and thus also those who should not be); different conditions that can be required for an individual to be granted amnesty; conditions that might be imposed for an individual to retain amnesty; the different mechanisms, institutions, and procedures one might use to administer an amnesty; and a summary of the relevant national, regional, and international jurisprudence on amnesties. I urge those of you contemplating the use of an amnesty here to consult those guidelines, and of course to critically assess the applicability of the lessons they provide to the Sri Lankan context.

Each of the five sets of observations I have made today – the importance of developing a uniquely Sri Lankan transitional justice plan that draws upon, but is not determined by, lessons from other transitions; coordinating and sequencing the elements of that plan; making sure the process of creating and implementing the plan is inclusive; developing a comprehensive communications strategy to explain, justify, and implement the plan; and using amnesty as an exceptional measure that furthers, rather than undercuts, the overall transitional justice plan – will, I hope, assist you as you continue along the path of creating a uniquely Sri Lankan path towards a more inclusive, pluralistic, and unified society that protects and nurtures all of its citizens. It is a vision that Neelan embraced, and I know that he would be pleased with how far you have come since his death. He would also, I assume, still want to remind all of us

that there is still much work to be done, and I would be remiss if I did not emphasize that message here and urge each and every one of you to redouble your commitment and efforts to healing and uniting this beautiful country, and in doing so to draw upon lessons and resources near and far, but always with a critical understanding of what is appropriate for Sri Lanka at this crucial time in your history.

About the Speaker

Ronald C. Slye is currently Professor of Law at the University of Seattle School of Law. He teaches, writes and consults in the areas of public international law, international criminal law, transitional justice, and international human rights law. From August 2009 to August 2013 he was chosen by Kofi Annan to be one of three international Commissioners for the Kenyan Truth, Justice and Reconciliation Commission. He is a legal advisor to the Documentation Center of Cambodia, and was an international consultant to the South African Truth Justice and Reconciliation Commission. At Seattle University he previously served as Director of the Law School's International and Comparative Programmes, the Centre for Global Justice, and the Global Justice in South Africa summer programme, which he helped to create.

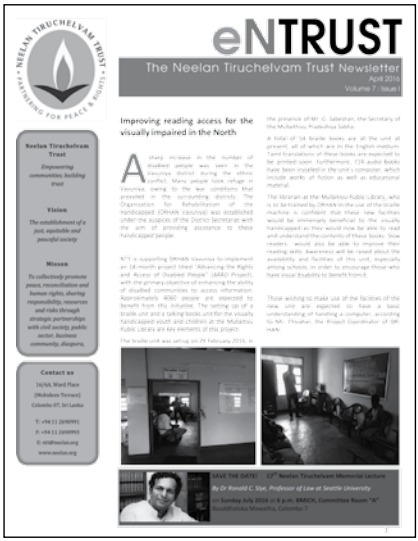
Before joining the faculty, Professor Slye was an assistant professor and Robert Cover Fellow in the clinical programme at Yale Law School, where he taught an interdisciplinary transactional clinical course focusing on homelessness and housing, as well as immigration law and poverty law. He also served as associate director of Yale's Orville H. Schell, Jr., Center for International Human Rights at Yale Law School and taught in Yale's international human rights law clinic. Professor Slye was a visiting professor at the Community Law Centre at the University of the Western Cape in South Africa from 1996-97 and, while there, served as legal consultant to the Truth and Reconciliation Commission. He is currently writing a book on the South African Truth and Reconciliation Commission and its amnesty process, and a book on the Kenyan Truth Justice and Reconciliation Commission.

Prof Slye has written other books and contributed with book chapters, reviews and a number of articles as well.

