

CASS

Community Analysis Support System



THE LEGAL FRONT: Counter-Terror Prosecutions in Rakhine



| December 2020 |



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Executive Summary

The Myanmar government designated the Arakan Army (AA) a terrorist organization on 23 March 2020. Since then, the Myanmar military, as a means to suppress the insurgency in Rakhine State, has increasingly used the 2014 Counter Terrorism Law (CT Law) to arrest and sue local people alleged to have ties to the AA. In fact, the military began to open criminal cases under this law months before the AA was declared a terrorist organisation.

The courts have discharged or dismissed many cases brought under the CT Law due to insufficient evidence. However, lawyers in Rakhine State report that the number of arrests and cases opened by the Myanmar military under the statute is increasing rapidly. This trajectory is likely to steepen unless a ceasefire agreement is reached between the military and the AA, or the Union Government's Central Committee for Counter Terrorism reverses its designation of the AA under the law. With few signs of dialogue emerging, and widespread cancellations of 2020 elections in western Myanmar, neither outcome looks likely. In addition to food shortages, casualties, and documented rights abuses, the CT Law and its usage thus far represent yet another modality by which civilians continue to be drawn into the conflict. It is, therefore, essential that response actors understand the various judicial mechanisms at play.

Key Findings

- To date, the primary reason judges have dismissed or discharged cases brought under the CT Law is lack of evidence. This is largely to do with military personnel failing to attend hearings and provide testimonies. However, in recent months the military has worked to increase attendance, and has gone so far as to transfer cases to less conflict-affected parts of the state to reduce the risk previously posed to military personnel traveling to AA-friendly territory.
- Judges in Rakhine State are under increasing pressure to take more rigorous action in dealing with CT Law cases, and their corresponding caution has resulted in fewer dismissals or discharges in recent months.
- Lawyers involved in these cases often work in silos, unaware of work being done elsewhere, especially where cases occur in different townships. This absence of coordination weakens the opportunity to exchange information and learn from others' experiences.
- A lack of timely public reporting makes it difficult to track exactly how many cases have been opened or how many people have been charged under the CT

Law across Rakhine State. This opacity hinders advocacy efforts.

- Local Rakhine lawyers have been providing free legal aid to the accused, many of whom cannot afford other legal support. While some are private lawyers, others are working for non-profit legal aid organisations. Some local NGOs offering free legal aid services have focused their attention on helping those facing charges under the CT Law. The Rakhine State Legal Aid Board and its members also provide free legal aid services for those accused or facing charges. This body is a state-level branch of the Union Legal Aid Board, which was established by the National League for Democracy government in 2018 in accordance with the 2016 Union Legal Aid Law, has branch offices at the district and township levels. However, the economic ramifications of imprisonment extend far beyond legal costs. Not only are those arrested often important contributors to household finances, the cost of traveling to the place of confinement and the financial burden of feeding a prisoner can destitute entire families.

Recommendations

There are a number of actions that response actors — local and international — could take to support legal actors working in Rakhine State to mitigating negative impacts on civilians:

- **Organise community awareness-raising activities about the CT Law in collaboration with the lawyers, lawyers' associations, and NGOs.** So far, very little attention has been given to local awareness-raising despite the growing need. Such training could cover the main provisions of the law, the rights of those accused, and fair trial standards. Many communities lack a thorough understanding of legal rights. For instance, many of those thus far arrested were not given access to a lawyer during the interrogation period. In some cases, family members have not been allowed to see the detained. As such, sensitisation activities or training on legal rights related to criminal and trial procedures would benefit not only the accused but also broader communities.
- **Encourage law enforcement authorities, including the police and the judiciary, to be more transparent with their actions and to respect the human rights and legal rights of civilians, as contained in both Myanmar and international laws.** All investigations should be transparent, conducted lawfully, and trials

made accessible to the public. For the children and women arrestees, the authorities must abide by the rules and regulations set out in the 2019 Child Rights Law of Myanmar as well as the UN Convention on the Rights of the Child and the UN Convention on the Elimination of all Forms of Discrimination Against Women, to which Myanmar is a signatory.

- **Engage the lawyers and organisations providing legal aid support in order to identify the opportunities and challenges they face, and to assess their capacity.** Response actors can then design support programmes that are targeted and effective in responding to identified needs. Given that the number of cases brought under the CT Law is increasing, it might be beneficial to establish a community of practice involving all the lawyers working on such cases to facilitate learning exchange.

- **Provide financial support to those facing trial and their family members throughout the trial period.** Interviews indicate that most of the detainees and accused are poor and often cannot even afford the cost of traveling to stand trial. Given that the trials can take a long time — some cases taking up to a year or more — they place a severe financial burden on the many people concerned. Response actors should study the economic impact these trials have on entire families and look into opportunities for funding or partnering with local CSOs and voluntary social work (*parahita*) actors to help alleviate these financial burdens.
- **Document any human rights violations that take place during different phases of the judicial process — from arrest and throughout the trial period.** A strong evidence base will be essential for any advocacy work to improve the conduct of law enforcement authorities and ensure the independence of the judiciary.

Introduction

Judges in Rakhine State – as elsewhere in Myanmar – continue to operate under the legacy of authoritarian rule. Though the National League for Democracy (NLD) government pledged to establish a fair and unbiased judiciary in its 2015 campaign, it has not done anything of significance to improve the function of the courts. As a result, public trust in the judiciary in Rakhine State remains very low. The perception that judges act as administrators of state policies and directives from higher-level officials, rather than on the basis of the rule of law and judicial independence, is widely held. As a result, many believe judicial mechanisms to be tools of control and suppression rather than a means by which justice can be served and rights protected.

Compounding this, the government (more specifically, the Office of the Advocate General) as well as the judiciary, have failed to publicly release information related to court cases associated with the 2014 Counter Terrorism Law (CT Law), despite the growing numbers of prosecutions under the law in western Myanmar's Rakhine State. Instead, the government has pressured lawyers not to disseminate information publicly. Additionally, there have been no public awareness-raising activities about the CT Law — neither its scope nor its sentencing directives. As a result, communities know very little about what is included in the law, their rights under it, or what kind of punishment they could potentially face.

To capture a comprehensive picture of the situation, this paper first discusses the background and context leading up to the current armed conflicts between the Myanmar military and the Arakan Army (AA) in Rakhine State, and the government's designation of the AA as a terrorist organisation. The background section also examines key provisions related to the offences and punishments covered under the CT Law and the organisational structure and mandate of the Central Counter Terrorism Committee formed under the CT Law.

Second, the paper discusses Myanmar's judicial system, some basic knowledge of which is essential to understand the structure of the courts and the power of the judges in Rakhine State. The section also provides information concerning the appointment system of judges at different levels, dynamics of ethnicity, and the authority of judges with reference to the relevant laws, including the 2008 Constitution of Myanmar and the 2010 Union Judiciary Law.

Third, the paper explores the court cases brought by the military under the CT Law, causes for the discharge or dismissal of certain cases, and their recent developments. This section also discusses the opinions of lawyers regarding the outcomes and conditions of the cases, judges' likely motivations, and the increasingly precarious situations facing them.

Methodology

This study adopts a qualitative approach to data collection and analysis and includes a desk review and interviews with the lawyers who have been working on the cases brought under the CT Law. The desk review includes the study of publicly available materials, including the content of the CT Law, 2008 Constitution, and 2010 Judiciary Law, media articles, and reports published by the Union Supreme Court, the Rakhine State High Court, and non-governmental organisations.

