

Replic and Duplic Point-by-Point Comparison

Replic Point #1:

The Prosecution asserts that the Charges had considered 21 witnesses, 9 experts and 7 items of documentary evidence, meant the Charges were in compliance with the requirements for criminal evidence stipulated under Article 184 KUHAP

My Dad's Response:

The Public Prosecution Team clearly shows its arrogance or ignorance that justice can only be upheld on the basis of its own witnesses. The Prosecution cites only about one third of the total witnesses. In essence the Public Prosecution Team is saying that it can prove a criminal charge simply by ignoring all the evidence disproving it.

Replic Point #2:

Under point 2 of the Replic, the Public Prosecution Team questioned two main issues regarding the external intervention and the lack of validity of the Subsidiary Principle. The Public Prosecution Team claims that: (a) external intervention is a right guaranteed in the 1945 Constitution, the Human Right legislation and the Environmental legislation and (b) the Subsidiary Principle is an alternative so that if any element of exception is fulfilled then the Subsidiary Principle does not apply and what applies instead are sanctions under the Environmental law.

My Dad's Response:

It seems the Public Prosecution Team readily accepted without any verification the reports and allegations of Dr. Jane Pangemanan, the Kompas articles and the reports in the mass media of allegations of heavy pollution in Buyat Bay that were started by some NGOs, politicians, and a small non-representative group of Buyat Bay residents. It is the duty of the Police and of the Attorney General's office at the investigative stage to conduct in-depth review and examinations, while taking into account the negative and sensitive impacts stirred up by such a case. Simple logic shows that if the Police and the Attorney General's office had been aware that the reports and allegations were based on nonexistent facts and evidence then there should have been a conclusion of innocence in favor of all the defendants. But since they chose to prosecute based on such obvious lies, I am forced to conclude that the Police and the General Attorney's office acted politically rather than in accordance with established laws.

Replic Point #3:

Regarding the Goodwill Agreement, the Prosecution contends that: "the existence of such an agreement does not invalidate the criminal element and therefore it may not be used as an argument for apology or justification by the Defendant to be released of criminal charges."

My Dad's Response:

In fact the Goodwill Agreement is an acknowledgement by the Government of Indonesia that there is doubt that Buyat Bay is polluted and that it will take 10 years of monitoring by experts to prove whether or not pollution has occurred. The Goodwill Agreement also indicates that dispute has been resolved.

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Replic Point #4:

Prosecutors contend that Mr. Ness is not being charged because of his position as the President Director of PTNMR by citing the expert opinion of Mr. Muladi.

My Dad's Response:

The Public Prosecution Team insists on accusing me solely because of my position as the leader of the company based on the expert opinion of Prof Muladi. However, Mr. Muladi's testimony is not only substantively wrong but legally inadmissible because he never completed his testimony in the court. Mr. Muladi never returned to the court to complete his testimony because his opinion would have been discredited under cross-examination.

Replic Point #5:

The Public Prosecution Team attempts to lecture the Defense Teams on the Indonesian legal system and its stipulations.

My Dad's Response:

What I have learnt from this case shows that on paper Indonesian laws and regulations might be good, include legal certainty and be just. But the reality of this case shows that the law has become most uncertain and definitely unfair towards PTNMR, myself, my family and a number of PTNMR employees due to the distortive way in which the laws were applied by the Police, the Attorney General's office and the Public Prosecution Team.

Replic Point #6:

The Public Prosecution Team continues to assert, as a matter of legal procedure, that the POLRI water sample results constitute valid legal evidence

My Dad's Response:

The Police results contradict the findings of more than thirty other studies conducted by various organizations including the WHO, CSIRO and others. The Police results are so wrong that even the water bodies that are disconnected from Buyat Bay show up with high levels of mercury and arsenic. And most surprisingly the Police results contain ten water samples that were never collected from Buyat Bay. Its self-explanatory that the Police results are simply wrong.

Replic Point #7:

Under this item, the Public Prosecution Team only extracted parts of the Defense to provide a selective response in its reply and they disregarded the substance of the issue and context in which the Pledoi discusses the issue of the lack of warning to PTNMR.