LIST OF PAST LECTURES

Date	Topic	Speaker	Speaker Profile
March 2000	Nationalism and self-Determination: Is There an Alternative to Violence?	Mr. Michael Ignatieff	Writer, Historian And Broadcaster
July 2000	Human Rights Political Conflict & Compromise	Mr. Ian Martin	Former Special Representative of the United Nations Secretary- General for East Timor and former Secretary-General, Amnesty International
July 2001	No Greater Sorrow (Times of joy Recalled in Wretchedness)	Prof. Amitav Ghosh	Novelist, Anthropologist, Professor of Comparative Literature, Queens College, City University of New York
July 2002	Truth and Reconciliation in Times of Conflict: The South African Model	Prof. Alexander L. Boraine	President, International Center for Transitional Justice
July 2003	Whose Face is That I See?: Remembering the Unfallen	Prof. E Valentine Daniel	Professor of Anthropology and Philosophy, Columbia University
October 2004	Justice and Human Rights for All: The Key to Peace and a Sustainable World	Ms Clare Short MP	British Labour Party Politician and Member of Parliament
July 2005	The Political Formation of Cultures: South Asian and Other Experiences	Prof. Narendra Subramanian	Associate Professor of Political Science McGill University, Montreal, Canada
July 2006	Terror and the Constitution: Notes from America since September 11	Mr. Steve Coll	Staff writer, The New Yorker, former Managing Editor, The Washington Post

July 2007	The Limits of State Sovereignty: The Responsibility to Protect in the 21st Century	Prof. Gareth Evans	President, International Crisis Group
July 2008	Democracy & Development: Restoring Social Justice at the Core of Good Governance	Prof. Gowher Rizvi	Harvard University Kennedy School of Government
July 2009	Constitutional Utopias: A Conversation with Neelan Tiruchelvam	Prof. Upendra Baxi	Emeritus Professor of Law University of Warwick, UK
August 2010	Histories and Identities	Prof. Romila Thapar	Emeritus Professor of Ancient Indian History, Jawaharlal Nehru University, New Delhi
July 2011	Making South Asian Cities Habitable: A Perspective from the Past	Prof. Ramachandra Guha	Historian, Biographer, Columnist, Environmentalist and Cricket Writer
July 2012	Constitutional Design in Plural Societies: Integration or Accommodation?	Prof. Sujit Choudhry	Cecilia Goetz Professor of Law, Faculty Director, Centre for Constitutional Transitions, NYU School of Law
July 2013	"The law, this violent thing" dissident memory and democratic futures	Prof. Vasuki Nesiah	Associate Professor of Practice New York University
July 2014	Stone and Flower: Truth as a Foundation for Community Learning and Reconciliation	Ms. Galuh Wandita	Co-convener of the Coalition for Justice and Truth in Indonesia, a member of a "citizen's council" tasked to seek the truth on Indonesia's past crimes
July 2015	Democracy in Plural Societies: problems and solutions	Dr. David Miller	Professor of Political Theory, Nuffield College, University of Oxford



eNTRUST

The Neelan Tiruchelvam Trust Newsletter

April 2016

Volume 7 : Issue I

Improving reading access for the visually impaired in the North

A sharp increase in the number of disabled people was seen in the Vavuniya district during the ethnic conflict. Many people took refuge in Vavuniya owing to the war conditions that prevailed in the surrounding districts. The Organization for Rehabilitation of the Handicapped (ORHAN Vavuniya) was established under the auspices of the District Secretariat with the aim of providing assistance to these handicapped people.

NTT is supporting ORHAN Vavuniya to implement an 18 month project titled 'Advancing the Rights and Access of Disabled People' (ARAD Project), with the primary objective of enhancing the ability of disabled communities to access information. Approximately 4080 people are expected to benefit from this initiative. The setting up of a braille unit and a talking books unit for the visually handicapped youth and children at the Mullaitivu Public Library are key elements of this project.

The braille unit was set up on 29 February 2016, in the presence of Mr. C. Sabeshan, the Secretary of the Mullaitivu Pradeshiya Sabha.

A total of 54 braille books are at the unit at present; all of which are in the English medium. Tamil translations of these books are expected to be printed soon. Furthermore, 719 audio Books have been installed in the unit's computer, which include works of fiction as well as educational material.

The librarian at the Mullaitivu Public Library, who is to be trained by ORHAN in the use of the braille machine is confident that these new facilities would be immensely beneficial to the visually handicapped as they would now be able to read and understand the contents of these books. Slow readers would also be able to improve their reading skills. Awareness will be raised about the availability and facilities of this unit, especially among schools, in order to encourage those who have visual disability to benefit from it.

Those wishing to make use of the facilities of the new Unit are expected to have a basic understanding of handling a computer, according to Mr. Thivahar, the Project Coordinator of ORHAN.

