

Subject: Tokyo Tribunal from Rhonda

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To all the memberd of the International Advisory Council,

Enclose is a copy of the comments sent by Rhonda to be considered and presented at the Seoul meeting. With the presence of the lawyers from victimized countries, I hope that we will be able to come up with a better resolution. Thank you very much Rhonda, Charlotte and Vahida and I will work out way through the kimchis in Seoul.

Much love,

Indai

To: WIWCT Organizing Committee

Fr: Rhonda Copelon

International Women's Human Rights Law Clinic

& ICC Legal Secretariat to the Women's Caucus for Gender Justice

Re: Charter of the Tribunal and related questions

Date: June 2, 1999

First, I am sorry I cannot join you and very glad that Vahida will be there. We have discussed a number of issues, some also with Charlotte, and on the basis of that and our discussions together in the Hague, here are some of my thoughts, offered in the full understanding that you will take them into account as your priorities and necessities warrant.

1. Whether to use a trial model like the ICC. I think this is both impossible and undesirable. The energy put into replicating a trial is tremendous and the trial process is very slow. And, the fact that it is essentially one-sided will open it to easy attack. I know that the thought is to model the ICC from a gender justice perspective, but that is not possible in a non-adversarial manner. I think the idea of a People's Tribunal or a Truth Commission make much more sense and give you greater flexibility.

2. The Truth Commission or People's Tribunal models have the advantage of inviting testimony and documentation and avoding the pitfalls of due process or picky evidentiary requirements. You have enough without that. I don't know whether it is possible that there are any of the perpetrators or perhaps their children who want to make public what they did and make public apology and I don't know what meaning that would have for the survivors or Japanese society. The Truth Commission model enables you to call for that and might generate something quite dramatic or nothing at all which will not undermine your efforts in any case since that is already the status quo.

3. I also note that the Guatemala Truth Commission calls for taking testimony in secret session. I think that is something to consider on the basis that you would report information without revealing identities. It would require great precautions, however. And there are political drawbacks. But to accomplish #2 above, it is something to consider. See further comments on in camera proceedings below.

4. Naming names. This depends on many factors beyond my knowledge. It is a very big decision. I note that the Guatemala Truth Commission was prohibited from attributing responsibility which was of course part of the peace deal. I don't have the South African model. I know you need to

consider its cultural impact. From the legal end if your system resembles our own in regard to libel and slander, you have to expect lawsuits from family members or the individuals. If you have absolutely ironclad proof and a strong consistent legal team available to take up these cases, then the generation of lawsuits may in fact a way to bring the issues into the Japanese courts on the merits. And as to this, your lawyers will assess the likelihood of success and what that would mean. (In the US, it is very hard to prove libel against a public official, but the result is not necessarily a finding that the statement was true) and the number of years and resources that will be involved in defending such cases. Even if possible, it may not be worth it as I think it will tie up resources for years. If the resources are there and you think you can turn the defensive posture into an offense and are very sure of your names, then it is a possibility to be considered.

5. Whether to include other examples of violence against women. I think that it is important to connect the crimes against the "comfort" women to current examples of sexual and gender violence, but I don't think that that need to decenter your main goal which is to have a formal proceeding to deal with the atrocities committed by the Japanese Army and compile a historical record in that regard. This is particularly true in a project that is scheduled for a few days. I am in favor of finding simplified ways of making the connections that will also encourage international participation and presence at the hearings.

Comments on the draft charter/statute.

1. I agree with Theo that you should have a lovely preamble that states your goals clearly.

2. Depending upon what you decide about scope of jurisdiction, you may want to add something to the title. Article 1 should state the scope clearly. I think the second para. may belong as chapeau to the preamble or is not necessary in the charter itself.

3. Article 2. Here you need to merge art. 2 and 3. We don't want to say that sexual violence crimes are not art. 2 crimes but rather a particular example of them. You could do this by a para 2 to art 2 which would read: "In particular, the Tribunal shall prosecute rape, sexual slaver, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual or gender violence as war crimes and crimes against humanity, in and of themselves and as constituting other recognized crimes against the person." I do not know enough facts to be clear about the applicability of genocide.

4. Then the question is whether you want further definition e.g. war crimes require war; crimes v. humanity require widespread or systematic attack. Note only crimes against humanity require widespread or systematic attack. One war crime is a war crime. You can use some of the definitions of crimes such as rape, sexual slavery etc. that WC is proposing to ICC. [Use WC proposed definition of forced pregnancy not the one accepted in Rome. Also define other pertinent crimes murder,

5. Article (4)3: I would call it Individual Criminal Responsibility and merge your 4 and 5.

6. Article 7: Need more work on state responsibility. Your standards are much tougher than state responsibility for human rights violations and even tougher than international standards of state criminal responsibility. I don't have expertise in this area. Question why in article 2 you characterize that as negligence. There is generally criminal responsibility for cover up or obstruction. I think state responsibility should be linked to acts of officials as well as decisions by authorized parts of the state. Note that in the ICC negotiations, the only discussion of state responsibility was re reparations. It failed but it is contained in the report of the March 1998 PrepCom and the broadest version would have given the Ct power to "order reparations*.if the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority;"

as well as power to recommend reparations in other cases.

7. Articles on composition/procedures will all of these need to be revised or eliminated given the model you determine.

8. Art. 11 re judges. maybe you should use the ICC language (fair representation) or balance of men and women. If you do this you can still have a majority of women. I suggest using the gender expertise requirement in conjunction with or as substitute for c. Do you need 12 judges politically? It's a lot and is not necessary for credibility of the Tribunal.

9. Article 17. To what extent are you expecting in camera testimony from survivors? Para. 2 should probably not talk about rights of the accused but rather reliability of the evidence or the fairness of the process. What are you planning re protection? Is there serious danger to survivors if they come forward? I was thinking of the secret/in camera proceedings above in relationship to persons associated with perpetrators. If in camera proceedings are a substantial concern, then need to deal with providing time other than that anticipated for public observation.

10. Participation is an interesting issue and could provide a model for the ICC. Need to study process of People's Tribunal (like Bertrand Russell) to understand who presents the evidence if that is the method is it a prosecutor? or do we speak of the person in terms other than those drawn from criminal trial system? If that becomes your direction, then also do consider how to have an advocate for the survivors directly participating in the proceeding. That person can draw out additional evidence; can ensure privacy. That would be a nice model for ICC. Probably the rules proposed from the Paris meeting will be helpful basis.

11. Judgments and penalties. Need to consider whether the opinion will be issued at the time or prepared and follow the taking of the testimony. Can be accompanied by briefer statement but if the opinion is to be a documentation that goes beyond existing studies and is responsive to what happens and not appear canned, I think it will take more time and it makes sense to give it that time. Need to have the drafters etc. I assume you want to publish a book with testimonies and the opinion.

12. Re penalties, I am not sure it makes sense to identify sentences. Perhaps just distinguish the gravity of the crime and identify if there has been an enrichment re forfeiture. I think reparations is the most important thing for the Tribunal to spell out and suggest making it a separate article. What would/does reparations mean to the survivors; what should be required of the perpetrators? These are also key questions for the ICC. Question word re-education; maybe it is service and education that enables the person to obtain an understanding of the atrocities for which they are responsible and to contribute to the elimination of violence against women and respect for the sexual autonomy, and equality of women.

That's all for now. Love to you all. Rhonda