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Sentencing People-Smuggling Offenders in Indonesia

Dr Antje Missbach

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Front Cover Image: Tamil asylum seekers aboard a boat intercepted by the Indonesian navy en route to Australia are brought into dock by the navy, Friday 16 October 2009 (AAP Image/Adam Gartrell)©

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Sentencing People-smuggling Offenders in Indonesia[1]

Against a backdrop of massive global displacement, facilitators of irregular movements ('people smugglers') have become a centre of attention in public discourse, which often wrongly deems them to be solely responsible for the hardship asylum seekers experience during their journeys in search for effective protection. Australia and Indonesia are at the forefront of combatting people smuggling in the Asia-Pacific region, often at the price of undermining humanitarian protection and increasing harm for asylum seekers and refugees.

This Policy Paper examines the sanctions applicable to people smuggling after it was defined for the first time as a criminal offence in Indonesia, in May 2011. Based on a sample of Indonesian court decisions in 99 people smuggling cases between May 2011 and October 2015, it analyses the socio-economic profiles of offenders, including their age, gender, citizenship, origin and religion, previous employment, and their roles in people-smuggling operations. The data also provides information about charges laid against accused people smugglers and the severity of sanctions handed down by the courts. Using this data, the policy paper provides a picture of recurring patterns within people-smuggling operations in Indonesia.

In fact, most sentenced offenders have played only minor roles in people-smuggling operations and are therefore easily replaceable. The prosecuting and sentencing of people smugglers has so far done little to inhibit people smuggling in Indonesia. On the contrary, the people-smuggling networks have not only been resilient enough to resist the law enforcement measures currently in place but also flexible enough to adapt to externally-driven conditions, such as fluctuating numbers of asylum seekers. The fact that operations are temporarily downscaled certainly does not mean people smuggling has been defeated in Indonesia.

METHODOLOGY OF THIS STUDY

This Policy Paper analyses decisions handed down by Indonesian courts in the trials of 99 people charged with smuggling between May 2011 and October 2015. I collected these decisions either by personally visiting the relevant Indonesian courts or downloading them from the Indonesian Supreme Court's online archive.[2] That archive,

1 I would like to thank Elizabeth Pritchard and Marlene Millott for their assistance in compiling and analysing the data set that became the basis of this Policy Paper, as well as Volker Schniepp who produced all the maps. I would also like to acknowledge critical input from Susan Kneebone, Julian Millie, Nik Feith Tan, and Thomas Harré, and ongoing support from Tim Lindsey, Helen Pausacker, Tim Mann and Rachel Salmond. All translations in this report are mine and any errors remain mine.

2 Although local district courts are supposed to upload decisions onto their webpages to

however, usually only contains cases that have been appealed twice and, consequently, were decided at the highest level.

The definition of 'case' in this study requires more explanation. Sometimes, law enforcement authorities prosecute several people in one trial, while at other times the cases of alleged people smugglers from the same operation are heard in separate court proceedings. This, of course, has consequences for the quantitative analysis of the court cases of people smugglers. For this paper, I treated each person charged as a 'case', even if the charges against them were heard alongside charges against other persons in the same court proceedings. In cases where different decisions were collected from different levels of the court system, only the final decision was used for analysis.

Due to limitations in public access to court decisions, there are shortcomings in this data. For example, I was only able to visit courts in a limited number of areas – mostly in provinces with reputations as 'hotspots' for people smuggling, such as East Nusa Tenggara and West Java. The long waiting time typically meant that even in those provinces I was only able to visit a small number of district courts, to get access to the archives and meet the responsible judge or clerk. For these reasons, the overall sample is somewhat random. The three courts that feature most prominently in this analysis are the District Court in Cibadak (West Java), the High Court in Mataram (West Nusa Tenggara) and the Indonesian Supreme Court (Jakarta).

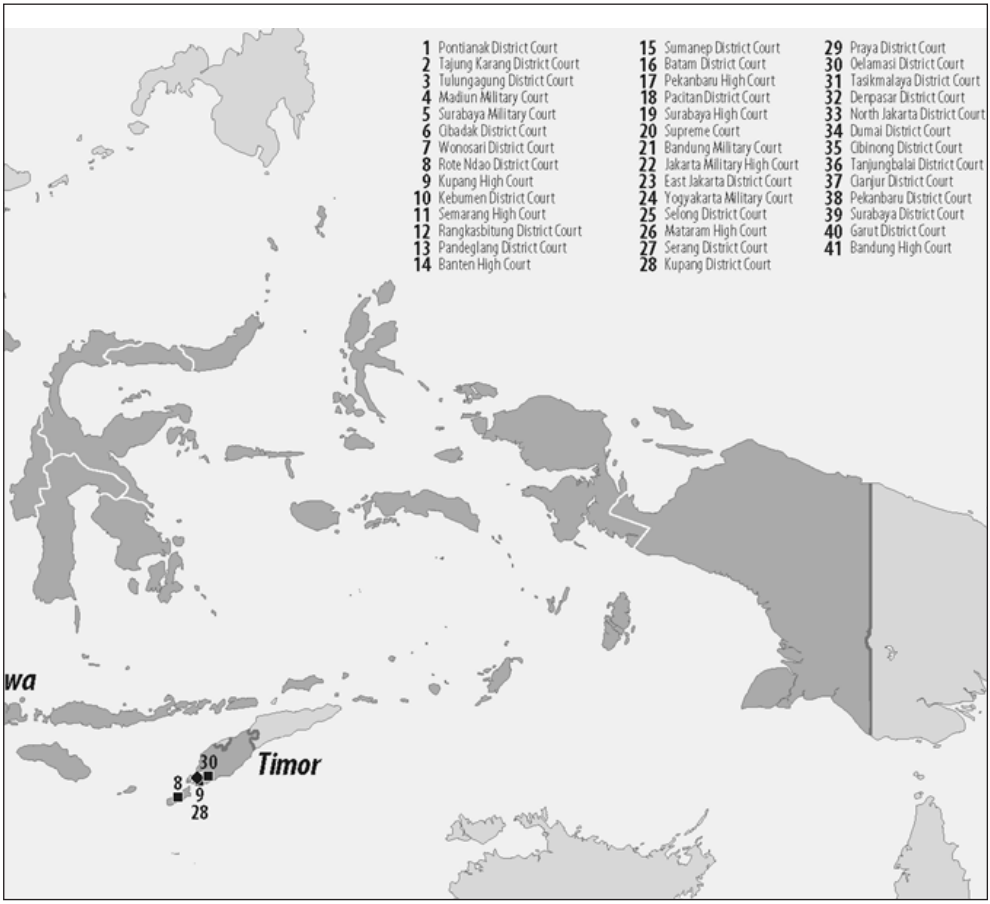
Although the sample of data used for this study is substantial, it is not comprehensive.[3] I was dependent, in part, on the willingness of court officials, the police force and the public prosecution service to share this information with me. As a result of previous related research, I am aware that, although large numbers of people are arrested for the offence of people smuggling, some of their cases never reach the courts (Missbach and Crouch, 2013). It also remains very difficult to obtain combined statistical data from all Indonesian provinces, as there is no reliable nation-wide system that compiles data on arrests of alleged people smugglers from the police and immigration authorities, or the outcomes of trials in the district and high courts. Data about people smugglers who

