DUPLIK – DEFENDANT II
PT NEWMONT MINAHASA RAYA

1. INTRODUCTION

Honorable Panel of Judges,

Public Prosecution Team and Members of this Court,

On this occasion we, once again, give our thanks to God Almighty that by His leave we stiill have this opportunity to submit our Rejoinder as a response and objection to the Reply of the Public Prosecution Team. Also on this occasion, we would like to express our thanks to the honorable Panel of Judges for the good leadership of this court that has allowed this trial to proceed in an orderly manner and for always giving us the opportunity throughout the trial to disclose the material truth although we were often obstructed by the disagreement of the Public Proseuction Team.

We also wish to express out thanks to the Public Prosecution Team who has managed to be present and on time throughout this trial, thus allowing this trial to proceed smoothly.

Having heard the Public Prosecution Team's Reply read at the 23rd February 2007's hearing and after reading and studying it, it seems that the Public Prosecution Team has completely failed to address and respond to the core of the issue and substance that we discussed and presented in our Defense of Defendant II. Was this because the Public Prosecution Team has difficulties in understanding the law or because it has recognized its mistakes in the Indictment? Is the silence of the Public Prosecution Team firstly caused by the content of the guidelines provided to the investigators and contained in the P-19, which clearly admitted that the Police Headquarter Forensic Laboratory did not have the authority to draw conclusions, and that the investigators did not fulfill their tasks by not examining witnesses for the Defense and that the case was not appropriate because it did not fulfill the Subsidiary Principle as detailed in the Defense? The Public Prosecution Team's silence actually indicates its agreement with the Defense and its agreement with the P-19 they issued.

There is nothing new in the Reply of the Public Prosecution Team. The Reply only presents and repeats the same items already contained in the Charges. A Reply that should be submitted in response to the Defense of Defendant II has not materialized,

or the Prosecution may be unable to respond to the legal facts disclosed during the trial. In fact, the Reply fails to address the legal analysis we submitted in the Defense of Defendant II and which should form the prime basis for a Public Prosecution Team in accusing the Defendant.

In short, we can state here that the **Public Prosecution Team has <u>still been unable to prove</u> pollution in Buyat Bay conclusively and beyond reasonable doubt.**

We are certain that the facts presented in our Defense of Defendant II include undeniable legal facts and logical arguments although the opinion of the Public Prosecution Team who attempted to trivialized them as a simple matter of "packaging" is naïve to say the least. The Defense presented strong and credible arguments and explained and proved the situation and the true facts rgarding Buyat Bay anthis was not merely done just to be admired without a meaning and truth, but all the material presented was intended to help the Panel of Judges, the Public Prosecution Team or anybody else interested in the Buyat Bay controversy to obtain clear and well presented facts and to assist this honorable Panel of Judges to reach certainty in relation ot the legal facts that Buyat Bay is not polluted. It is very regrettable, however, that the Public Prosecution Team has implied its completely unfounded prejudice, as if the Panel of Judges was to rule on the basis of a colorful Defense.

2. RESPONSE TO THE REPLY

2.1 The Reply was haphazardly put together:

Honorable Panel of Judges,

Allow us to express our disappointment at the way in which the Public Prosecution Team has approached its Reply. It is very regrettable that just as for the Charges, the Public Prosecution Team's Reply continued to circle around procedural administrative issues, and if that had been the objective of this trial, then the case should have been heard in the Administrative Court and not in this court. Meanwhile, the substance or the legal facts as to whether Buyat Bay is polluted, have not been addressed at all. Also, as for the Charges, the Public Prosecution Team presented its arguments unsystematically, at random and giving the impression of a lack of seriousness in

presenting its arguments without taking into account the corelation with the facts disclosed throughout the trial:

(1) The Public Prosecution Team argued that marine currents in Buyat Bay can mix the tailings so that they rise to the sea surface and used for comparison the black box believed to be in the waters of the Majene sea in West Sulawesi (Point 17 pages 23-24, Reply). In support of the statement, the Public Prosecution Team stated that:

> "… *The black box of the plane itself weighs six kilograms and all Indonesian experts and experts from the Mery [sic] Sears recommended that the black box should be recovered immediately as there are concerns that it may shift place because of the currents…"*
>
> *Learning from this, we may draw the comparison that if an object weighing 6 kilograms at a depth of 2000 meters below sea surface may be easily shifted by the current, then it is even more probable with soft particles of sediments at a depth of only 50 to 82 meters. …"*