A combination of purposive and convenience approaches was used to identify lawyers for interviews. Altogether, eight lawyers from Rakhine State were interviewed – six from Sittwe, one from Mrauk U, and one from Kyauk Phyu. While some are private lawyers, others are members or heads of non-governmental legal aid organizations and lawyers' associations. Two retired senior judges were also interviewed, bringing the total number of research participants for this paper to 10.

Background

With an estimated 7,000-strong force, the AA has become a powerful ethnic armed organisation and a formidable threat to Myanmar's government and the military, as well as its ongoing peace process. Although Rakhine State has seen some armed struggle in the past, the armed groups involved attracted few recruits and had limited resources. By comparison, chronic poverty and a lack of job opportunities have combined with rising anti-union sentiment to bolster support for the AA, swaying many young Rakhine to join.

The 2009-2010 Integrated Household Living Condition Survey (IHLCS) ranked Rakhine State as the second poorest state in terms of overall poverty: 43.5 percent compared to the national average of 25.6 percent.¹ The World Bank, however, recorded a higher prevalence of poverty, at 78 percent, with its GDP 25 percent below the country average.²

The report of the Advisory Commission on Rakhine State, chaired by the former UN Secretary General Kofi Annan, also states:

“...the state is marked by chronic poverty from which all communities suffer, and lags behind the national average in virtually every area. Protracted conflict, insecure land tenure and lack of livelihood opportunities have resulted in significant migration out of the

state, reducing the size of the work force and undermining prospects of development and economic growth.”³

Political dissatisfaction has also increased support for the AA. In the general elections held in November 2015, the Arakan National Party (ANP) — the largest Rakhine ethnic party — won 22 of the 35 elected seats in the 47-member Rakhine State Hluttaw (parliament). However, the Bamar-dominated National League for Democracy (NLD) appointed a Chief Minister from among its own party, despite winning only nine seats in the Rakhine State Hluttaw. Many in Rakhine State were disappointed by what they regarded as the denial of their political rights, which has in recent months manifest as an overarching sense of disillusionment with the democratic process. In October 2020, Myanmar's Union Election Commission canceled polls in vast swaths of Rakhine State ahead of Myanmar's 8 November 2020 general elections on security grounds. The cancellations were interpreted as political and are expected to fuel grievances.

Increased support for the AA has fundamentally changed the political landscape, as it gives legitimacy, as well as strength, to the armed group as the representative of the Rakhine people. On 10 April 2020, the 11th anniversary of the AA, the group's general, Tun Mrat Naing, underlined the importance of the public's support in his speech:

[1] https://www.mm.undp.org/content/myanmar/en/home/library/poverty/publication_1.html

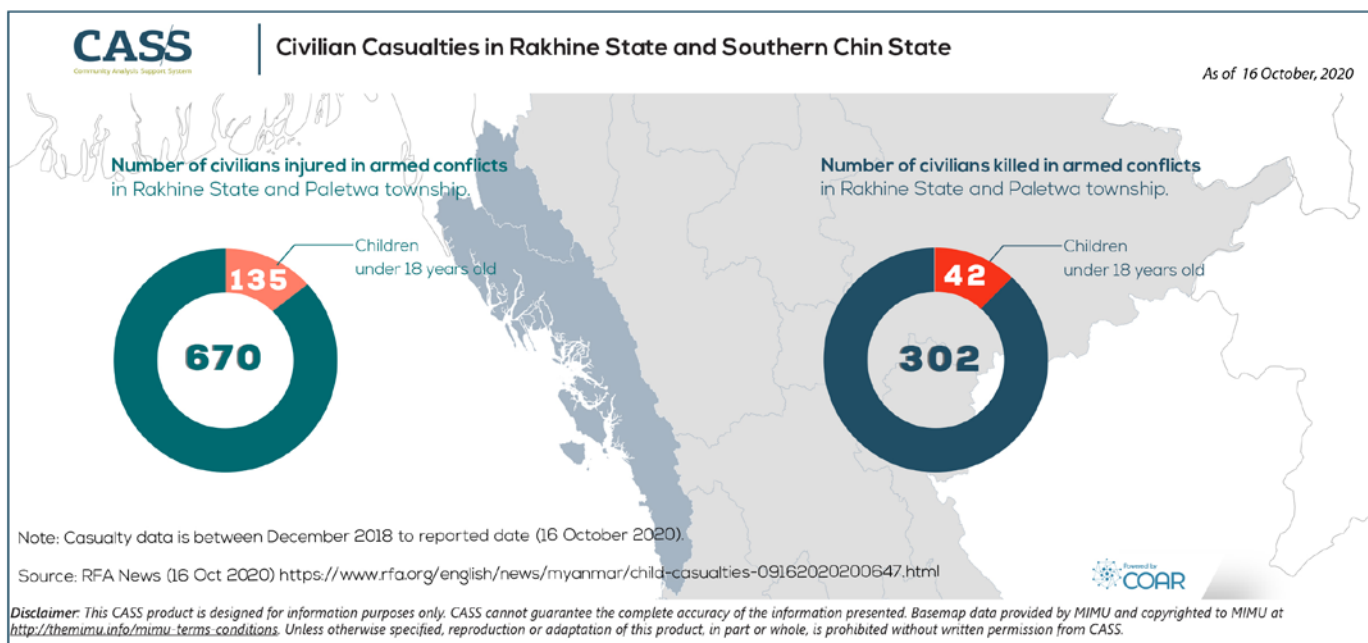
[2] <https://www.worldbank.org/en/news/statement/2019/06/12/the-world-bank-and-myanmars-rakhine-state>

[3] http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf

“One of the main reasons why the Arakan Army can firmly stand up and resist full-force offensive attacks of the enemy is because the entire population of Arakan supports us ... Our Arakan Army is absolutely legitimate in Arakan where the people of Arakan support us with their own will and political recognition.”⁴

Hardening perceptions of marginalisation, the Myanmar military left western Myanmar out of its unprecedented unilateral ceasefire announced on 21 December 2018. Although the military claimed that Rakhine State was excluded because of the ongoing threat from the Arakan Rohingya Salvation Army — a small armed group of the Rohingya active in northern Rakhine State and parts of Bangladesh — few in Rakhine State believed the narrative.⁵ Instead, many in Rakhine State assumed that the AA’s expansion into the northern parts of the state was the underlying reason.

The AA responded to their exclusion with a coordinated, early morning attack on four border outposts in Buthidaung Township in northern Rakhine State, killing 14 police officers on 4 January 2019, Myanmar’s 71st Myanmar Independence Day.⁶ Since then, the armed conflict between the Myanmar military and the AA has escalated and affected all townships in northern and central Rakhine State, and increasingly those in the state’s south. Hundreds of civilians have been killed or injured. Local civil society organisation Rakhine Ethnic Congress reports that 80,903 people are currently displaced in sites and another 154,012 are displaced outside of sites or are otherwise conflict affected in the state, while the Rakhine State government reports a total of 94,080 persons displaced.⁷ Displacement remains elastic, dynamic, and difficult to track.