make them available to the public (Supreme Court Transparency Decree SK No 144 of 2007; Law No 14 of 2008 on Transparency of Public Information; and revised Supreme Court Decree No 1-144 on Transparency of Information at Courts), many of the more than 800 district courts in Indonesia, and even the provincial-level high courts, lack the technical capacity to do so. Although this means that there is still a substantial deficit in consistent public access to jurisprudence, there has, nonetheless, been a significant improvement in court transparency over the last decade.

3 The only comparable collection of people smuggling court decisions from Indonesia was compiled by the 'Migrant Smuggling Working Group' under the supervision of Professor Andreas Schloenhardt at the University of Queensland. That sample is, however, limited to just 19 entries (https://ssl.law.uq.edu.au/som-database/#formstart).

were arrested but not charged and prosecuted were therefore excluded from this study.

Map: Locations of Indonesian courts included in this study


1 Pontianak District Court
2 Tajung Karang District Court
3 Tulungagung District Court
4 Madiun Military Court
5 Surabaya Military Court
6 Cibadak District Court
7 Wonosari District Court
8 Rote Ndao District Court
9 Kupang High Court
10 Kebumen District Court
11 Semarang High Court
12 Rangkasbitung District Court
13 Pandeglang District Court
14 Banten High Court
15 Sumanep District Court
16 Batam District Court
17 Pekanbaru High Court
18 Pacitan District Court
19 Surabaya High Court
20 Supreme Court
21 Bandung Military Court
22 Jakarta Military High Court
23 East Jakarta District Court
24 Yogyakarta Military Court
25 Selong District Court
26 Mataram High Court
27 Serang District Court
28 Kupang District Court
29 Praya District Court
30 Oelamasi District Court
31 Tasikmalaya District Court
32 Denpasar District Court
33 North Jakarta District Court
34 Dumai District Court
35 Cibinong District Court
36 Tanjungbalai District Court
37 Cianjur District Court
38 Pekanbaru District Court
39 Surabaya District Court
40 Garut District Court
41 Bandung High Court
wa
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28

Indonesian court decisions usually reveal limited information about individual perpetrators and their lives before they were arrested. Nevertheless, the decisions do offer some basic socio-economic parameters about the convicted offenders. The following sections offer some crucial demographic facts about people prosecuted and sentenced for people-smuggling offences from May 2011 to October 2015. Furthermore, comparison of sentences requested by the prosecution and actual sentences handed down by the judges allows some preliminary generalisations to be made about trends in the sentencing of people smugglers and efforts to combat people smuggling more widely.

From May 2011 to October 2015, at least 99 people-smuggling cases were prosecuted by Indonesian courts under Law No 6 of 2011. This is a significantly higher number than the fifteen prosecutions from 2007 to 2011 (Crouch and Missbach, 2013). It is safe to assume that in both periods the real number of prosecutions may have been higher. Table 2 provides the numbers of the cases analysed in this paper and the year in which a final verdict was handed down (sometimes by a district court and sometimes by the High Court or Supreme Court).

Year of final verdict	Number of cases
2011	5
2012	36
2013	37
2014	20
2015	1

Table 1. Known people-smuggling cases heard in Indonesian courts, 2011–2015

DEMOGRAPHIC PARAMETERS OF THE CONVICTED OFFENDERS

Age

An analysis of the court documents reveals that the ages of the offenders ranged between 17 and 63 years. The mean age was 36 years (SD 9.3).

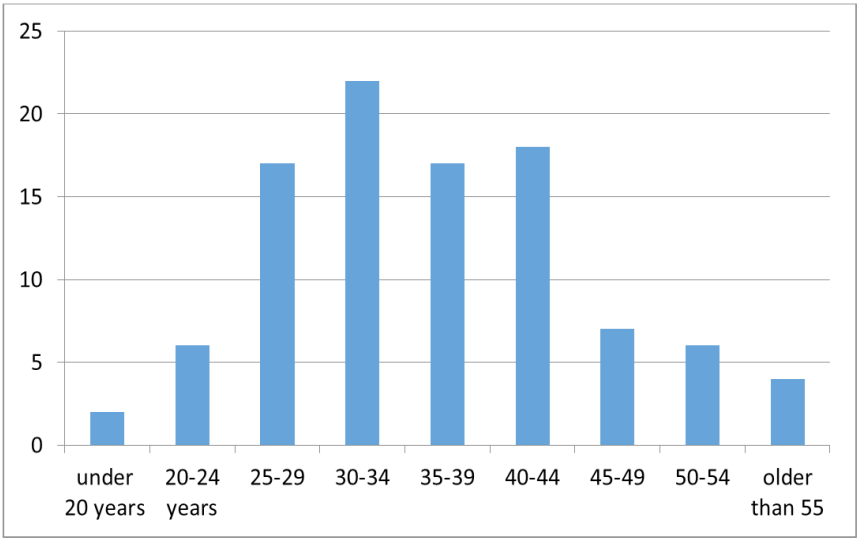

Figure 1. Ages of those prosecuted for people-smuggling offences (n=99)

The initial assumption was that those prosecuted would either be younger than 20 or older than 45, as people in these age groups were more likely not to have responsibilities for families. That assumption was based on the fact that prison sentences for people smuggling tend to be very long and would, therefore, be disincentives for people to become involved in people smuggling. This sample, however, shows high numbers of sentenced smugglers in their late 20s, 30s and early 40s. It can therefore be concluded that they either ignored the risks of imprisonment for several years, or simply did not know about the harsh prison sentences. It is, of course, also possible that they knew the risks but decided they were outweighed by the benefits. Interviews with sentenced people smugglers in prison showed that some individuals faced significant economic desperation and felt they had no alternative to provide for their families than to accept a tempting offer given to them by a third person to become involved in people smuggling

(Missbach, 2016).[4]

Gender

The majority of convicted people smugglers in this sample were men (99 per cent). This matches with the previous occupations (and required skill set) of the sentenced people smugglers investigated for this study, the majority of whom came from very male-dominated sectors (for example, fishing, transport or security forces). On the other hand, this finding differs from other comparable studies of people smuggling and clandestine border crossings in other countries and geographic settings, for example, in Mexico. These show a higher involvement of women, particularly in collecting and transferring money, providing temporary housing, and even recruiting paying customers (Sanchez, 2015).