SAVE THE DATE! 17th Neelan Tiruchelvam Memorial Lecture

By Dr Ronald C. Slye, Professor of Law at Seattle University

on Sunday July 2016 at 4 p.m. BMICH, Committee Room "A"

Bauddhaloka Mawatha, Colombo 7

Neelan Tiruchelvam Trust

Empowering communities, building trust

Vision

The establishment of a just, equitable and peaceful society

Mission

To collectively promote peace, reconciliation and human rights, sharing responsibility, resources and risks through strategic partnerships with civil society, public sector, business community, diaspora,

Contact us

16/6A, Ward Place

(Molokhena Terrace)

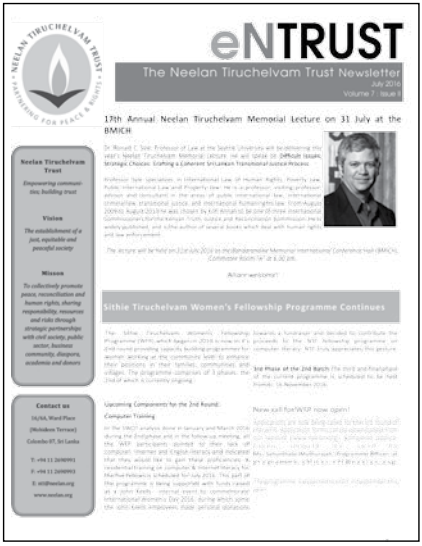
Colombo 07, Sri Lanka

T: +94 11 2690991

F: +94 11 2690993

E: ntt@neelan.org

www.neelan.org



eNTRUST

The Neelan Tiruchelvam Trust Newsletter

July 2016

Volume 7 : Issue II

17th Annual Neelan Tiruchelvam Memorial Lecture on 31 July at the BMICH

Dr Ronald C. Slye, Professor of Law at the Seattle University will be delivering this year's Neelan Tiruchelvam Memorial Lecture. He will speak on Difficult Issues, Strategic Choices: Crafting a Coherent Sri Lankan Transitional Justice Process.

Professor Slye specializes in International Law, IP Human Rights, Poverty Law, Public International Law and Property law. He is a professor, visiting professor, advisor and consultant in the areas of public international law, international criminal law, transitional justice, and international humanitarian law. From August 2009 to August 2010 he was chosen by Kofi Annan to be one of three International Commissioners for the Kenyan Truth, Justice and Reconciliation Commission. He is widely published, and is the author of several books which deal with human rights and law enforcement.

The lecture will be held on 31st July 2016 in the Bandaranaike Memorial International Conference Hall (BMICH), Committee Room "A" at 4.30 pm.

All are welcome!

Sithie Tiruchelvam Women's Fellowship Programme Continues

The Sithie Tiruchelvam Women's Fellowship towards a fundraiser and decided to contribute the Programme (WFP), which began in 2010 is now in it's proceeds for the WSF Fellowship programme on third round providing capacity building programmes for computer literacy. NTT truly appreciates this gesture women working in the community both to enhance their positions in their families, communities and colleges. The programme comprises of 3 phases, the 2nd Phase of the 2nd Batch The third and final phase of which is currently ongoing.

Upcoming Components for the 2nd Round:

Computer Training

In the WNOT analysis done in January and March 2016 during the 2nd phase and in the follow up meeting, all the WFP participants pointed to their lack of computer, internet and English literacy and indicated that they would like to gain these proficiencies. A residential training on computer & internet literacy for Madhura Fellowship, scheduled for July 2016. This part of the programme is being supported with funds raised at a John Keells internal event to commemorate International Women's Day 2016, during which some the John Keells employees, made personal donations.

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If you are interested in reading more about our work, please visit www.neelan.org. Our newsletter eNTrust can also be accessed via the website. For printed copies, kindly contact NTT.

Neelan Tiruchelvam Trust (NTT) is an indigenous philanthropic organisation that supports social justice, peace and reconciliation. It was founded in 2001, two years after the assassination of Dr. Neelan Tiruchelvam. NTT is devoted to sustaining his intellectual legacy as a peacemaker, legislator, constitutional lawyer and institution builder.

Our Vision

The establishment and protection of a just, equitable and peaceful society.

Our Mission

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16/6 A, Ward Place (Mohideen Terrace)
Colombo 7, Sri Lanka
Tel: +94 11 2690991
Fax: +94 11 2690993
E-mail: ntt@neelan.org
www.neelan.org
www.facebook.com/neelantiruchelvamtrust

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