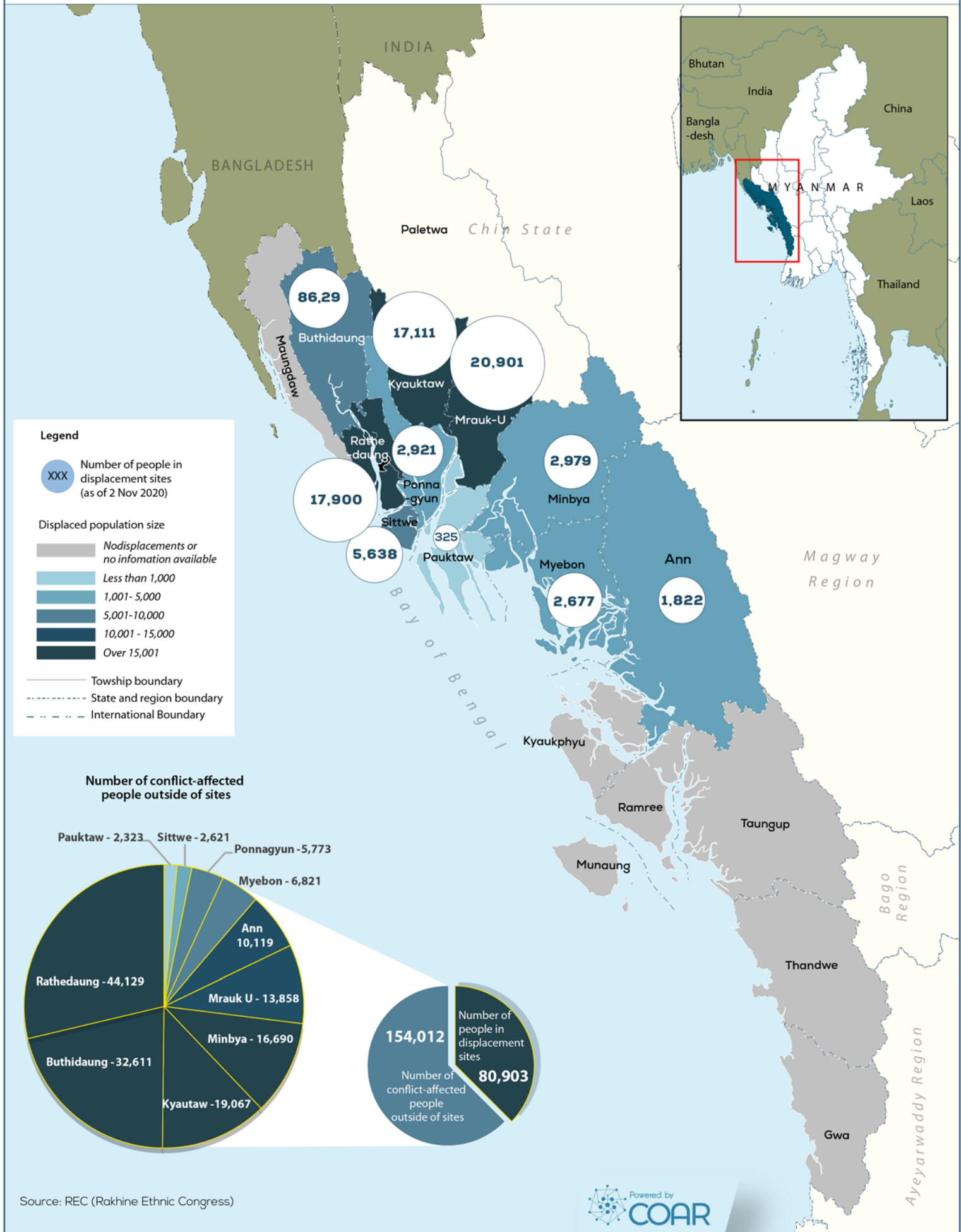


[4] See “Speech by Commander-in-Chief at 11th Anniversary Day of the Arakan Army”, official website of the Arakan Army, 10 April 2020.

[5] ARSA was first branded as a terrorist organisation on 25 August 2017 under the 2014 Counter Terrorism Law.

[6] Aung, T.T., and Naing, S. (2019). Rakhine rebels kill 13 in Independence Day attack on Myanmar police posts. Reuters. Retrieved from: <https://www.reuters.com/article/us-myanmar-rakhine/rakhine-buddhist-army-kills-seven-in-independence-day-attack-on-police-posts-idUSKCN10Y0NO>

[7] Rakhine Ethnic Congress (2020) Social media post 2 November. Retrieved from: [https://www.facebook.com/permalink.php?story_fbid=972846993240493&id=250589055466294&__cft__\[0\]=AZU5zXInln0rRLwZ7vh1RWX_5Xm0Dmw7C5V0bT2JUqbde8Q3wr6StvkQ8pR3HNkx1eLBAgU7r6K61tPdWJf_lpu1IQArA7Zfmm3DW-UhL8SgN2KtG7JEGAUUVPEiulch9yM3gtvsUu0aG1x478fnK6jb&__tn__=%2C0%2CP-R](https://www.facebook.com/permalink.php?story_fbid=972846993240493&id=250589055466294&__cft__[0]=AZU5zXInln0rRLwZ7vh1RWX_5Xm0Dmw7C5V0bT2JUqbde8Q3wr6StvkQ8pR3HNkx1eLBAgU7r6K61tPdWJf_lpu1IQArA7Zfmm3DW-UhL8SgN2KtG7JEGAUUVPEiulch9yM3gtvsUu0aG1x478fnK6jb&__tn__=%2C0%2CP-R)



Source: REC (Rakhine Ethnic Congress)

There are few signs of de-escalation in the near future,⁸ particularly following the government's designation of the AA as a terrorist group. On 23 March 2020, the Anti-Terrorism Committee, headed by the Minister of Home Affairs, who is also a general in the Myanmar army, designated the AA as a terrorist organisation under the 2014 CT Law. The committee's statement accused the AA of causing "...serious losses of public security, lives and property, important infrastructures of the public and private sector, state-owned buildings, vehicles, equipment and materials."⁹ On the same day, President U Win Myint also declared the group unlawful under the 1908 Unlawful Associations Act.¹⁰

Counter Terrorism Law

Offences under the CT Law are subject to severe punishments, including life imprisonment and the death penalty. For instance, section 49 of the law authorises a minimum sentence of 10 years, and a maximum of life imprisonment or the death penalty for "acts to produce, transfer, maintain, provide or offer to provide the weapon and ammunitions, biological, chemical and nuclear weapons or explosive weapons, nuclear material to a terrorist or member of any terrorist group." To date, sections 50(a), 50(j), and 52(a) have been the most frequently-applied charges.

Section 50(a) of the law authorises a minimum sentence of 10 years and a maximum of life imprisonment for causing severe damage to the security, or the life and property, of the public, or for forcing the government or any organisation to commit an unlawful act or to refrain from following the law. Section 50(j) also authorises the same level of punishment for providing financial support and services, helping to raise and transfer funds, or possessing or managing the assets of a terrorist group knowingly or with reasons to know. The vague language and definition of the latter section allow authorities a broad interpretation. Section 52(a) authorises a sentence of three to seven years in prison for "knowingly participating in a terrorist group, knowingly concealing or harboring a terrorist group, or giving permission for a terrorist group to use a building or gather."

Sections 51(b) and (c) have also been used to arrest and charge suspects for allegedly possessing arms and explosives. These sections allow the imprisonment of five

to 10 years for "an offence against plastic explosives" and for the "production, distribution, sale, gift or possession of explosive material, bomb or arm to commit terrorist bombing or to abet in the commission of terrorist bombing." A sister and brother-in-law of the AA Chief General Tun Mrat Naing have also been arrested and charged under this section of the law for allegedly possessing explosive devices.¹¹

Another worrying aspect of the law is the structure and mandate of the Central Committee for Counter Terrorism. This committee comprises the ministers and high-level officials from various ministries and agencies and is chaired by the Minister of Home Affairs, a general appointed by the commander-in-chief. There are no criteria or qualifications for the members of the committee, nor any limit on the numbers of committee members.