In order to get a clearer understanding of why the participation of women in people smuggling in Indonesia seems so low, more detailed studies are required. Future studies on people smuggling and gender should start with exploring the role of the Indonesian wives or long-term partners of sentenced non-Indonesian people smuggling organisers, to gain insights into their potential involvement, for example, in laundering the profits made by their husbands or boyfriends (Missbach, 2015a).

Religion

The data collected for this study showed that 87 of the convicted people smugglers (of both Indonesian and non-Indonesian origin) stated they were Muslims (87 per cent), while the remainder were either Protestant or Catholic Christians. Of 91 Indonesian convicted people smugglers, just 12 (13 per cent) were Christian. In the overall distribution of religions in Indonesia, approximately 87 per cent of the population were Muslim in 2010, while Christians (both Catholic and Protestant) constituted less than 10 per cent (Na'im and Syaputra, 2010). The distribution of religions among the Indonesian smugglers is thus very close to that of the general population. East Nusa Tenggara, however, has a majority Christian population and is one of the two major exit spots for irregular migrants and a source of captains and crew, who are hired to transport asylum seekers, refugees and undocumented migrants out of Indonesia from other embarkation points. This explains the slightly higher percentage of Christians in this sample.

Citizenship

The majority of convicted offenders in this sample were Indonesian citizens (91 per cent). The remaining eight had either Pakistani, Afghani, Kuwaiti, Australian, Burmese, Iraqi, Sri Lankan or Iranian citizenship. The eight foreigners were either recruiters or organisers, whereas the Indonesians were predominantly involved as transporters

4 Interviews with sentenced people smugglers in Ba'a, 29 September 2014.

(drivers and crew), facilitators and security providers. Transnational people smuggling networks are successful cross-cultural, albeit illegal, enterprises, in which the actors involved overcome cultural, linguistic and other differences. The different tasks and the distribution of responsibilities, however, creates a numerical disproportion, that is, more Indonesian than non-Indonesian people are involved in the organising of a passage for irregular migrants. This, in turn, leads to more Indonesian than non-Indonesian actors being apprehended, prosecuted and sentenced. This disproportion is also mirrored in the statistics of police investigations. For example, Figure 2 shows that comparatively higher numbers of Indonesians were investigated for people smuggling than non-Indonesians between 2009 and 2013.

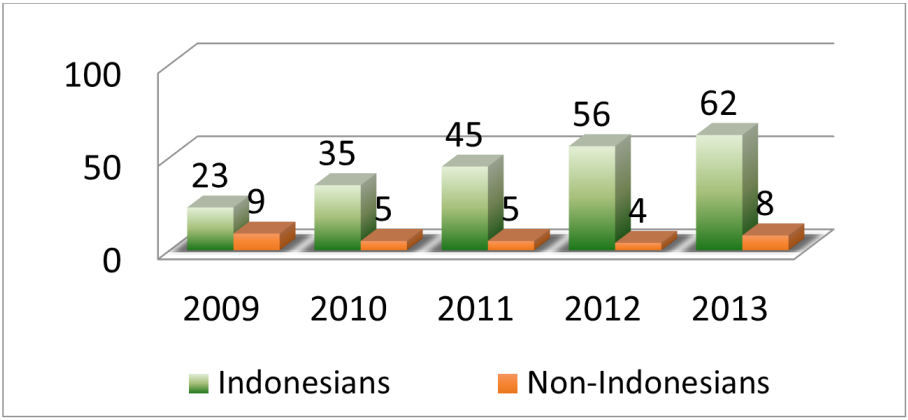

Figure 2. Number of Indonesian and non-Indonesian suspects investigated by the Indonesian police between 2009 and 2013[5]

My sample is probably too small to provide a clear picture of whether or not the non-Indonesian people smugglers receive higher sentences than their Indonesian colleagues. Two of eight non-Indonesian actors received less than the minimum sentence of five years, as their case took place before the enactment of the new Law on Immigration. Five of those charged received five years imprisonment and a fine but two foreigners were given six years and another seven.

5 'Optimalisasi Kehadiran Polisi Berseragam melalui Quick Respon Contact Centre 110 Guna Mewujudkan Zero Konflik, Anarkhis [sic] dan Accident dalam Penanganan Penyelundupan Manusia', Power point presentation by member of the Indonesian Police at an anti-people smuggling training course for police officers, 20 March 2012, Kupang.

Regional Origin

In analysing the geographic origin of the Indonesian nationals who received sentences for people smuggling, it is clear that the largest group of offenders were from East Java (Figure 3). This is not surprising, as Java, which includes the provinces of East, Central and West Java, as well as Banten and the Special Region of Yogyakarta, is Indonesia's most populous island. Moreover, the southern shores of Java have become one of the most frequent points of embarkation for asylum seeker boats heading to Australia's Christmas Island after 2011 (Missbach, 2014a). It is also important to note that the less populous provinces of East and West Nusa Tenggara, which were previously popular embarkation points for boats heading to Australia's Ashmore Reef, also feature prominently in this study.