My Dad's Response:

Here again, the Public Prosecution Team wants to ignore the point that the Government of Indonesia never gave us any kind of a warning that we were doing something wrong.

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Replic Point #8:

Regarding the issue of Minamata Disease, the Prosecution argues that “... *this argument is completely irrelevant for submission in this criminal case because the Minamata disease was never mentioned or discussed in the Indictment, evidence presented in this court or in the Charges of the Public Prosecutor.*”

My Dad's Response:

One needs to keep in mind that the origin of this case was the allegation of Minamata disease or mercury poisoning. The Minamata disease issue was raised by Dr. Jane Pangemanan in her report to the Police. This police report (although subsequently withdrawn by Dr Pangemanan herself because she could not support the allegations she had made and spread) but this became the basis for the Police investigation and were included in the Police BAP. Clearly, the prosecution is contradicting its own case.

Replic Point #9:

“The Defense teams for Defendants I and II stated that no pollution or environmental degradation had taken place in Buyat Bay based on public knowledge” and the Prosecution argues that *“In an environmental case it is not possible to just base claims on perfunctory observations unsupported by legal and valid laboratory analysis”*.

My Dad's Response:

The prosecutor is trying to give credibility to the analysis conducted by the Police Headquarters Forensic laboratory and the report generated by some members of the Integrated team in Nov 2004.. While all the evidence shows that the results of these two analyses are not credible and therefore are “NOT VALID”. First the Police sample results are very much in question as they do not agree with results from split samples nor do they match any other samples collected by neither a third party nor by NMR, nor could they be replicated in the court ordered resampling in 2006. The chain of custody of the police samples is questionable because there were 24 water samples taken and 34 were received at the police laboratory. No one has ever explained where those 10 extra samples came from, so how can the Prosecution assert that the sample results are valid and reflect the actual conditions of Buyat Bay while all the evidence before this court demonstrates that the samples are invalid.

Replic Point #10:

“The Defendants attempted to create an unsubstantiated opinion by relating the activities of PT Newmont Minahasa Raya to the PROPER method because to this point in time PT Newmont Minahasa Raya has never been involved in the PROPER program.”

My Dad's Response:

The core criterion for PROPER rating is based on the quantitative assessment of how good or bad the value of an environmental parameter is relative to the applicable standard. Irrespective of whether or not PTNMR participated in the PROPER program, the PROPER methodology has established that the environmental performance of PTNMR would qualify for a Green rating.

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Replic Point #11:

“The General Prosecutor’s refusal to look at and observe the exhibit in Teluk Buyat shows that Teluk Buyat is not polluted. That particular statement is supported by the article in the National Geographic magazine, August 2006 edition as well as the daily newspaper, Kompas dated 18 December 2006. (Pled. I page 7-10, Pled. II page 7-8, Pled III)” however the Prosecution argues that *“This statement is inconsistent with the previous statement where forwarding an argument has to be accompanied with solid evidence and not merely based on assumptions.”* The Prosecution also states that *“The refusal by the General Prosecutor for not inspecting the location and not taking samples from the location at Teluk Buyat is in fact a form of consistent effort by the General Prosecutor to follow the court’s procedures.”* Also *“The reacquiring of samples is no longer necessary keeping in mind the disposal of tailing into the sea and PTNMR activities was completed in 2004”* and *“It would be impossible to use the magazine, National Geographic Indonesia and the newspaper, as exhibits to prove the non-occurrence of contamination and/or destruction of the environment in Teluk Buyat this is so because the two mentioned tools of evidence are not valid and legal as stipulated in the Indonesia Supreme Court Jurisdiction Number: 1479/Pid/1969 date 18 December 2006.”*

My Dad's Response:

First, is it not odd that when this five Judge Panel issued a direct and written order to resample and the Prosecution at that time did not raise any objection in court but later they refused to comply with the order? Though I am not a lawyer, in my mind this action or inaction is nothing short of “Contempt of Court”. Second, the tailings which the Prosecution contends are the source of pollution are still in Buyat Bay (by definition Pollution is said to have occurred when there is a long term impact) and still could be measured if indeed the allegations were true. This could be paraphrased another way and state that the Prosecution continues to rely solely on the Police laboratory results that are inconsistent with all other samples ever taken in Buyat Bay with known errors in the quantity of samples taken in the field with those evaluated by the Police Laboratory in which no one has explained to the court where those 10 extra samples came from. This alone makes the police sampling illegal and invalid.