The term of office for the members is not clearly defined either. Section 5 of the law only states: "the Union Government shall form the Central Committee for Counter Terrorism consisting of the Union Minister for the Ministry of Home Affairs as Chairman, Ministers from the relevant Ministries, and the responsible persons from the Government departments and organisations as members, and may re-form the Central Committee as may be necessary."

The powers of the committee are also not clearly specified. For instance, section 6(e) vaguely describes that the committee could declare "any organisation, association or group as a terrorist group and any person as a terrorist, and revocation of such declaration with the approval of the Union Government or under the declaration of the United Nations Security Council." It is unclear what evidential basis is needed to justify declaring a group to be a terrorist organisation.

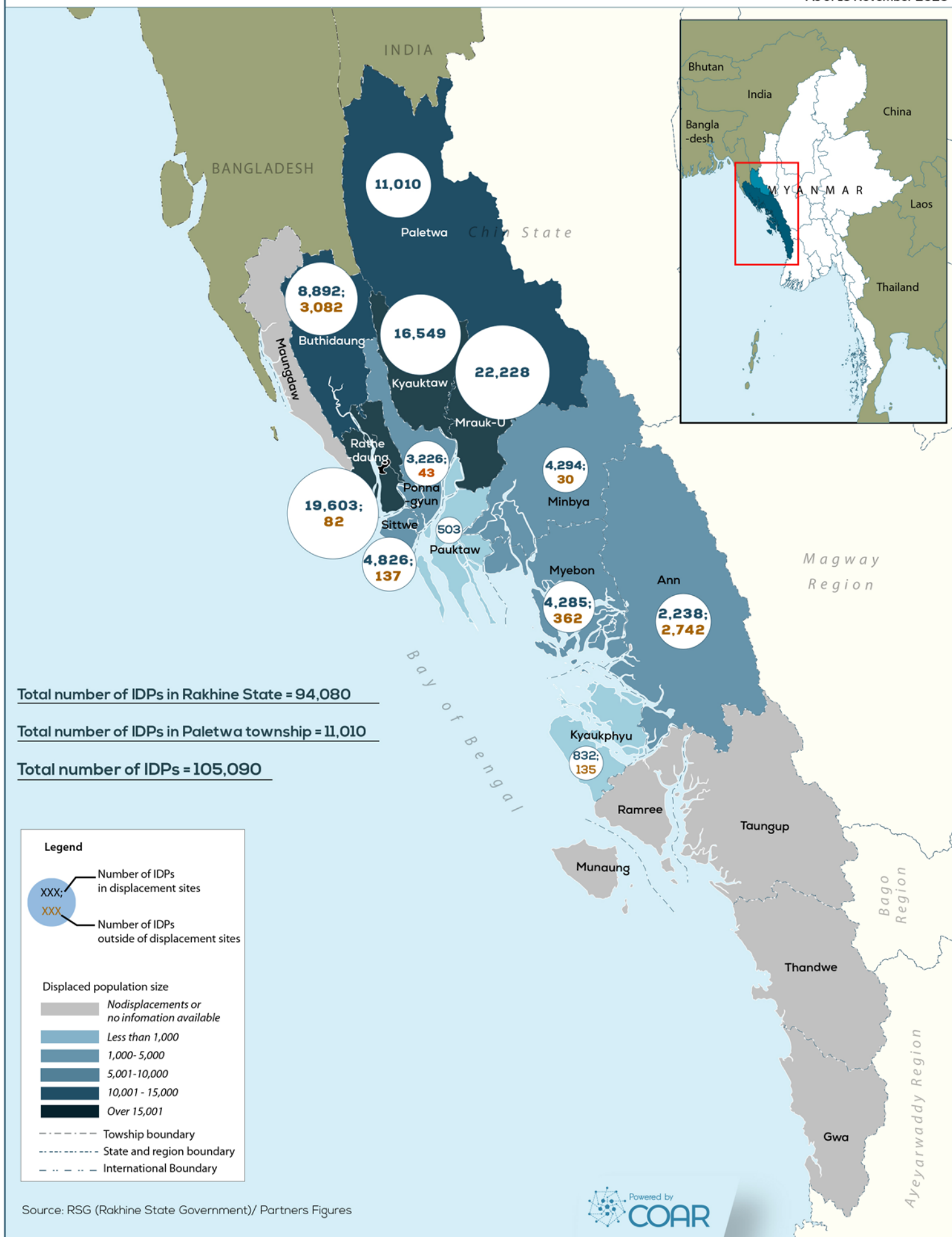
Moreover, the law provides blanket immunity for the Committee members as well as military personnel. They cannot be prosecuted for any wrongdoing in their acts of counter terrorism. Section 71 declares, "No prosecution shall lie in any court against any person or any member of any organisation assigned to perform any function and duty contained in this Law for the performance thereof in good faith."

[8] <https://cass-mm.org/rakhine-state-and-southern-chin-state-scenario-plan-october-update/>

[9] The Global New Light of Myanmar (2020). Declaration of Terrorist Group. Retrieved from: <https://www.globalnewlightofmyanmar.com/declaration-of-terrorist-group/>

[10] The Global New Light of Myanmar (2020). Declaration of Unlawful Association. Retrieved from: <https://www.globalnewlightofmyanmar.com/declaration-of-unlawful-association/>

[11] BNI (2019). AA chief's sister & brother-in-law charged under terror act. Retrieved from: <https://www.bnionline.net/en/news/aa-chiefs-sister-brother-law-charged-under-terror-act>



Myanmar Judiciary

In theory, the 2008 Constitution of Myanmar guarantees the separation of powers and the independence of the judiciary. The Constitution states: “The three branches of sovereign power, namely: legislative power, executive power and judicial power, are separated to the extent possible, and exert reciprocal control, check and balance among themselves.”¹² This horizontal separation of power among the three branches is also replicated in the governance structures in regions, states, and self-administered areas.

Generally, the judicial system in Myanmar consists of four levels of courts: Township Courts, District Courts, High Courts of the States and Regions, and the Supreme Court of the Union. Currently, there are 442 courts across Myanmar — a Supreme Court of the Union, 14 State and Regional High Courts, 75 District Courts and Self-Administered Zone Courts, 330 Township Courts, and 22 other courts (Juvenile Courts, Municipal Court, and Traffic Courts) across Myanmar.¹³ The Courts of the Self-Administered Division and Zones are at the same level as the District Courts.

The Township Courts are the lowest-level with original jurisdiction in both civil and criminal cases. Above the Township Courts are the District Courts, which have original jurisdiction in some matters as well as the jurisdiction to hear certain appeals from Township Courts. Township and District Courts are supervised by High Courts, of which there is one in each of Myanmar’s 14 regions and states. The High Courts also supervise the Courts of the Self-Administered Division/Zone, and courts of special jurisdiction such as Juvenile Courts, Municipal Courts, and Traffic Courts.¹⁴

At the apex stands the Supreme Court, which is the court of final appeal and has appellate jurisdiction to decide on judgments passed by state and regional High Courts, and judgments of the other courts in accordance with the law. The Supreme Court also has the duty and power to: (a)

supervise all courts in the Union; (b) direct to adjudicate the important cases of the High Court of the Region or State, Courts of the Self-Administered Division, Self-Administered Zones and District Courts by a bench consisting of more than one judge.¹⁵ It is also authorised to issue writs and protect the fundamental rights of citizens prescribed in the Constitution.¹⁶