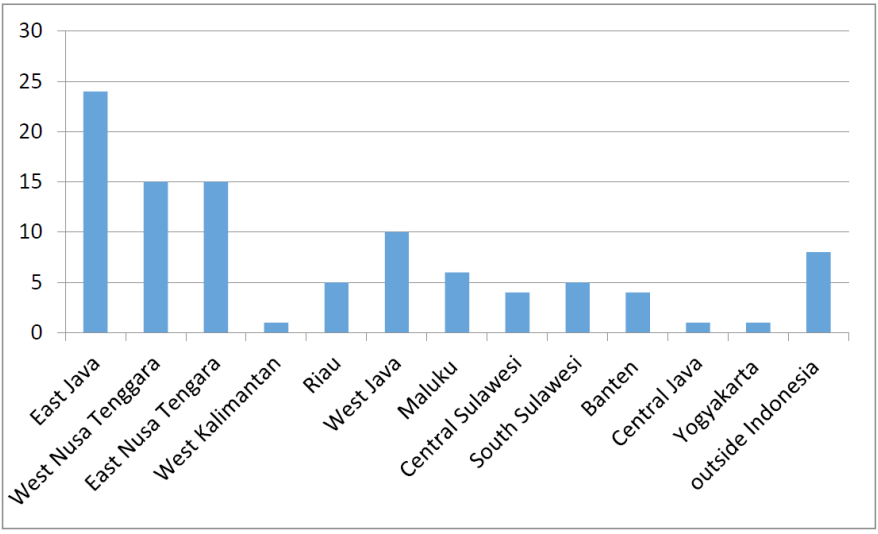

Figure 3. Origin of people prosecuted for people-smuggling offences

One explanation for the relatively high involvement in people smuggling by Indonesians from the less populated provinces in the East, such as West Nusa Tenggara and East Nusa Tenggara, lies in the fact that those provinces have lower incomes, higher poverty and poor social indicators (for example, higher infant mortality and lower life expectancy). They are, in fact, usually considered the poorest parts of Indonesia (Missbach, 2016). As Baird and Liempt (2016: 412) noted, participants in people smuggling typically come from areas characterised by social marginality, precariousness and inequality. James Fox (2013) has demonstrated, for example that when Indonesian smuggling organisers and facilitators were no longer able to hire poor fishermen from Eastern Indonesia to work on the asylum seeker boats, they started to hire men from urban slums in Java's

cities, even though they lacked nautical skills.

Previous Employment

As Figure 4 shows, those convicted of people-smuggling offences were employed in a variety of fields before being arrested for involvement in people smuggling. According to the verdicts, the majority of offenders indicated that they were self-employed (*swasta* or *wiraswasta*), prior to their involvement in people smuggling. 'Self-employment' can, however, cover a wide range of activities, from casual business activities to being a full-time entrepreneur. In many cases, however, these terms are simply euphemisms for unsteady livelihood, with irregular income and dependence on others or external circumstances.

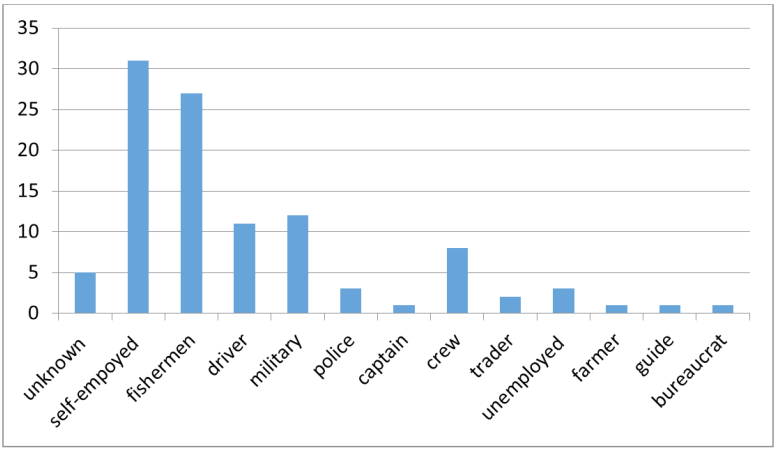

Figure 4. Occupations of people prosecuted for people-smuggling offences

The second largest field of previous employment stated in the court documentation is fishing. Due to their physical and practical skills, resilience and low salary cost, fishermen are sought after by smuggling facilitators and organisers to work as transporters at sea, as are boat captains and crew (*anak buah kapal* or ABK). Fishermen from East and West Nusa Tenggara, in particular, have a reputation for superior navigational skills and dare-devil attitudes. The typical socio-economic status of these fishermen is, however, that they are poor or caught in a debt-trap and so are more prone to accept illegal jobs and high levels of risk to provide for their families (Therik, 2008; Balint, 2005).

It is important to bear in mind that fishermen from Rote have suffered great economic difficulties in recent years because of Australia's draconian measures to prevent illegal fishing outside designated areas (Balint, 2005; Carnegie, 2014). If caught by the Australian authorities, boats and equipment on board are destroyed and the

fishermen are arrested, prosecuted and imprisoned, often for many years (Stacey, 2007). This means that, upon return to Indonesia, they face massive debts and are thus inclined to take up more lucrative and risky jobs, such as transporting asylum seekers (Balint, 2012). An alternative source of income has included seaweed farming. Due to recent drastic drops in prices, oil spill contamination in the region, and the refusal of PTTEP Australasia (the company alleged to be responsible for the disaster) to pay compensation, incomes have become further restricted (Mitchell, 2015). With increasing demands on their finances, impoverished fishermen are eager to be hired in any role, including people smuggling. Last but not least, there are a large number of impoverished fishermen from East and West Nusa Tenggara serving sentences in Australian prisons, many of whom are minors (younger than 18 years) (Indonesian Embassy Canberra, 2013).

The third largest cluster of people smuggling offenders are members of the Indonesian security forces, with both military (12 per cent) and police officers (3 per cent) featuring in this sample. This outcome was expected, because people-smuggling operations require support from physically strong and well-connected guarantors of security (*pendamping*) before the departure at sea. It also confirms the findings of researchers who studied other geographic contexts and found that although the relationship between law-evading smugglers and law-enforcing state officers is, in theory, antagonistic, it is, in reality, often unintentionally symbiotic (Andreas, 2001: 108). Most members of the security forces convicted of people smuggling offences were low-ranking officials. The exception was one offender who was a member of the presidential security force (*Pasukan Pengamanan Presiden,* PASPAMPRES) (Roberts, 2014). In another case, four sentenced smugglers from the military alleged that they acted on behalf, or with the knowledge, of their superiors but the court dismissed their claims (Missbach, 2015b: 164ff).

No previous employment was known for 5 per cent of the cases, as the first-instance court verdicts were not available in these cases and some second instance or final verdicts did not indicate the full background of the offender.

Role in the People-smuggling Operation

As explained above, people smuggling operations require specific staff for different roles. The roles of offenders included drivers, captains, boat crew, organisers, recruiters, facilitators, money collectors and ‘unknown’ (Figure 5).