The Public Prosecution Team's argument is totally unacceptable. In fact, even a layperson would consider this comparison a preposterous argument. The analysis in this criminal trial that the tailings would rise to the surface as stated in the Indictment was never proved by material evidence and now the Public Prosecution Team brings up the completely speculative matter of the black box without the backing of a single shred of evidence. How can such statement that the Public Prosecution Team calls an argument be admitted in a Reply before such a respectable court and that, *notabene*, all opinions submitted by a Public Prosecution Team as official documents to accuse a Defendant, especially in a case of pollution such as this, must prove the facts based on scientific principles fulfilling material evidence criteria.

The Public Prosecution Team's argument above, clearly cannot be included in the category of a legal fact based on research because it is not based on logic nor on scientific facts but strictly on assumption. In fact, the Public Prosecution Team in its Reply did not show where the "black box" argument originated and whether the argument was the product of scientific research or just a piece of news. In short, there is no evidence of rational thinking or even a scientific foundation. The Public Prosecution Team's argument proves that its shallow analysis of this case is a matter for grave concern.

The Public Prosecution team has been unable to prove with material evidence how the tailings could rise to the surface, while on the other hand the Defendant clearly explained before this court that tailings were not mixed to the surface and remained

stable under the waters of Buyat Bay as testified by expert witness Dr. Andojo Wurjanto at the 16th June 2006's hearing. Dr. Andojo Wuryanto's testimony was supported by empirical data on research and studies about the movement of currents and tailings in Buyat Bay over a period of 8 years. The testimony of expert witness Lalamentik who also conducted studies and dives in the waters of Buyat Bay also supported Dr. Andojo Wurjanto's statement, while the report of expert witness Lalamentik proved that the coral reef around the tailing pipe was alive (transcript page 1283). If tailings had in fact been mixed, then the coral reef around the tailing pipe would have died or been covered by the tailings. Also, the result of the study which subsequenly became the AMDAL and was used in evidence by the Public Prosecution Team in this case, showed that the tailings released on the seabed of Buyat Bay would have remained stable and not have risen – see AMDAL pages 2-42 to 2-45. The evidence of these expert witnesses fitted with the AMDAL evidence, and with the NMR RKL/RPL reports to the government which periodically and continuously reported the results of water purification studies to ascertain whether tailings rose to the surface (please see column TSS [*Total Suspended Solid]* in the NMR RKL/RPL); in fact the Public Prosecution Team used the RKL/RPL as evidence. The Public Prosecution Team statement was totally devoid of data and scientific study regarding the movement of marine currents in the Majene waters in West Sulawesi where it is believed the remains of the Adam Air plane are buried or have moved.

Furthermore, comparing two completely unrelated objects in connection to marine current movement in two unrelated locations cannot be justified scientifically and it is totally beyond comprehension how the Public Prosecution Team could compare tailings with the Adam Air black box. To this point in time there are no material facts about the Adam Air black box as to whether it is still inside the airplane or has been separated from it, and such a comparison makes the Public Prosecution Team argument absurd. As a matter of fact, it is not very surprising that the Public Prosecution Team came out with the "black box" argument because before that the Prosecution's Charges also used the statement of expert witness Abdul Gani Ilahude who had never been to Buyat Bay, never had any empirical data about Buyat Bay waters and had never himself conducted any study in the Buyat Bay waters to support the statement that tailings were not placed under the thermocline and that therefore could be mixed and brought up to the surface. If we follows the illustration flow of the Public Prosecution Team then it means that the Prosecution wants to challenge the opinion of [its own witness] Abdul Gani Ilahude who stated that an object in the thermocline does not rise, by comparing it with the Adam Air black box.

To further clarify this point, we have quoted Abdul Gani Ilahude's statement from page 645 of the trial transcript: (HK III= Judge and AGI = Abdul Gani Ilahude)

"......