Replic Point #12 and 13:

The Prosecution states that: (a) the Defenses of Defendants I and II regarding the Police illegal investigation are not relevant to the issue of Supreme Court ruling in the Habeas Corpus case and that (b) the Contract of Work demands that NMR comply with the Environmental law.

My Dad's Response:

Our legal rights were violated during the investigation phase, and therefore we filed the Habeas Corpus action which was ruled in our favor. It is also clear that the Supreme Court legislation itself precludes appeals and cassation in a Habeas Corpus ruling by a District Court. This rule was violated by the Police who submitted a cassation on the Habeas Corpus ruling. Subsequently the Supreme Court violated the Supreme Court Law and its own Gazette by issuing a cassation ruling on a case of Habeas Corpus. NMR did not violate even a single stipulation of the Contract of Work and NMR did not violate any Environmental law stipulations or regulations.

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Replic Point #14:

Public Prosecution Team wants to state that the PTNMR's AMDAL and the Minister of the Environment Permit did not constitute a permit to place PTNMR tailings on the seabed of Buyat Bay. They do so by repeating time and time again that this has been proven by the PTNMR letter requesting for a permanent waste disposal permit.

My Dad's Response:

The Defense Team exhaustively addressed and proved this by referring to undeniable witness and expert testimonies that NMR's AMDAL and the permit by the Minister of the Environment constituted a permit to dispose of NMR tailings on the seabed of Buyat Bay in accordance with Indonesian laws and regulations.

Replic Point #15:

Replic claims that: *“General Prosecutor has proven in a convincing and lawful manner based on the information given by the Expert Witness Sulistyowati who asserted that PTNMR has disposed 33 tons of Mercury in the time span of 4.5 years. Of the 33 tons of Mercury mentioned, 17 tons expelled to the air in gas form and the other remaining 16 tons are disposed to the bottom of the Buyat Bay and “the tailing produced by PTNMR is B-3 due its metal contents is classified as heavy metals and is listed in the Government Regulation Number 19 Year 1994 as attached and in connection with Government Regulation Number 12 Year 1995 also stated in the mining activity’s B-3 waste material list, therefore PTNMR has conducted transgressions against the laws in effect,.....”*

My Dad's Response:

If one looks at the transcripts of Sulistiowati's testimony of February 17, 2006 you will find that she stated no such thing. The Prosecution has falsely attributed this quote to Sulistiowati. Further tailings can ONLY be classified as a B-3 material under classification code D-222 after undergoing toxicity testing and if the results are above prescribed standards. Since the tailings were tested using the TCLP criteria and proved not to be a B-3 (hazardous) material as testified to in this court, the Prosecution has misrepresented the facts once again. It is self-evident that the tailings are not B-3 waste because the government would not have approved the AMDAL or the issued the permit on 11, July 2000.

Replic Point #16:

The prosecution claims that the ERA submitted by PT Newmont Minahasa Raya was never approved by the Ministry of Environment as stated by the witnesses Sonny A. Keraf, Isa Karmisa Ardiputra and Masnelyati Hilman.

My Dad's Response:

The ERA is an evaluation tool to allow regulators to make informed decisions. Governments do not “approve” ERA's. No one was expecting approval, the Government's options upon receipt of the ERA would be to increase or decrease discharge requirements or to revoke the permit. But “approving” the ERA was not a regulatory option under any existing law. Every witness and expert witness concluded that the ERA is not a part of Indonesian law. It is a scientific study of the environment to determine not only if there is any damage currently, but also to determine if there is any risk of damage in the future.