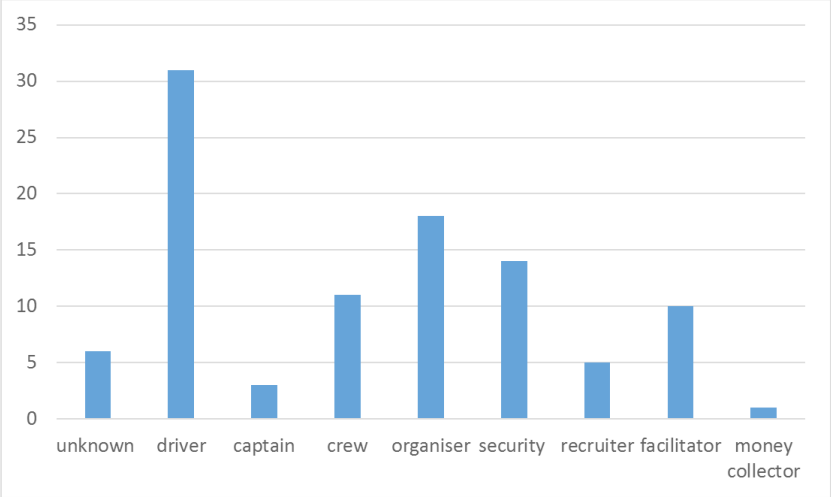

Figure 5. Roles of offenders in people-smuggling operations

It is not surprising that drivers feature predominantly among the offenders, as there are more transporters involved in a typical operation than recruiters, facilitators, security or organisers. Clients are usually housed in small groups in different locations, to avoid detection. Many drivers are required to take them to these hide-outs and to the beaches for departure. Fewer captains and boat crew members appear in the data. For a journey from Kupang to Ashmore, one captain is sufficient. For the longer journey from Java to Christmas Island that takes several days, a second captain might be required. The number of boat crew members responsible for cooking, providing water to the passengers, cleaning, handling fuel, and other tasks depends on the number of passengers on board.

As mentioned previously, the majority of people smuggling arrests by Indonesian authorities take place on land rather than at sea. This is because it is very expensive to carry out maritime patrols and there is insufficient equipment for maritime patrols (Missbach, 2015b). The risk of arrest on land is therefore much higher, not least because there are usually a limited number of roads leading from temporary hide-outs to the shore and roads are therefore easily controlled. In recent years, there have been many campaigns to raise awareness among the civilian population of smuggling hotspots along the Javanese coast. The population is encouraged to report the presence of 'suspicious' foreigners (McNevin, Missbach and Mulyana, 2016). Once a boat is at sea, the boat crew only risks arrest when the journey is interrupted by technical difficulties or is intercepted by Australian border forces and returned to Indonesia.

Given that Indonesian prisons are overcrowded (Sudaryono, 2013), and that imprisoning drivers is unlikely to have much effect on the broader control of people smuggling, several Indonesian prosecutors interviewed stated that drivers, if arrested, can now count on more leniency and will only be prosecuted if they are repeat offenders.[6] They did not, however, indicate that such exemptions would be applied to boat crews.

Legal Basis for Sentencing

In the majority of cases in this study, judges applied Law No 6 of 2011 on Immigration – especially art 120, which imposes the highest fines and longest prison sentences (Figure 6). In three of the 99 cases analysed here, the judges had to rely on the previous Immigration Law (No 9 of 1992, as amended by Law No 37 of 2009) because the offence was committed before Law No 6 of 2011 was enacted. The sentences of the convicted smugglers in those three exceptions were therefore much lighter. In one case, the judge applied Law No 17 of 2008 on Shipping, explaining that the captain of the boat, who was paid Rp 35 million (A$ 3,830), tried for four days to transport a group of asylum seekers to Christmas Island but failed to do so and returned them to Java.[7] He was charged with using a boat without the required paperwork, not with exiting or attempting to exit Indonesia illegally.

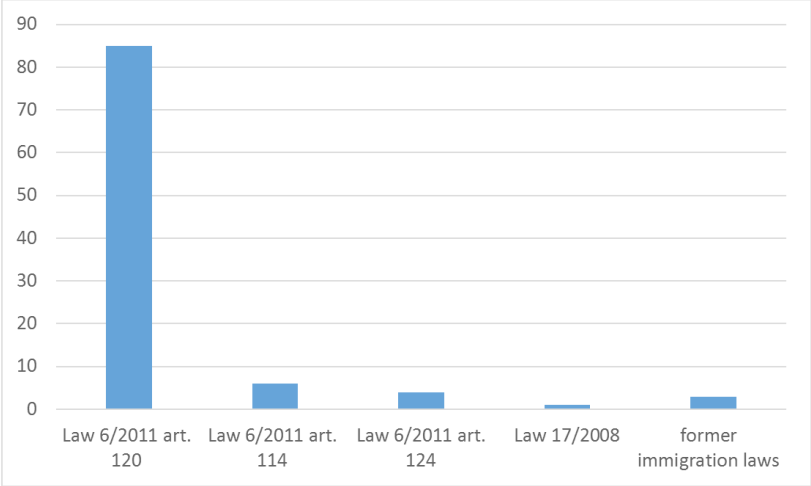

Figure 6. Indonesian laws under which convicted people smugglers were charged

6 Interviews at the Office of the Provincial Prosecutor of West Java, Bandung, June 2012.

7 Unless indicated otherwise, conversion rates are as at 1 June 2011.

The majority of offenders were, however, prosecuted under art 120 of Law No 6 of 2011 on Immigration. Although this law takes into consideration the different roles played by those involved in people-smuggling operations, the verdicts suggest that many judges, have, in their application of art 120 (which prescribes prison terms between five and fifteen years), imposed the same penalties on transporters, recruiters, organisers and facilitators alike. This means that even if a person's role in the operation was ancillary, and their share of the profits minimal, he or she would receive the same punishment as those who held greater responsibility for the operation as a whole and earned greater shares of the profit.