HK III: *That's not what I meant, that is disposal of waste, whether processed or not processed in the thermocline, what is the reason for disposing of it in the thermocline, what is the difference whether or not it is disposed in the thermocline like above, what is the impact on the creatures' life or that is I what I meant.*

AGI: *So if speaking of disposal and thermocline* ***we know that the thermocline is an area safe from marine currents and tides****. It does not reach it but if the tailing is in that area, if for example sir, if it is disposed it can still be moved by the waves and by the tides, especially if only 20 meter....."*

The Public Prosecution team assumed that if a black box weighing 6 kg and at a depth of 2000 meter under the sea, can be shifted then tailings definitely will shift too, meaning that the Public Prosecution Team wanted to disqualify Ahli Abdul Gani Illahude's testimony, and in this case the Public Prosecution Team was inconsistent. This shows that the Reply failed to clarify the Charges and cannot therefore disqualify the legal facts that tailings remain stable on the seabed of Buyat Bay.

(2) The Public Prosecution Team capriciously stated that:

"Basically, tailings are solid and are diluted with water so that from solid waste they become liquid waste. Therefore, quality standards applied for tailings are based on Minister of the Environment Decree No 51/1995 on Liquid Waste Quality Standards in Attachment C". (point 21 page 26 of the Reply).

The Public Prosecution Team made assumptions and created fiction because its arguments do not show clearly the origin of their legal basis. Tailings are categorized as solid waste under Article 42 of Government Regulations 82/2001 on the Management of Water Quality, Pollution Control and its Elucidations. Also Article 1 points 12 and 13 of Government Regulations No.19/1999 make a distinction between solid and liquid waste, it is not the same simplistic conclusion of the Public Prosecution Team that tailings are solid waste diluted to become liquid waste. Therefore, it is clear that with Minister of the Environment Decree No.51/1995 on Waste Quality Standards, Attachment C may not be applied to tailings, because the decree does not mentioned tailings at all. The Public Prosecutor Team's statement is not only unfounded but also shortcuts the aforesaid legal regulations that state cleary that "tailings" are solid waste,

and by saying this it further shows the erratic nature of the Public Prosecution Team Reply.

(3) The Public Prosecution Team under point 22 page 27 of the Reply has insolently relied on the function of an area simply based on the testimony of witness Masnellyarti and expert witness Rahmansyah who stated that "if the function of an area is not specifically determined, then general stipulations apply".

With further impudence, the Public Prosecution Team also stated that "pollution and or degradation occurring in "surface water" means that the water is in direct contact with the air and that therefore the meaning of surface water may also apply to sea water".

That tailings are solid has been determined by legislation, and the function of an area in Indonesia and the definition of surface water have also been determined by legislation. Article 28 of Law No. 24/1992 on Spacial Planning and Government Regulation No. 47/1997 on National Regional Spacial Planning clearly regulate that in drawing up a function for an area at national level, the implementation should be coordinated and determined by the District and Sub-district heads and that therefore it is clear that the function of an area of Indonesia does not rest on the statements of Masnellyarti Hilman and Rahmansyah.

Concurrently, what is included in the category of surface water has been determined by Article 1 paragraph (3) of Law No. 7/2004 on Water Resources which states that surface water is all water found on the earth surface and not "water coming in direct contact with the air".

2.2 The Reply did not address our Defense of Defendant II.

As previously stated above, the arguments submitted in the Reply did not address our Defense of Defendant II in particular with regard to the legal facts presented which are the legal conclusions following [witness] examinations throughout the trial where, based on facts, it has been proven that Buyat Bay is not polluted.

Essentially, the thirty one points of arguments submitted by the Public Prosecution Team, can be grouped under 7 basic issues. Following are the basic issues and the response of the Defense Team for Defendant II to the arguments of the Public Prosecution Team. As there is nothing new in the Reply, our response will not repeat what has already been stated in our Defense of Defendant II and will only refer to the relevant sections of the Defense document.

(1) In relation to the validity of evidence forming the basis for the Public Prosecution team in submitting the Charges:

Under points 1, 6, 24, 25, 26, 27, 28, 29, 31 of the Reply, the Public Prosecution team essentially stated that the results of the Police Headquarter Forensic Laboratory are legal and valid, testimonies of the witnesses and experts called by Prosecution are legal testimonies, documentary evidence such as the 8th November 2004 report of the Team Handling the Alleged Case of Pollution and or Environmental Degradation in the villages of Buyat Pante and Ratatotok [established] by the Ministry of the Environment (code P-4 Integrated Team Report) constitute legal evidence while documentary evidence from Defendant II in the form of studies by the Minamata Institute, CSIRO, and WHO is [considered] too weak to conclude whether or not Buyat Bay has been polluted.