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Replic Point #17:

Regarding the issue of the thermocline, the prosecution states that “we would like to invite this court read again the actual news article on the black box of the Adam Air plane in the waters of Majene, West Sulawesi detected by the USNS Mery Sears at a depth of 2000 (two thousand) meters under the sea surface. This black box itself has a weight of about 6 (six) kilograms and all experts, whether Indonesian as well as those experts from the Mary Sears vessel suggested to have the black box immediately taken out of the water, since there are worries that it might move due to sea water currents”.

My Dad's Response:

The Prosecution’s witness never went to Buyat Bay to estimate the depth of the thermocline but merely did an extrapolation from some of his measurements out in the Maluku Sea in 1972 or 24 years prior to the start of the NMR mine operation. His opinions were point by point examined and then destroyed by the Defense witness who had examined about 10,000 measurements in Buyat Bay which indicated the presence of a thermocline at an average depth of 43 meters. Real data means real conclusions, and this means that the thermocline is around 43 meters. What has the Adam Air crash and the aircraft’s flight recorder have to do with tailings in Buyat Bay? Maybe the experts are correct and that there are sea currents in the area of the crash, but how does this relate to the confines of Buyat Bay. The simple answer is that there is no relationship.

Replic Point #19:

The prosecution claims that the *sludge* and the *sediment pond degraded and are supported by the Exhibit Letter of the Mabes Polri Criminology Laboratory Report Number: 4171/KTF/2004 dated 27 September 2004. Hence, based on these facts it was validly and convincingly proven that the quality of the Buyat River water has been degraded and that this was caused by sludge and the sediment pond.*”

My Dad's Response:

First, Dr. Ir. Rudy Sayoga of ITB testified that arsenic and mercury in the Buyat River were below applicable standards. Second, Ministry of Environment’s report stated that mercury and arsenic in Buyat River were below applicable standards. CSIRO’s report came to the same conclusion. There is not even one bit of evidence that shows that there is pollution in Buyat River.

Replic Point #20:

Defense Counsel for Defendants and Defendant II argued that the marine biota samples and the Buyat Pante Village inhabitants were not contaminated by heavy metals originating from PT Newmont Minahasa Raya’s tailings. (Pled. I, Pled. II 4.3, Pled. III.)”, while the Prosecution contends that the court was provided with proof that many fishes died, had lumps, and migrated due to environmental disturbance, that damages occurred at the coral reefs and sea-weed, that a high concentration of arsenic and mercury existed in fish organs and marine biota that exceeded the international/WHO standards, as

My Dad's Response:

The technical data and visual verification of Buyat Bay makes it clear that there is abundance of fish and the local fishermen catch enough of it everyday to eat, sell and even export it. These observations were testified to by numerous witnesses. No evidence was presented that fish had died as a result of NMR’s tailings placement. Also no one produced any fish with lumps. On the contrary experienced fishermen from Buyat testified before the court that they had never ever seen one. Further the number of species of fish never decreased and in fact a private investor is constructing a large cold storage and fish processing plant right on Lakbon/Buyat beach. So this clearly points to

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well as there was a high concentration of heavy metals in human bodies.

the fact that investors and the fisherman do not perceive that there is a problem. All the evidence shows is that the marine ecological system in Buyat Bay is vibrant and thriving.

Replic Point #21:

In the Replic the Prosecution refers to the Decree of the Minister of Environment No.51/1995 regarding quality standards for liquid waste for industrial activities and argues that basically tailings are solids liquefied by water, so its form is no longer solid waste but liquid waste.

My Dad's Response:

This is a scientific impossibility because tailings are insoluble in water. The Prosecutor's attempt to cast the characteristics of tailings as something similar to the solubility of salt or sugar only confirms the Prosecution's ignorance and incompetence in basic science. The Defense argued that tailings are what in scientific and legal terms can be called solid waste.

Replic Point #22:

The Prosecution contends that the Defense argued that the Requisitor did not clearly and convincingly elaborate the elements of the articles being indicted. The elements of Article 41 did not have the legal foundation to explain several elements, such as "... did not function according to its designation". However, the Prosecution contends that if a region has not been specifically designated vis-à-vis its allocation, then the general designation shall apply.