However, the Supreme Court has no authority over the Courts-Martial and the Constitutional Tribunal. The 2008 Constitution of Myanmar states, “Without affecting the powers of the Constitutional Tribunal and the Courts-Martial, the Supreme Court of the Union is the highest Court of the Union”.¹⁷ The Courts-Martial adjudicate matters relating to Defense Services personnel, and the 2008 Constitution forbids both the executive and the judiciary to influence or interfere in the military justice system led by the Courts-Martial, which is under the absolute control of the military. Furthermore, the 2008 Constitution gives the Constitutional Tribunal authority to interpret the Constitution and to review and ascertain whether the laws enacted by the government are in line with its provisions. The Constitutional Tribunal is a separate judicial organ with nine members appointed for fixed, five-year terms; the President, the Speaker of the Pyithu Hluttaw, and the Speaker of the Amyotha Hluttaw each select three members of the Tribunal, and the Supreme Court has no authority over this organ.¹⁸

To guarantee judicial independence, the 2008 Constitution provides that the judges of the Supreme Court can hold their offices until they reach the age of 70, to be removed only through an impeachment process at the Union Hluttaw. In terms of qualification, a person appointed as chief justice of the Union or Judge of the Supreme Court of the Union must not be younger than 50 years of age or older than 70; have served as a Judge of the High Court of the Region or State for at least five years, a Judicial Officer or Law Officer for at least 10 years no lower than the level of the Region or State level,

[12] Please see the Article 11(a) of the 2008 Constitution of Myanmar.

[13] The Supreme Court of the Union (2019). The 2019 Annual Report of the Supreme Court of the Union. Retrieved from: <http://www.unionsupremecourt.gov.mm>

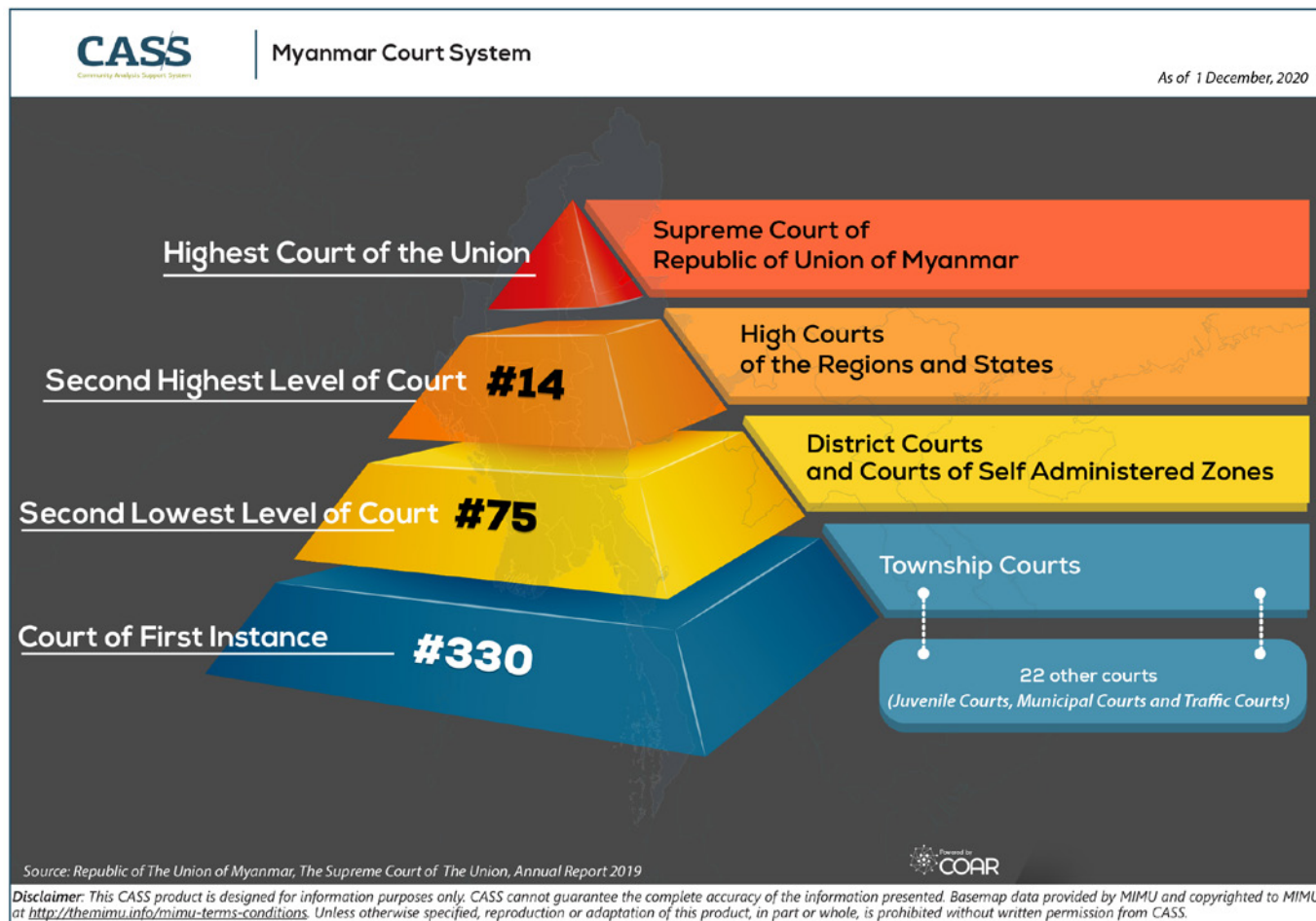
[14] Articles 314, 315, and 316 of the 2008 Constitution of Myanmar.

[15] Myanmar Law Information System (2010). 2010 Union Judiciary Law, Chapter 3. Retrieved from: <https://www.mlis.gov.mm/mlsView.do;jsessionid=8904B2B7D3593B29B980CD308294A038?lawordSn=7355>

[16] Article 378 provides that the Supreme Court of the Union shall have the power to issue the following writs as suitable: (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; (5) Writ of Certiorari. Section 381 provides that citizens have the right to redress by due process of law for grievances entitled under law.

[17] Ibid, Article 294.

[18] Ibid, Article 321.



or have practiced as an Advocate for at least 20 years; or who is, in the opinion of the president, an eminent jurist.¹⁹

However, judicial independence is significantly undermined by the extent of control the executive branch has over the body. The president nominates the chief justice of the Supreme Court, and the Pyidaungsu Hluttaw has no right to reject the nomination unless it is clearly proven that the nominated person does not meet the qualifications defined under the Constitution. On a similar basis, and in consultation with the chief justice of the Supreme Court, the president also nominates other judges of the Supreme Court and the chief justices of the State and Region High Courts.