To address the above issue let us reconsider the testimony of expert witness Prof. Daud Silalahi who, at the 14th July 2006 hearing stated that:

> *"One of the spearheads of environmental law enforcement is the process of evidence. There are three groups pertaining to this State Administration Law process. The first is that to prove a causal relation we have to collect samples, in English a "legal sample" or a sample taken according to a predermined protocol. Second is the legal laboratory which means a laboratory officially appointed by the government to conduct the analysis and third, the analysis results that must be interpreted by competent experts".* (page 1609 of the transcript, testimony of expert witness Prof. Daud Silalahi).

Based on expert witness Prof. Daud Silalahi's evidence it is clear that the results of the Police Headquarter Forensic Laboratory and the Report of the Team Handling the Alleged Case of Pollution and or Environmental Degradation in the villages of Buyat Pante and Ratatotok of 8th November 2004 **(Integrated Team Report)** do not meet the criteria as explained in our Defense of Defendant II, pages 9 to 10 and pages 81 to 95.

On page 10 of the Reply, the Public Prosecution Team referred to, *"Based on Jurisprudence of the Supreme Court Decision Number: 1479K/Pid/1989 of 20th March 1993.which confirms that evidence acceptable in court shall meet the criteria of official and valid. Legal, meaning that it has been requested and submitted by the investigators through a protocol pursuant to the CODE OF CRIMINAL PROCEDURE while valid means that it is based on legal and correct methodology".*

The Public Prosecution Team used the ruling of the Supreme Court as if it was a jurisprudence to support its argument that the Police Headquarter Forensic Laboratory's results are legal and valid.

However, after having examined it, we found that in Ruling of the Supreme Court Number: 1479K/Pid/ of 20th March 1993, first there was never a consideration of the Supreme Court saying that legal and valid evidence acceptable in a court of law is evidence requested and submitted by the investigators only.

Secondly, if for example - QUAD NON – the Police Headquarter Forensic Laboratory test results had been legal and valid, what are indeed the criteria of legal and valid? Because the results of the Police Headquarter Forensic Laboratory were grossly inaccurate.

Considering the testimony of Munim Idris, it is clear that the Police Headquarter Forensic Laboratory's BAP is inconsistent including the laboratory's lack of accreditation, as demanded by Head of Bappedal Decree no 113/2000, or the discrepancies in the number of samples taken, examined and submitted in this court which greatly differ from each other.

Third, regarding the fact that accreditation is a legal criteria regulated under Article 16 of Government Decree No.82/2001, and that the Police Headquarter Forensic Laboratory requires an accreditation issued by the Minister or Governor at regional level for [the analysis of] environmental studies such as water, fish and sediments.

Fourth, it is real and a legal fact that the results of the Police Headquarter Forensic Laboratory on the waters of Buyat Bay differ with the results of the Integrated Team Report and that therefore if there are discrepancies of this nature, it is not possible to use the Supreme Court ruling as argued by the Public Prosecution Team because the nature of the ruling is not one of positive law which should be followed as is the case for positive law. [?]

The Public Prosecution Team submitted sea water results from the Police Headquarter Forensic Laboratory which differed from the results of the Integrated Team and also from the results of the split samples the Police gave to NMR and that were analyzed by the ALS laboratory in Bogor. The results of the Integrated Team which used the government-owned Pusarpedal laboratory were not relevantly different from those of ALS Bogor or the split samples. Here, the Public Prosecution Team submitted both the results of the Police Headquarter Forensic Laboratory and the results of the Ministry of the Environment Integrated Team showing different results of the sea

analysis and that therefore in such a case Article 17 of Government Decree No.82/2001, applies:

(1) Should there be a discrepancy in analysis results regarding the quality of waste water between two or more laboratories then an analysis verification should be conducted".

(2) The scientific verification as intended under paragraph (1) shall be made by the Minister through referral to a national laboratory".

Consistent with the principle of observance of the law and observance of principles, then the Public Prosecution Team should have disqualified the results of the Police Headquarter Forensic Laboratory and the results of the Integrated Team as they returned different results. The results of the Police Headquarter Forensic Laboratory showed sea water to be above the standard threshold while the Integrated team showed that it was below the threshold but these discrepancies were not verified, considering also that the Police Headquarter Forensic Laboratory was not an accredited laboratory.