My Dad's Response:

NMR conducted and received an approval on an AMDAL as well as annual work plans submitted to the Government. In these meetings and in the approval process, representatives from the Regional, Provincial and National levels of the Government participated and all the approvals were granted including the disposal of mine tailings to be placed at the bottom of Buyat Bay. This being the case, logic dictates that the function of Buyat Bay was mentioned in this context because it was designated as a place where mine tailings could be placed. Second, sea water is not classified as surface water. The government has defined "Surface Water" in Government Regulation 20 – 1990 Concerning the Control of Water Pollution. To quote the definitions adopted in Article 1.1, which states: "Water means all the water that is present in or is derived from water sources, and is found on the surface of the ground, **not including water that is present below the surface of the soil, or sea water**" It seems that the Prosecution did not conduct appropriate research for the regulation when drafting their Replic, because under this regulation, sea water is NOT surface water. If sea water and surface water were one and the same, why would the government write separate regulations for sea water and surface water?

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Replic Point #23:

The Prosecution argues that based on the testimony of Isa Karmisa, KLH has not received any reports from NMR since 2002.

My Dad's Response:

The Pledoi and its attachments contain delivery receipts signed by KLH that show that RKL/RPL reports were received every quarter till the end of the operations in 2004. Further I have also checked the court transcripts and I cannot find when and where Isa Karmisa ever stated before the court that KLH never received RKL/RPL reports after 2002. Clearly the prosecutors have simply manufactured this claim.

Replic Point #24:

The Prosecution contends that even if the arguments expressed by the Defense regarding witnesses were accurate, the arguments cannot legally disqualify the legitimacy of the witnesses.

My Dad's Response:

Legal Counsel argued that the court reject the testimonies of witnesses from the community because: 1) the witnesses went to Jakarta to seek "treatment" but then went on a demonstration at the Hotel Indonesia roundabout and were interviewed by members of the mass media; 2) witness testimonies were suspiciously similar; 3) witnesses had filed a civil suit and then retracted their suit; 4) all witnesses are related by family ties, as such their objectivity is questionable; 5) there is a witness who is not related to others (Salim Modeong) listed in the BAP but he was never presented in court; 6) witnesses had been talking about pollution in Buyat Bay from PTNMR tailings even before PTNMR carried out tailings placement in Buyat Bay.

Replic Point #25:

The Prosecution contends that the authority to reject and grant requests to bring witnesses [Masnellyarti] is the authority of the Panel of Judges.

My Dad's Response:

Defense Legal Counsel argued that the testimony of witness Masnellyarti shall be rejected because the witness never reappeared in court to be confronted about the accuracy of her statements even though she had been officially summoned.

Replic Point #26:

The Prosecution contends that the statement of the Defense Counsel is contrary to the fact the court expressly accepted Sulistyowati, Muladi, and Rignolda as experts to be examined before the court.

My Dad's Response:

Defense requested that Prosecution Experts' testimonies be rejected because they do not reflect specific expertise necessary to clarify this case. 1) Expert Sulistyowati who was declared an expert in permits/licenses apparently did not have any legal educational background; 2) Till the conclusion of the hearing, the expert named Muladi never finished his testimony so the legal

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.....Continuation of Replic Point #26.....

counsel, including the Defendants, did not get a chance to ask questions and respond to the expert's testimony; 3) Rignolda talked about many things, while his academic background was in mangrove forestry, as stated by the Dean of Fisheries and Oceanography Faculty of Sam Ratulangi University

Replic Point #27:

The prosecution claims that the samples were secure because they were placed in one of the rooms in the Polsek and the rules of laboratory examination were followed.

My Dad's Response:

Clearly the prosecution does not understand that securing a bottle of sample by sealing it is different from simply keeping it in a room in Polsek. The prosecution does not explain the reason for the discrepancy of ten samples. Even the prosecution witness Mr. Munawardin admitted that he could not explain the mysterious appearance of the ten samples.

Replic Point #28:

The Prosecution contends that the Defense Legal Counsel argued that the list of evidence in the BAP listed 129 items of evidence. But in the dossier of file handover from the Public Prosecutor to Manado District Court dated 11 July 2005 the listing was apparently not the same.