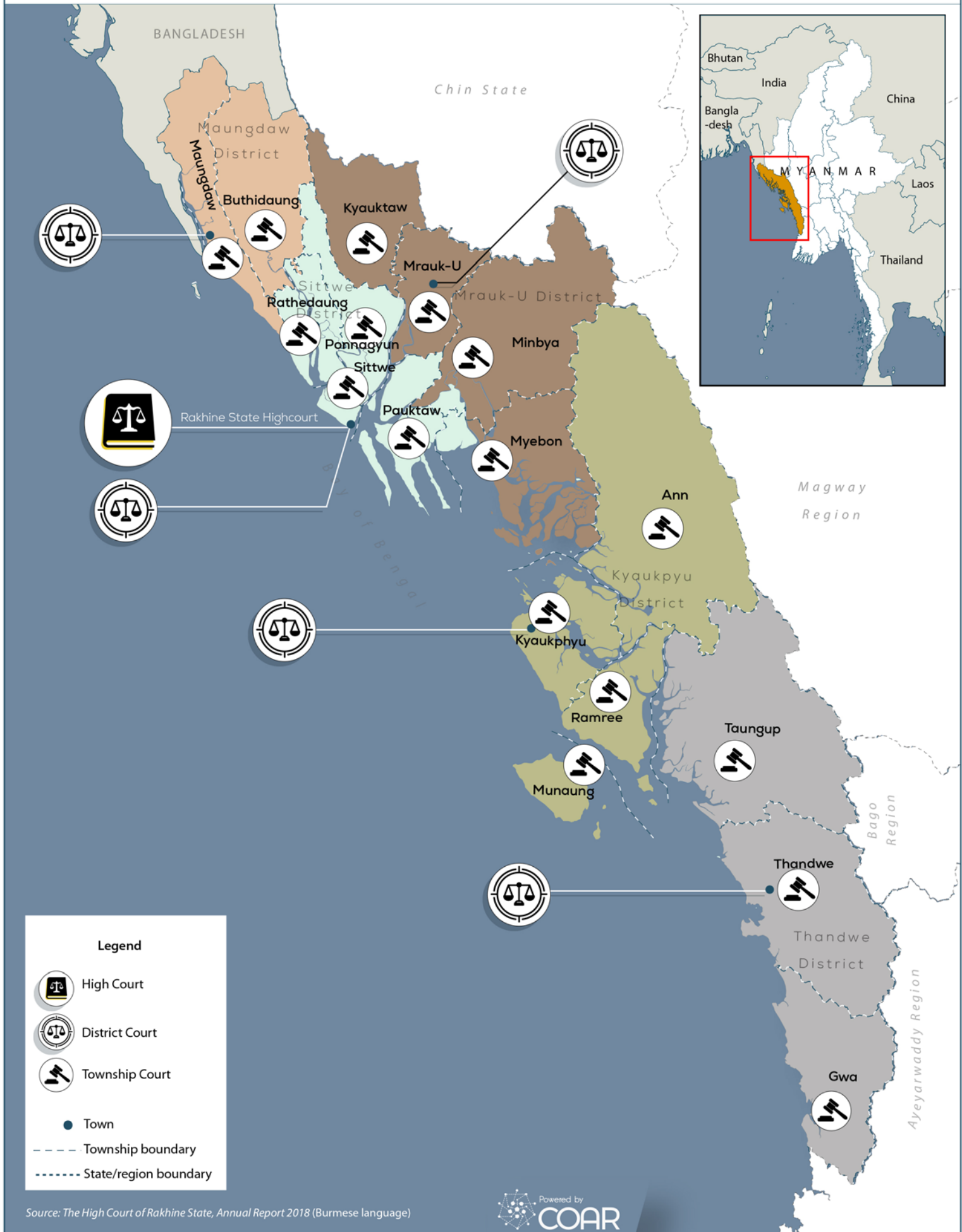
Judges in Rakhine

The Appointment System

In Rakhine State, there are 23 courts altogether — 17 Township Courts, five District Courts, and the High Court. According to the Annual Report of the Rakhine State High Court for the Year 2018 (published in 2019), there are altogether 37 judges in Rakhine State (three High Court judges, five District judges, five Deputy District judges, 16 Township judges, two Additional Township judges, and six Deputy Township judges). There were 23 vacancies (six Deputy District judges, one Township judge, six Additional Township judges, and 16 Deputy Township judges).²⁰

[19] Ibid, Article 301.

[20] The Supreme Court of the Union (2018). The Annual Report of the Rakhine State High Court for the year 2018 (Burmese version only). Retrieved from: <http://www.unionsupremecourt.gov.mm> The Annual Report for 2019 is not yet available.



Source: The High Court of Rakhine State, Annual Report 2018 (Burmese language)

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Under the 2008 Constitution, the president appoints the Chief Justice of the High Courts of the States and Regions in consultation with the Chief Justice of the Union. Thus, the Chief Justice of the Rakhine State High Court is an appointee of the president and remains under the supervision of the Chief Justice of the Union. As with the Supreme Court, to maintain the independence of the High Court, the Constitution provides that the judges of the High Courts can hold their offices until they reach 65 years of age, retire, or are removed from office through an impeachment process at the state or regional Hluttaw.

Other judges of the Rakhine State High Court are appointed by the chief minister of Rakhine State in coordination with the chief justice of the Union Supreme Court. Obviously, there is a great deal of authority to be exercised by both the executive and the Union Supreme Court in appointing the judges of the High Court. Though the nominations are sent to the State Hluttaw for approval, the State Hluttaw has no right to refuse the nominated persons unless it is clearly proven that the nominee does not meet the qualifications prescribed under the Constitution.

To qualify, the chief justice or judges of the High Court must not be younger than 45 years of age or older than 65. Professional requirements include either service as a judicial official or law officer for at least five years at a level not lower than that of the Region or State level; a judicial official or law officer for at least 10 years at a level not lower than that of the district level; practice as an advocate for at least 15 years; or being, in the opinion of the president, an eminent jurist.²¹

Unlike the judges of the Supreme Court and High Courts, who are politically appointed, the judges of the District and Township Courts are appointed by the Supreme Court of the Union. Currently, the power to appoint, transfer, promote or discipline the subordinate judges at District and Township levels lies mainly with the chief justice of the Union. Lower-level judges are selected like other civil servants through a Public Service Selection and Training Board, formed by the president to carry out duties for selecting, training civil service personnel, and prescribing civil service regulations.²² All civil servants, except the Defense Services personnel and members of the Myanmar Police Forces, are under the jurisdiction of the Union Civil Service Board Law. However, in practice, the Supreme Court alone has full discretion regarding

the posting, promotion, transfer, and disciplining of the lower-level judges. There is a training facility in Hlaing Tharyar Township in Yangon, and judges of different levels, including the new recruits, attend the courses offered by the Union Supreme Court and the Attorney General's Office.

Judges and Their Ethnicity

All the judges in the High Court of Rakhine State are ethnic Rakhine, and they are political appointees as described above. At the district level, most of the judges in the northern part of Rakhine State (Sittwe, Mrauk U, and Maungdaw districts) are ethnic Rakhine. Although the district judge of Sittwe is not Rakhine, the two additional district judges are. Almost all the township-level judges in northern Rakhine State are ethnic Rakhine. On the other hand, most of the judges in the southern districts (Thandwe and Kyauk Phyu) are Bamar, including both the district judge and the deputy district judge in Kyauk Phyu.

Historically, Rakhine State, especially northern Rakhine State, has never been a location of choice for civil servants, including judges and judicial officers. For a civil servant, a posting to northern or even central Rakhine State can be seen as a punishment. Rakhine State, in general, can be difficult to navigate for a non-native: the locals rarely speak Burmese; transportation and communications can be extremely challenging, both due to lack of infrastructure as well as the heavy monsoon rains and other difficulties associated with a predominantly riverine terrain. More recently, the security conditions have become increasingly precarious due to the active armed conflicts between the Myanmar military and the AA.

The centralized system of appointment and transfer also offers no scope or choice for the judges. Like other civil servants, the judges cannot defy or appeal the decisions made by their superiors with regard to postings, promotions, and transfer. In theory, the judges could make suggestions for their postings but often fear that doing so could attract anger and admonishment from their seniors. In effect, the district and township judges have to go where they are assigned. To date, the Union Supreme Court has tended to appoint ethnic judges to judicial positions in ethnic areas. As such, most of the judges in Rakhine State happen to be Rakhine, which is more or less the same as in other remote ethnic areas.