By taking into account these stipulations, the boycotting of the Public Prosecution Team who refused to obey the Judge's ruling that resampling or additional sampling should be conducted with the involvement of the Pusarpedal is very regrettable.

In addition to the above, there has been more than sufficient evidence to disqualify the results of the Police Headquarter Forensic Laboratory. Based on the 28th and 29th July 2000's [sampling] BAP, when comparing the number of samples of sea water and river water analysed in the laboratory, the total was different, that is, 10 jerrycans unofficially found their way into the Police Headquarter Forensic Laboratory (see table of sample discrepancies attached to the Defense) compared with the total sea water and river water analyzed and the discrepancy also showed and proved correctly that the sample collection coordinate points, based on the sampling BAP differed from that of the Police Headquarter Forensic Laboratory's results BAP and also differed from the sample evidence submitted in this court. Also, in the Police Headquarter Forensic Laboratory' BAP it was stated that the sea water had been preserved with HNO3 at the police statiion, while instead in Buyat there was no police station and also the Police Headquarter Forensic Laboratory's BAP was at loggerheads with the testimony of Jerry Kojansow and the sampling video showed in this court and also submitted in evidence in this case and that proved that HNO3 was added on the boat and not at a fictive police station, so HNO3 was added twice and this is a violation of the protocol as explained by laboratory analysis expert Sri Bimo Andi, and therefore the content of

the BAP, it has been proven, is not credible and does not conform with correct sampling procedures and this could have happened because the Police Headquarter Forensic Laboratory is not accredited and therefore does not have a sampling protocol for environmental cases and therefore, from whichever point we look at it, the results of the Police Headquarter Forensic Laboratory do not constitute credible evidence.

Other than that, with regard to the samples, their authenticity could not be assured because the samples were not received by the investigator but by Rignolda Djamaluddin, a person that, from the beginning, has always been opposed and intent on discrediting the Defendant and with regard to the sampling protocol and the uncommon presentation of the results which exceeded the laboratory authority, as stated by expert witness Munim Idris who explained clearly and in details on pages 81 to 85 of the Defense of Defendant II's Defense Team, it is crystal clear that the Police Headquarter Forensic Laboratory's BAP cannot be accepted as legal and valid evidence.

Under point 31 of the Reply, the Public Prosecution Team stated that Minamata Institute, CSIRO and WHO's studies were insufficient to prove that Buyat Bay was not polluted. Apparently the Public Prosecution Team did not study our Defense of Defendant II. The studies conducted by the Minamata Institute, CSIRO and WHO are part of the 119 items of documentary evidence we submitted in this trial, and this excludes the evidence from witnesses to the facts, expert witnesses and guidelines. If the Public Prosecution Team had taken the time to read all the evidence we submitted, the Public Prosecution Team would have found that CSIRO, WHO (Minamata Institute) arrived at the same conclusions also supported by studies from the Ministry of the Environment of 14th October 2004, Department of Health, University of Sam Ratulangi, University of Indonesia, ALS Indonesia and experts who conducted studies in Buyat Bay and all reached the same conclusion that Buyat Bay is not polluted. Based on all the evidence we submitted, all aspects mentioned on page table of the Public Prosecution Team Reply, should have been studied as well as the evidence proves that Buyat Bay is not polluted.

Please note, and we underline it, that the Report of the Integrated Team clearly admits that "arsenic and mercury content in the sea water of Buyat Bay and Ratatotok Bay is still below the quality standard". (page 34 Reply, colum "Integrated Team Report", first sentence).

In relation to the testimonies of witnesses to the facts and expert witnesses as submitted by the Public Prosecutor Team and connected to Article 185 of the Code of Criminal Procedure which states that:

paragraph (5):

”Both opinions and fiction obtained from mere ideas, do not make a witness testimony”.

paragraph (6):

“In judging the truth of a witness testimony, the Judge must carefully consider:

a. consistency between witness testimonies;

b. consistency between witness testimony and other evidence;

c. the reason for a witness to give a certain evidence;

d. the way of life and morality of a witness and all other thing that make a testimony believable or otherwise”.