My Dad's Response:

The dossier of file handover from the Public Prosecutor to Manado District Court dated 11 July 2005 the listing was apparently not the same. Therefore, the evidence presented by the Public Prosecutor does not guarantee the accuracy and the authenticity of the evidence (Pledoi I page 51, Pledoi II), while the Prosecution in the Replic states that the argument about the dissimilarity in the number of evidence items is very vague because it does not explain what the legal counsel refers to as "dissimilarity," as such this has to be disqualified.

Replic Point #29:

The Prosecution stated in the Replic that the Legal Counsel for the Defendants and Defendant II argued that PT Newmont Minahasa Raya did not commit any act of pollution in Buyat Bay based on the report of the KLH Integrated Team published by Nabel Makarim. The Prosecution stated that the argument regarding this statement must be disqualified based on the testimony of Nabel Makarim (the then State Minister for Environment) because he had published the Integrated Team report when the Team had not yet concluded the study and the analysis.

My Dad's Response:

The Technical Team worked for the Minister Nabel Makarim to assist him in the evaluation; it was not the Minister who worked for the Technical Team. As the Minister of the Environment he had the right to accept or reject any work product the Technical Team came up with. The final KLH report by Minister Nabel Makarim was issued on October 14, 2004, declaring that Buyat Bay was clean. A subgroup of the Technical Team comprised of NGOs and some of the Prosecution's witnesses, worked to twist facts and reverse as many conclusions as it could. They came up with the scientifically flawed conclusions which were printed in a subsequent report dated 8-Nov-2004.

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Replic Point #30:

The Prosecution states that the Defense Legal Counsel argued that Buyat Pantai community members have changed their position and Dr. Jane Pangemanan retracted her grievance (Pledoi I, Pledoi II, pages 11, 14, 16, Pledoi III), however the Prosecution contends that this statement is irrelevant and must be disqualified because pollution and/or destruction of the environment is not a grievance and so the legal process is not dependent upon a report or filing of a complaint.

My Dad's Response:

The retraction of testimony by Dr. Jane Pangemanan is very relevant matter if the goal is to find out the turth. When someone goes to the media and creates a national sensation that people are suffering from Minamata Disease and then later changes her story because she suddenly realizes that she had not even conducted a single laboratory test and had no basis for such a claim, then such a reversal demands a close scrutiny. Dr Jane Pangemanan was the only medical doctor who testified for the Prosecution. Her retraction of testimony is a crucial turn of events. The only other witness for the Prosecution who called himself a medical doctor was Super Expert Rignolda Djammaludin, who, as we all know, was only qualified to talk about Mangroves.

Replic Point #31:

The Prosecution contends that the Defense Legal Counsel for the Defendants argued that PTNMR did not commit pollution in Buyat Bay based on the results of studies by Minamata Institute, CSIRO, and WHO (Pledoi I, Pledoi II, Pledoi III), while the Prosecution argues that there is pollution based on two questionable studies- the 8-Nov-2004 Report of the Integrated Team and the Dossier of Criminal Laboratory.

My Dad's Response:

The Prosecution forgot to mention that the defense is based on the findings of over 30 scientific studies and supported by expert testimony, not just two questionable reports. But by choosing to base their prosecution and efforts to put me in prison on only two incorrect pieces of evidence, they have actually aided my defense. First, they contradict each other on a key point: The Police Laboratory Report finds that the sea water in Buyat Bay is unusually high in mercury and arsenic content but that the fish are very low in both mercury and arsenic, the Integrated Team report concludes that the sea water in Buyat Bay is well within regulatory limits for arsenic and mercury, (matching all other studies) and completely discrediting the Police Laboratory results. However, in other points they agree with each other and with all other legitimate studies. The metals found in fish in both the Integrated Teams report and the Police Lab reports are normal. But because of their bias, some members of the technical team then used some formulae that they got wrong by 4,500% and refer to non-existent ASEAN Marine Water Guidelines for sediments as their baseline. Therefore, in their final arguments, the Prosecution has just destroyed the credibility of the only two pieces of so-called evidence that it has.. Thank you, Prosecutors, for aiding me in my defense.

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