Sentences (Imprisonment)

Although people smugglers found guilty of violating art 120 of Law No 6 of 2011 should receive a prison sentence between five and fifteen years, as prescribed by the law, judges took a different approach, in a number of cases. As Figure 7 shows, most of those convicted of people smuggling received sentences of five years (60 months). Three people were only fined and received no prison sentences. In 21 cases, the judges imposed a term of imprisonment below the minimum level. In 30 cases, judges handed down prison sentences higher than the minimum sentence, with the highest being eight years (in five cases). In a few cases, the captain of a boat received a slightly higher fine than the other members of the crew. Those who had been involved in people-smuggling operations in which clients had died because of overcrowding on boats, bad weather or, in most cases, a combination of both, were given longer prison sentences.

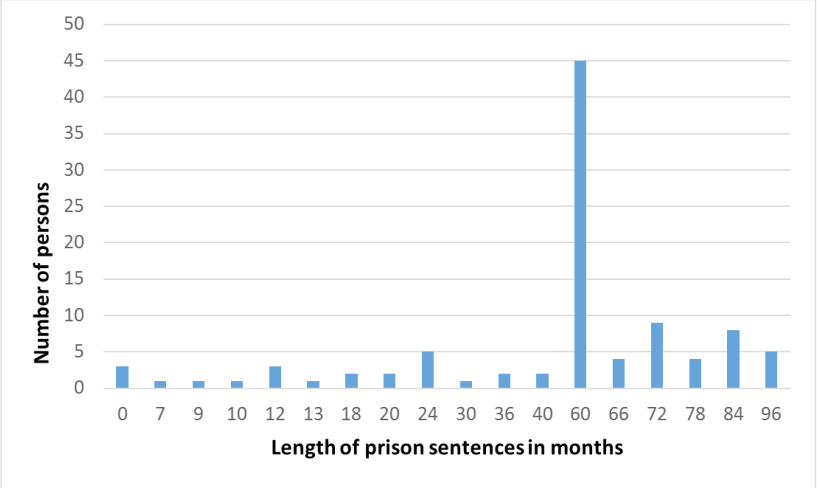

Figure 7. Length of prison sentences (in months) of convicted people smugglers

There are some options available for those convicted to reduce their time in prison. Each year, for example, prisoners can apply for remission before Indonesia's national holidays and their main religious holiday (*Eid al Fitr* for Muslims, Christmas for Christians). The chronic overcrowding of Indonesian prisons also increases their chances of receiving early parole.

Sentences (Fines)

Given the meagre monthly earnings of fishermen and drivers (usually less than Rp 2 million or A$ 218), and their lesser share in profits from the people-smuggling operation, the fines prescribed in the Law for people smuggling (imposed in addition to prison sentences) are quite substantial. Given the low incomes in Indonesia, it would take the average offender a very long time to pay fines of between Rp 200 and 500 million (A$ 21,800 to 54,725).[8] It is often assumed that crew members and captains are well-paid for transporting asylum seekers and refugees, however, interviews conducted with sentenced people smugglers in prison suggest the opposite is the case.[9] Ordinary crew members are sometimes offered Rp 3 to 5 million (A$ 328 to 547) per trip but they are only paid the first instalment and not the entire amount. The promised profit for captains is substantially higher. One captain was promised Rp 20 million (A$ 2,180) and received the full amount, whereas another was promised Rp 35 million (A$ 3,830) but received only Rp 30 million (A$ 3,282).[10]

8 The minimum wages for East Nusa Tenggara in 2015, for example, were Rp 1,250,000 per month (A$ 126) (Indonesia Investments, 2014), although some traditional fishermen make an monthly income as little as Rp 70,000–100,000 (A$ 7–10), see *Jawa Pos*, 2014. Fishermen usually get a share in the overall profit made from their catch but they also bear responsibility should a voyage produce no profit. They have to cover the costs of fuel and food consumed during the unsuccessful trip, see Therik, 2008. According to interview data from Java, an ordinary member of a fishing crew makes between Rp 1.2 to 2 million (A$ 120 to 200) per month) (interviews in Pelabuhan Ratu, 15 September 2014).

9 Interviews with sentenced smugglers, 20 September 2014, Ba'a.

10 Interviews with sentenced smugglers, previously imprisoned in Australia, 28 September 2014, Rote.

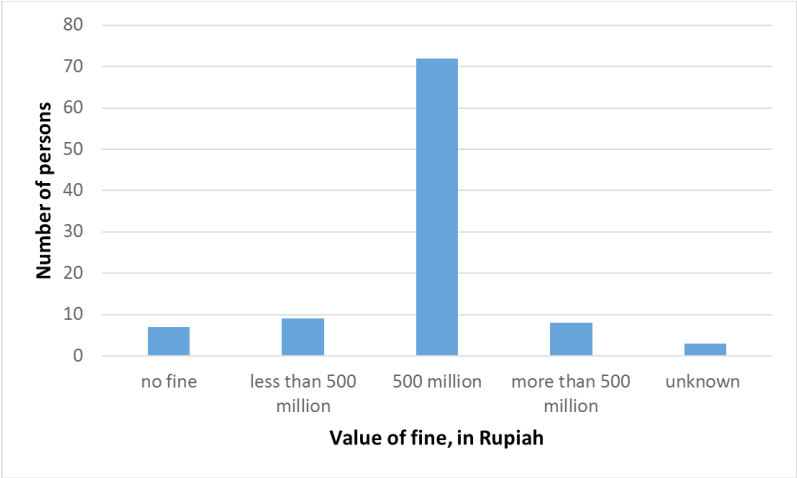

Figure 8. Fines (in Rupiah) imposed on convicted people smugglers

Convicted people smugglers who are unable to pay the fines receive extended prison sentences. It is at the discretion of the courts to determine the length of the sentences and this results in inconsistencies. For example, in some cases, not being able to pay the fine of Rp 500 million incurred three extra months of imprisonment, while in other cases it incurred six months. The fines in Figures 7 and 8 above only take into account the primary prison sentence and fines, and not additional months in prison incurred through inability to pay the fine.

Trends in Sentencing

Figures 9 and 10 show that the prosecution tended to demand higher prison sentences and fines than the courts handed down. This study did not analyse in detail what caused the judges to hand down more lenient punishments than those demanded by the prosecution but judges most commonly pay attention to the behaviour of the accused in court, for example, whether they were considered polite (*sopan*) and whether they regretted their doings (*menyesali perbuatanya*) and promised never to repeat their offence (*berjanji tidak mengulangi perbuatannya*). In some of the verdicts examined, the judges also took into consideration whether the accused person bore the sole responsibility for earning income for his family (*tulang punggung keluarga*, literally the backbone of the family) or if the person was still young and therefore had the potential to become a better person (*masih ada kesempatan untuk memperbaiki diri*).

