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(Open Letter)

To/
Mr. Ban Ki-moon
Secretary General
The United Nations
June 5, 2008

Subject: To take immediate action for the release of comedian Za Ga Na and to propose that the Security Council refer the situation in Burma to the International Criminal Court

Dear Sir,

Warm greetings from the Burma Lawyers' Council! With deep concern, we are writing to you with a request for help regarding the detention of comedian Za Ga Na, victim of a crime against humanity.

On June 4 2008, Za Ga Na was arrested at his home by ten local authorities who then searched his home and seized various items including a tape recorder and \$US 500. No official statement has been made by the SPDC regarding Za Ga Na's detention, but there can be no doubt that his arrest is linked to his recent attempts to provide aid for victims of the Cyclone Nargis. On 25 May 2008, government authorities threatened to charge the comedian with sedition (Myanmar Penal Code Art. 124A) if he continued the humanitarian efforts that he had been organizing along with other prominent actors. This is Za Ga Na's second arrest in less than a year: he was detained in September 2007 after urging people to join the protests taking place that month.

The detention of Za Ga Na should be characterized as a crime against humanity. It is the latest in a series of SPDC actions to demonstrate the junta's contempt for its own civilian population. Za Ga Na's incarceration has far-reaching consequences and should be considered in a wider context than the deprivation of a single man's liberty. The most immediate impact of the arrest is that it deprives the victims of Nargis of the urgently needed aid that was being provided by Za Ga Na himself. Furthermore, this action was designed to send a message to prominent members of Burmese society and is sure to deter others from taking similar humanitarian action. Finally, the seemingly arbitrary arrest of a well-known figure in civil society has further contributed to the climate of fear and intimidation present in Burma.

The imprisonment of Za Ga Na satisfies the legal definition of a crime against humanity included in the Rome Statute. This, the founding document of the International Criminal Court, provides that “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law” (Rome Statute Art. 7 §1(e)) constitutes such a crime. Za Ga Na’s arrest and the search and seizure of his property occurred in absence of a warrant and in violation of due process. It must, therefore, be considered to have infringed the fundamental rules of international law.

Za Ga Na’s incarceration is all the more egregious when considering the direct and indirect impact it will have on the victims of the Cyclone Nargis. The humanitarian efforts that were being provided by Za Ga Na and his associates have been compromised in order to further the political interests of the junta. The prioritization of SPDC’s agenda will necessarily cause further death and suffering amongst the civilian population. It, therefore, constitutes the crime against humanity in the form of “[o]ther inhuman acts ... intentionally causing great suffering, or serious injury to body or to mental or physical health” (Rome Statute Art. 7 §1(k)). It can also be characterized as extermination, defined as “the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population” (Rome Statute Art. 7 §2(b)).

The SPDC’s most recent illegal act should not be viewed in isolation but in the context of the many criminal acts preceding it. The junta’s deplorable response to the Cyclone Nargis is not an aberration. Rather, it is consistent with the Generals’ policy of sacrificing the well being of the Burmese people in order to cling to power. The junta’s attacks upon the civilian population must be conceptualized as “widespread” and “systematic” and, thus, are in keeping with the definition of a crime against humanity (Rome Statute Art. 7 §1). The detention of Za Ga Na is part of the SPDC’s persistent campaign – which includes the continued and illegal detention of Daw Aung San Suu Kyi – to arrest, intimidate, torture and murder civilians.

That this arrest is a single, acute incident does not preclude its characterization as a crime against humanity. A single detention can qualify if it is meant to “intimidate the entire civilian population” (Jean Graven, *Les Crimes Contre Humanité*). In addition, it has been argued that “an isolated attack can constitute a crime against humanity if it is the product of a political system based on terror and persecution” (Francisco Forrest Martin et al, *International Human Rights & Humanitarian Law, Treaties, Cases & Analysis*). This is a claim supported by international criminal precedent: “As long as there is a link between the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity” (*Prosecutor v. Mrksic and other*, International Criminal Tribunal for the Former Yugoslavia, 3 April 1996, IT-95-13-R61).

The arrest of Za Ga Na occurred in breach of due process and must be conceptualized as a crime against humanity. His illegal detention violates his human rights and has served to impede the humanitarian effort taking place in the aftermath of Cyclone Nargis.

The SPDC has a long history of deceiving, delaying and tricking both the UN and the international community. While we applaud the use of your good office to press the SDPC into allowing more aid to reach cyclone victims, it is our concern that the regime's partial concessions are but another stall tactic designed to relieve international pressure. For instance, after the September 2007 "Saffron Revolution", the SPDC told Ibrahim Gambari, UN Special Envoy, that the government would engage in a meaningful dialogue with Daw Aung San Suu Kyi. Any subsequent talks took place only with low-level officials and have since ceased altogether without producing results. Mr. Gambari's trips to Burma are generally considered to have been a failure. Significantly, after each of these UN visits, the SPDC's tactic of partial and empty concessions has successfully resulted in a decrease in international pressure allowing the media, foreign governments, and many international NGOs to shift their attention onto another global crisis.

Eleven days after the announcement, made by you as UN Secretary General, that Burma had agreed to accept foreign aid, the Thai newspaper *The Nation* reports today, June 5 2008, "Despite the promises of millions of US dollars worth of humanitarian aid for the cyclone victims in Burma, only a few small organizations are actually working at the scene. Inaccessibility can be blamed, because Burma's xenophobic junta is reluctant to open the door wider for international aid workers." Given that, as of now, the victims of the cyclone cannot rely on the assistance of the international community, the aid of local actors such as Za Ga Na contributes significantly to their survival. The detention of Za Ga Na and the future detention of local contributors that is likely to ensue will surely augment the plight of cyclone victims.

In keeping with the above, we respectfully request that Secretary General Ban Ki-moon make every effort for the immediate release of Za Ga Na and propose that the Security Council refer the situation of Burma to the International Criminal Court as a crucial step to establishing the Rule of Law in Burma. The longer justice is delayed the more difficult it will be to alleviate the distress caused by Cyclone Nargis. The time for justice is now.

Respectfully Yours,

Aung Htoo
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