[21] Ibid, Article 310.

[22] Ibid, Article 246.

Judicial Authority

Township Courts have original jurisdiction in both civil and criminal cases. Above the Townships Courts are the District Courts, which have original jurisdiction in serious disputes, including criminal cases that could be punished with more than seven years' imprisonment. District courts also have jurisdiction to hear appeals from Township Courts. Township and District Courts are supervised by the High Court.

According to the 2010 Union Judiciary Law, the High Court of the Region or State supervises the judicial matters of the District Courts and Township Courts. The Jurisdiction power of the High Court according to the 2008 Constitution and 2008 judiciary law include:

- a) adjudicating on an original case;
- b) adjudicating on an appeal case;
- c) adjudicating on a revision case;
- d) adjudicating on cases prescribed by any law.

Additionally, they also have the jurisdiction to:

- a) adjudicate on a case transferred to it by its own decision within its jurisdiction of the region or state;
- b) adjudicate on a transfer of a case from any court to any other court within its jurisdiction of the region or state.²³

The 2010 Union Judiciary Law does not define the jurisdiction and powers of the District and Township Courts. In accordance with the Code of Criminal Procedure, a High Court judge or District Court judge may pass any sentence authorized by law, but any sentence of death is subject to confirmation by the Supreme Court. When a High Court or District Court passes the sentence of death, the sentence cannot be executed unless it is confirmed by the Supreme Court. The deputy district judge may pass any sentence authorized by law, except a sentence of death or of imprisonment for a term exceeding seven years. A Township judge and an Additional Township judge (if empowered with special magisterial powers) may pass sentences not exceeding seven years. Deputy Township judges can impose sentences according to their magisterial powers.²⁴

Counter Terrorism Cases

Early Application Dismissals and Discharges

The Myanmar military began to use the CT Law to arrest and sue local people for their alleged ties to the AA in 2019 — as early as a year before it was declared a terrorist organisation. In fact, the top five leaders of the AA, along with some villagers from Mrauk U Township, were charged under section 50(a) of the law months before the government designated the AA a terrorist organisation.²⁵ Although there is no official data available, several of these cases, and the accused involved, were either dismissed or discharged by the courts. Indeed, section 253 of the Code of Criminal Procedure mandates a judge to release the accused if there is insufficient evidence to bring forward the charge.

The lawyers interviewed for this study highlighted three key reasons for the dismissals or discharges.

Firstly, the evidence used against the accused was extracted mainly through interrogations during military detention, and the court cannot solely rely on such evidence when moving forward with prosecution. This is both a matter of law and common practice. When there is no other evidence apart from that extracted during police or military interrogations, the court cannot (or rather, does not) rely on it alone. In accordance with section 162 of the Criminal Procedure Code, evidence, such as testimonials, must be acquired in an environment free from threats or duress. As a result, the judge must decide whether the evidence presented is true or trustworthy, and the manner by which the evidence is extracted is thus

[23] Sections 38,39, and 40 of the 2010 Union Judiciary Law 2010.

[24] According to an interview with a retired judge and director of the Supreme Court. Please also see section 30, 31 and 32 of the Code of Criminal Procedure available at <https://www.mlis.gov.mm/IsScPop.do?lawordSn=10442>

[25] Nwe, P.E.E. (2019) Top leaders of AA charged under anti-terrorism law. Mizzima. Retrieved from: <http://mizzima.com/article/top-leaders-aa-charged-under-anti-terrorism-law>

generally taken into consideration. When there is other evidence or testimonials available, and evidence extracted through the interrogations can be corroborated, the Court then considers it with all other available evidence to make a judgment.

Secondly, the plaintiff's witnesses (military personnel) failed to appear in court to provide testimonies against the accused, and the judges had to discharge the cases. It is difficult to say exactly why military personnel failed to appear; however, some of the lawyers interviewed for this paper suggested that the lack of security played a role, particularly in the areas outside of Sittwe. However, it may also be the case that military personnel on the ground were merely busy (Rakhine State is, after all, a front line) and had no time to attend court hearings.

Thirdly, the lawyers who were providing legal aid to the accused also argued in court that there was no strong legal basis for using the CT Law to prosecute the accused as the AA had not yet been declared a terrorist organisation.

Judicial Activism?

In the opinions of the lawyers interviewed, the judicial decisions to discharge or dismiss the cases were not influenced by ethnicity. Those consulted believe that the judges based their decisions mainly upon the existing evidence and legal requirements. Overall, the lawyers hold a view that the judges, despite their affiliations to the accused in terms of ethnicity, are afraid of making mistakes and that they would not take any risks by making extrajudicial actions in favour of the accused — their careers are at stake, and a small misstep could jeopardise their prospects for promotion or transfer to better locations. In this sense, the highly centralised nature of the judicial system results in little professional independence for the subordinate judges. After all, the Supreme Court alone has full discretion regarding the posting, promotion, transfer and disciplining of the subordinate judges at district and township levels.

Some of the respondent lawyers also claimed that the whole judiciary in Rakhine State is increasingly under pressure. They claim that the chief justice of the Rakhine State High Court is now pressuring the subordinate judges to take extra caution when hearing cases brought

by the military under the CT Law. Whilst it is not certain whether such pressure is self or externally imposed, there is a widespread perception that the lower-level judges are subjected to pressure from their senior officials.

This is unsurprising, given the long-tarnished reputation of the judiciary of Myanmar. Regarding the undue pressure facing the judges across Myanmar generally, a 2012 report of the International Bar Association's Human Rights Initiative stated:

"...judges were easily intimidated. Township Court judges were often very young, because the minimum age for appointment had recently been reduced to 25, and all judges feared complaints from clients, reprimands from superior judicial officials, and pressure from the government or military."²⁶

The International Commission of Jurists has also indicated that political and military influence over judges remains a major obstacle to judicial independence. It points out that, depending upon the nature of cases, especially those that challenge the government or involve the vested interests of powerful individuals, the judges just render decisions based on instructions from government officials.²⁷ Moreover, corruption is widespread and deeply embedded at different levels of the judiciary, severely affecting judicial integrity and public trust. A wide-ranging 2020 public opinion survey by civil society group the People's Alliance for Credible Elections found that only 33 percent of respondents reported having trust in the courts, compared to 77 percent trusting in the state counsellor, and 43 percent trusting in the military. In ethnic states, levels of trust in the courts dropped again to just 31 percent.²⁸

Official Designation

The number of cases brought against civilians under the CT Law has increased since the AA was officially designated a terrorist organisation on 23 March 2020. Immediately following the announcement, the military warned that anyone could be prosecuted for contacting the organisation, and expanded its crackdown on those

[26] International Bar Association's Human Rights Initiative (2012), 'The Rule of Law in Myanmar: Challenges and Prospects'. International Bar Association. London.

[27] International Commission of Jurists (2014). Myanmar: Independence and impartiality; Judicial integrity and accountability. Retrieved from: <https://www.icj.org/cijlcountryprofiles/myanmar-introduction/judges/independence-and-impartiality-judicial-integrity-and-accountability/>

[28] People's Alliance for Credible Elections (2020). 2020 General Elections: Preliminary Report of Pre-election Survey Findings. Retrieved from: <https://www.pacemyanmar.org/pre-election-2020/?fbclid=IwAR3xUjG5QHBDiG4rM-WEs1Y7NNemf1xMN51XAqFS0pp-D3xW-m-xfteBo>

people suspected to have ties with the group, including journalists who interview AA officials. A few days after the law was introduced, the Myanmar Police arrested several journalists and editors who had interviewed the AA.²⁹

Due to heightened security concerns caused by the intensifying conflicts across many different townships in northern Rakhine State, many cases are now transferred to and heard at the Sittwe District Court, around which the military place heavy security forces for every court hearing. Although the Sittwe District Court had previously discharged several cases involving dozens of locals due to insufficient evidence, this is no longer the case. The lawyers interviewed for this paper stated that since the AA was declared a terrorist organisation, the Sittwe District Court has yet to discharge any of the accused. This is also due to the increasing efforts of the military to provide testimonies. Participants in this research pointed out that military personnel now attend every court hearing without failure.