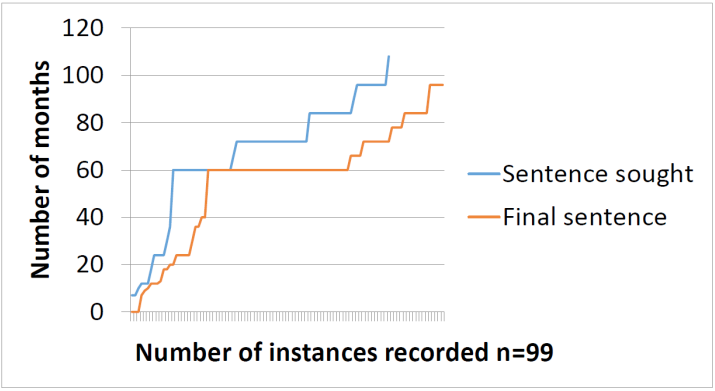

Figure 9. Prison sentences handed down for people smuggling, compared with prosecution requests

The judges usually accepted the prosecution's suggested fine but in some cases handed down a lower fine than that suggested by the prosecution. Given that the majority of the accused were unlikely to be able to pay the additional fines, the judges appeared to consider that a higher fine would be inappropriate because it would just result in a longer prison sentence for the smuggler.

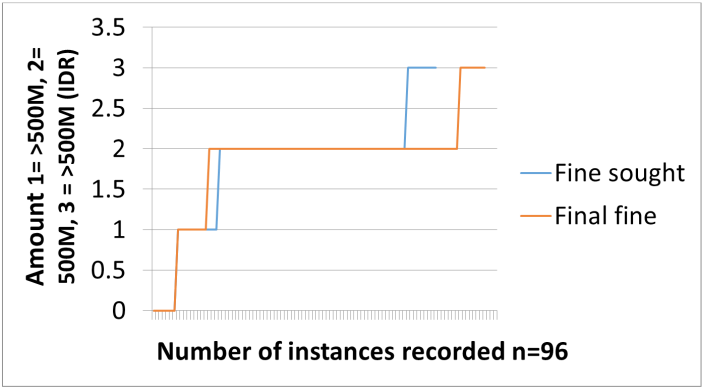

Figure 10. Fines handed down for people smuggling, compared with prosecution requests[11]

11 The sample size in figure 10 only represents 96 of the 99 cases, because information about the prosecution's requested prison sentences and fines was not available in the court records of the other three cases.

SUMMARY

In May 2011, Indonesia enacted Law No 6 of 2011 on Immigration and commenced imprisonment of people smugglers. The progress made over five years by Indonesian law enforcement agencies in prosecuting people smugglers in the courts in Indonesia needs to be considered, as do the challenges to consistently implementing Law No 6 of 2011 on Immigration and deterring people smuggling operations more effectively.

This study examined the different roles played within people-smuggling networks, to question the blanket legal definition of people smugglers and, instead, describe the social reality of people smuggling in Indonesia. This study has shown that the average sentenced Indonesian people smuggler is a middle-aged, male Muslim from a poor province and is usually not from a well-to-do background. This finding contradicts the stereotypes of people smugglers commonly depicted in the Australian, and, to a lesser extent, the Indonesian media. The realities of people smuggling have little in common with its depiction as the billion-dollar business with cartel structures and mafia-like organisational patterns (Achilli, 2015).

The media concentrates on 'celebrity smuggling organisers', often non-Indonesians with an inclination to nightlife and partying.[12] Substantial numbers of the sentenced smugglers are, however, poor fishermen, drivers, self- or unemployed workers and, occasionally, corrupt, low-ranking security officers. Because they are the easiest replaced in the smuggling network, business can continue uninterrupted if they are imprisoned. Current slow-downs in the frequency of people smuggling between Indonesia and Australia therefore cannot attributed to the enforcement of the Indonesian anti-people-smuggling Law. Due to the intricacies of people-smuggling operations and the complex set up of the networks, organisers and recruiters are rarely identified, arrested or prosecuted. This trend is reflected in this study, which shows only a small number of organisers and recruiters among the sentenced people smugglers. This policy paper has suggested that organisers and recruiters are also reasonably easily to replace. To verify this claim, however, a quantitative approach to analysing people-smuggling verdicts is insufficient. Future studies would need to take a more biographical approach to analysing people-smugglers' career paths.

The challenges posed by people smuggling remain pressing and require a more nuanced understanding of the phenomenon. It is important to approach the issue from a variety of angles to better understand the dynamics of people smuggling. It should not be seen just as a migration issue, a matter of organised crime or even a problem of public order. It should also be viewed as an issue of human and labour rights, maybe

12 See, for example, the photos of convicted people smuggler Sayeed Abbas published in Australia, which showed him drinking and smoking in night-clubs. Pictures of lavish life styles support the notion of the greedy smuggler who exploits others merely to fund his own amusement (for a more detailed analysis of his case, see Missbach, 2014b).

even as moral issue, as the matters involved are becoming increasingly morally and legally complex (Ahmad, 2011).

Narrow legalistic analyses of people smuggling do not provide much understanding of the complex reasons why displaced people rely on people smugglers. They also overlook the effects of the securitisation of migration at borders (which deter people from reaching safety). People smuggling is needed for the protection of rights of displaced people (Liempt and Sersli, 2013: 1029), as it is often the only viable choice for people escaping persecution and human rights violations. Yet, their status of being victims of persecution and human rights violations does not prevent some from also becoming people-smuggling offenders during their journeys in search of safety and effective protection.

REFERENCES

Achilli, Luigi (2015) 'The Smuggler: Hero or Felon?', Policy Paper, Robert Schuman Centre for Advanced Studies, Florence.

Andreas, Peter (2001) 'The Transformation of Migrant Smuggling across the US-Mexico Border', in David Kyle and Rey Koslowski (eds) (2001) *Global Human Smuggling: Comparative Perspectives.* Baltimore and London: The Johns Hopkins University Press, 139-57.

Baird, Theodore and Liempt, Ilse van (2016) 'Scrutinising the Double Disadvantage: Knowledge Production in the Messy Field of Migrant Smuggling', 42(3) *Journal of Ethnic and Migration Studies* 400–17.

Balint, Ruth (2005) *Troubled Waters: Borders, Boundaries and the Possession in the Timor Sea.* Crows Nest, NSW: Allen & Unwin.