Rearrests

Some of those previously accused and released have been rearrested using different sections of the law. For example, in Taungup Township, the military arrested five men for allegedly soliciting support, raising funds, and supplying food for the AA, and sued them under section 52(a) of the CT Law, which authorises a minimum of three years and a maximum of seven years imprisonment. Though the Court discharged them over lacking evidence, just half an hour later, the local police rearrested the men to investigate their connection to recent bombings in the township, and the military opened a new case using a different section of the CT Law.³⁰ After hearing the testimonies of the 26 prosecution witnesses, the court discharged them for a second time on 12 August as it again found insufficient evidence for the charge. To date, this is the only case a court has discharged — twice in this instance — since the government declared the AA a terrorist organisation.

Targeted Abuse

Village Administrators

The military has arrested and charged some village administrators, accusing them of having ties with the AA.³¹ These arrests have caused an extraordinary level of disruption for local governance and administration as dozens of administrators in conflict areas have now resigned out of fear of arrest and other arbitrary actions of the armed actors.³² Ward and Village Tract Administrators are important officials in the General Administration Department (GAD), as they are often seen as a bridge between the communities and the state administration, and hold responsibility for the daily life of ordinary people. There have even been reports that in certain rural areas there is a very limited presence of state institutions — police, GAD, law officials, and judges — and the AA has in effect taken their place.

Politicians

Some members of the ANP have faced a similar situation. In June, the military and police arrested some local leaders and members of the ANP from Taungup and Maei sub-townships. Although the ANP leader from Maei Sub-Township was released after more than a month in military detention, the others from Taungup are still awaiting trial under sections 50(a) and 52(a) of the CT Law.³³

Women and Children

A number of women and children also face charges under the CT Law. As recently as the end of July 2020, the military arrested three women and charged them under sections 50(j) and 52(a) of the law. The military claimed that it seized camouflaged military and police uniforms from the women's houses and charged them with soliciting support and raising funds for the AA.³⁴ UNICEF and its legal aid partners in Rakhine State have been supporting 18 children who are facing trial. The UN agency for children has noted a worrying trend in the number of children arrested and charged, although all the children it is supporting are currently under their

[29] Khine, M.A. (2020). Myanmar Military Re-Arrests Rakhine Civilians After Court Release. The Irrawaddy. Retrieved from: <https://www.irrawaddy.com/news/burma/myanmar-military-re-arrests-rakhine-civilians-court-release.html>; International Commission of Jurists, Myanmar: Independence and impartiality; Judicial integrity and accountability.

[30] Khine, M.A., Myanmar Military Re-Arrests Rakhine Civilians After Court Release.

[31] Htein, A., and Nwe, H. (2020) Dozens of administrators in Myebon Twsp resign as peers are prosecuted. Development Media Group. Retrieved from: <https://www.dmediag.com/news/1567-mb-adm-q>

[32] Aung, S.Y. (2020). Myanmar Police Continue Arrests, Interrogations of Reporters Over AA Coverage. The Irrawaddy. Retrieved from: <https://www.irrawaddy.com/news/burma/myanmar-police-continue-arrests-interrogations-reporters-aa-coverage.html>

[33] See <https://www.dmediag.com/news/1586-amp6m> and <https://www.bnionline.net/en/news/maei-town-anp-leader-released-military-detention>

[34] Lei, L. (2020). Myanmar Military Arrests Three Rakhine Women for Alleged Ties to Arakan Army. The Irrawaddy. Retrieved from: <https://www.irrawaddy.com/news/burma/myanmar-military-arrests-three-rakhine-women-alleged-ties-arakan-army.html>

parents' supervision.³⁵ However, according to one lawyer who has been working on cases involving children in Ann Township, the police there have continued to hold children in custody, even after their lawyer highlighted specific provisions for the protection of children in the 2019 Child Rights Law.

Tracking Trajectories

Many people view the military's actions as deliberate intimidation. Even though it is widely believed that contacting a designated terrorist organisation is punishable by imprisonment, there is no specific provision in the CT Law that explicitly prohibits contact with members of designated groups. Charges under the Unlawful Association Act have also been used to discourage contact with the AA. The editor-in-chief of the Development Media Group has been in hiding for more than a year after he was charged for violating the Unlawful Association Act.

Additionally, around 30 detainees have been reported missing since January 2020. According to the Defense of the Union of Myanmar (Special Arrangements for Military Operations) Act of 1956, the military can arrest and detain for three months, "...any suspected person who did or does or will do or abet any dangerous act to the security of military personnel". However, in many instances, detentions far exceed this legally allowable period.³⁶ More than a dozen civilians have recently been reported as having died during, or immediately after, military interrogation.³⁷

Complicating matters is the fact there is no precise or recent data about the number of court cases pursued, military detainees, or accused. The Union Supreme Court and Rakhine State High Court annual reports usually include the total number of court cases aggregated by types of criminal and civil cases adjudicated throughout the year. However, in both reports, there is no data concerning cases related to the CT Law.³⁸ As the Annual Report of the Rakhine State High Court for the year 2019 is yet to be published, it remains to be seen whether it will include any information or statistics regarding cases.

Indeed, it appears that the government does not want to release official data regarding the number of court cases associated with the CT Law. According to some lawyers, state government officials — especially the Minister of Security Affairs — have even pressured lawyers to stop disseminating information and data relating to court cases on Facebook or other public platforms. Some of the lawyers who frequently gave interviews to the media describing the situation of the trials and the number of court cases have been harshly criticized by the state government.

Nevertheless, according to a statement on 20 May 2020 by the Rakhine State Attorney General in the Rakhine State Parliament, there have been more than 100 court cases in 13 townships in which people have been charged under the CT Law. The lawyers interviewed for this study also estimated that there are now more than 100 court cases involving around 800 local people, with dozens of people involved in some cases.³⁹ Many of the accused have already fled their communities.

[35] Relief Web (2020). UNICEF Myanmar's E-bulletin, June 2020 Retrieved from: https://reliefweb.int/sites/reliefweb.int/files/resources/12.6.2020_UNICEF%20Child%20Protection%20COVID-19%20E-bulletin.pdf

[36] See section 6 of the law. Retrieved from: <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/AFB75CE787700365C12576CD004C3B4A>

[37] Lwin, N (2019). Military to Investigative In-Custody Deaths in Rakhine. The Irrawaddy. Retrieved from: <https://www.irrawaddy.com/news/burma/military-investigative-custody-deaths-rakhine.html>

[38] Radio Free Asia (2020). Myanmar Lays Terrorism Charges Against 5 Rakhine Men Beaten in Viral Video. Retrieved from: <https://www.rfa.org/english/news/myanmar/terrorism-charges-05272020152815.html>

[39] Khine, M.A. (2019). Terrorism Trial for Civilians in Rakhine Drags On; AA Denies Any Ties. The Irrawaddy. Retrieved from: <https://www.irrawaddy.com/news/burma/terrorism-trial-civilians-rakhine-drags-aa-denies-ties.html>



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