Balint, Ruth (2012) 'Small Fry: The Story of a People Smuggler', The Monthly, Schwartz Publishing, August: 37–40.

Carnegie, Michelle (2014) 'Sailing-Trading Livelihoods in Southeastern Indonesia: Adapting to Change', 41(6) *Asian Journal of Social Science* 543–79.

Crouch, Melissa, and Antje Missbach (2013) 'Trials of People Smugglers in Indonesia: 2007-2012', Centre for Indonesian Law, Islam and Society Policy Paper, University of Melbourne.

Fox, James J (2013) 'People-Smugglers and the Crews They Recruit: Changing Patterns'. Paper presented at Annual Conference of the Australian Anthropological Society, 5-8 November, Canberra.

Indonesian Embassy Canberra (2013) 'Pemulangan 50 WNI Tersangka Kasus Penyelundupan Manusia', *Berita Perwakilan*, 9 March <www.kemlu.go.id>.

Indonesia Investments (2014) 'What are the Minimum Wages in Indonesia in 2015?', 20 November <www.indonesia-investments.com>.

McNevin, Anne; Missbach, Antje; and Mulyana, Deddy (2016) 'The Rationalities of Migration Management: Control and Subversion in an Indonesia-based Counter-smuggling Campaign', 10(3) *International Political Sociology*, June.

Jawa Pos (2014) 'Merdeka sebagai Bangsa Maritime', 21 August <www2.jawapos.com/>.

Missbach, Antje and Crouch, Melissa (2013) 'The Criminalisation of People Smuggling: The Dynamics of Judicial Discretion in Indonesia', 14(2) *Australian Journal of Asian Law* 1–19.

Missbach, Antje (2014a) 'Doors and Fences: Controlling Indonesia's Porous Borders and Policing Asylum Seekers', 35(2) *Singapore Journal of Tropical Geography* 228–44.

Missbach, Antje (2014b) 'The Extradition of People Smugglers from Indonesia to Australia: Political and Legal Challenges', 15(2) *Australian Journal of Asian Law* 1–23.

Missbach, Antje (2015a) 'Making a "Career" in People-Smuggling in Indonesia: Protracted Transit, Restricted Mobility and the Lack of Legal Work Rights', 30(2) Sojourn 423–54.

Missbach, Antje (2015b) *Troubled Transit: Asylum Seekers Stuck in Indonesia.* Singapore: ISEAS.

Missbach, Antje (2016) 'Perilous Waters: People Smuggling, Fishermen and Precarious Livelihoods on Rote Island, Eastern Indonesia'. Paper presented at workshop, 'Critical Approaches to Irregular Migration Facilitation: Dismantling the Human Smuggler Narrative', Migration Policy Centre, European University Institute, Florence, 5-6 April.

Mitchell, Emily (2015) *After the Spill: Investigating Australia's Montara Oil Disaster in Indonesia.* Sydney: Australian Lawyers Alliance.

Na'im, Akhsan and Hendry Syaputra (2010) 'Kewarganegaraan, Suku Bangsa, Agama, dan Bahasa Sehari-hari Penduduk Indonesia: Hasil Sensus Penduduk 2010'. Jakarta: Badan Pusat Statistik, <www.bps.go.id/>.

Roberts, George (2014) 'Indonesian President Susilo Bambang Yudhoyono's Bodyguard Involved in People Smuggling, Court Judgment Shows', ABC News, 21 May <www.abc.net.au/news>.

Sanchez, Gabriella (2015) *Human Smuggling and Border Crossings.* London and New York: Routledge.

Stacey, Natasha (2007) *Boats to Burn: Bajo Fishing Activity in the Australian Fishing Zone.* Canberra: ANU E-Press.

Sudaryono, Leopold (2013) 'Overcrowding Crisis', 113 *Inside Indonesia,* July-September <www.insideindonesia.org>.

Therik, Wilson (2008) 'Nelayan dalam Bayang Juragan: Potret Kehidupan Nelayan Tradisional Bajo di Tanjung Pasir, Pulau Rote, Nusa Tenggara Timur'. Salatiga: Universitas Kristen Satya Wacana, Institute of Indonesia Tenggara Studies, Working Paper.

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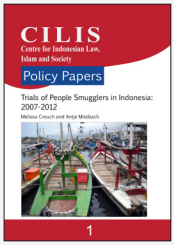
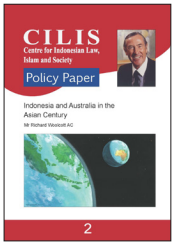
	No 1 (2013)	'Trials of People Smugglers in Indonesia: 2007-2012'	Dr Melissa Crouch and Dr Antje Missbach
	No 2 (2013)	'Indonesia and Australia in the Asian Century'	Mr Richard Woolcott AC
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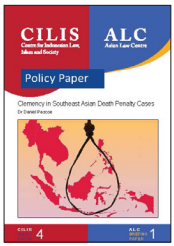	No 4 (2014)	'Clemency in Southeast Asian Death Penalty Cases'	Dr Daniel Pascoe

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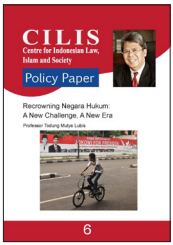	No 6 (2014)	'Recrowning Negara Hukum: A New Challenge, A New Era'	Professor Todung Mulya Lubis
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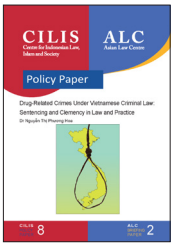	No 8 (2014)	'Drug-Related Crimes Under Vietnamese Criminal Law: Sentencing and Clemency in Law and Practice'	Dr Nguyen Thi Phuong Hoa

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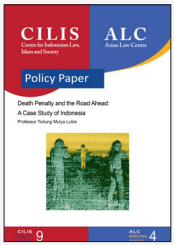	No 9 (2015)	'Death Penalty and the Road Ahead: A Case Study of Indonesia'	Professor Todung Mulya Lubis
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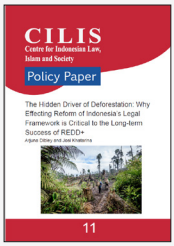	No 11 (2016)	'The Hidden Driver of Deforestation: Why Effecting Reform of Indonesia's Legal Framework is Critical to the Long-term Success of REDD+'	Arjuna Dibley and Josi Khatarina

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