Therefore the testimonies of witnesses and experts for the Prosecution cannot be considered as evidence because the testimonies are incorrect and irrelevant.

Our Defense of Defendant II, pages 109 to 116, has detailed that the testimonies of witnesses Mansur Lombonaung, Ahyani Lombonaung, Juhra Lombonaung, Yahya Lombonaung, Rasit Rahmat, Juhria Ratunbahe, Masna Stirman, Marjan Ismail, Surtini Paputungan, Nurbaya Pateda, Sul Manopo, and Herson Bawole - some of the Buyat residents who were called by the Public Prosecution Team - were mostly based on fiction and personal opinions and unsupported by legal facts, that Buyat Bay was polluted. The testimonies of these witnesses also contradicted those of other witnesses called by the Public Prosecutor Team. As an example, witnesses from Buyat stated that the sea water in Buyat Bay was polluted and that fish had disappeared. However, on the other hand, witness for the prosecution Ricky Telleng who had conducted a study on fish population in Buyat Bay stated that there was still abundant fish in Buyat Bay (transcript 18 November 2005’s hearing page 248). Or expert witness Abdul Gani Ilahude who stated there was no thermocline in Buyat Bay. Conversely, witness Dibyo Kuntjoro and Sigfried Lesiasel - also witnesses for the Prosecution - stated that based on a study of the NMR AMDAL, the thermocline in Buyat Bay was found at a depth of 50 meter. In our Defense of Defendant II the motives and the inconsistencies of the witnesses and the inaccuracies of the Prosecution’s expert witnesses have been sufficiently detailed. Therefore, it is

sufficient for us to reiterate that conclusively and beyond reasonable dou it has been proven ,that Buyat Bay is not polluted.

(2) With regard to the charges of criminal liability against Richard Bruce Ness as the President Director of PT Newmont Minahasa Raya (Number 4 page 7, Reply):

Also stated in the Indictment: Defendant II as NMR President Director between October 1997 and 2004 or for a time that cannot be determined exactly, but at least approximately around October 1997 until 2004 in locations under the jurisdiciton of the District Court of Tondano, in violation of the law and intentionally **committed an act** that **caused pollution and or environmental degradation** and that said **act was committed** by the **Defendant** by…. etc.

From the quote of this indictment, in particular the writing in bold it can still be said that the meaning is the same with that of "an act" pursuant to Articles 41-44, UUPLH No.23/97 indicted under said articles always include "committed an act" or Article 43 "discharged", meaning a true or active act (*commission*), but the Public Prosecution Team is inconsistent in its Charges by defining "committing an act" as a "real act". However, conversely, page 45 of the Indictment states that Defendant II Richard Bruce Ness was guilty of intentionally having permitted or failed to prevent pollution, meaning that the Public Prosecution Team stated that Defendant II did not take active measures (o*mission*), and that therefore the Indictment indirectly proved that Defendant II was not the accountable party in this criminal case.

Pages 42 to 70 and pages 167 to 179 of our Defense clearly state in details why Richard Bruce Ness was not the individual tasked and responsible for the technical section of NMR mining operation and that therefore he may not be held liable in his capacity as the President Director of NMR and in a personal capacity for the crime of pollution in Buyat Bay.

Furthermore, the Public Prosecution Team's Indictment clearly and explicity stated that Defendant II did not do something, but instead permitted, and yet for an indictable crime two elements must be proven, that it, the crime (*actus reus)* and the intention (*mens rea).* The act committed must be a real act, in fact the Charges stated the meaning of "committing an act" is a real act and if that is the case, from the point of view of the Indictment there should have been no crime committed by Defendant II because the Indictment explicitly states that Defendant II Richard Bruce Ness did not commit an act but permitted [an act to be committed]. In legal terms, for guilt to be established, it is necessary to prove first the two cumulative elements of *actus reus* and *mens rea*; if either one of the two elements is not proven then there is no crime,

there is no crime without guilt (*geen straff zonder schuld*) and this is a principle and is part of the opinions of well known expert, namely:

Prof. Dr. A. Zainal Abidin Farid, S.H. in his book, *Hukum Pidana I,* Sinar Grafika, Jakarta, 1995, page 42*,* opinion of Prof. Moeljatno, S.H. in his book, *Asas-Asas Hukum Pidana,* Rineka Cipta, Jakarta, 1993, page 57. Opinion of Prof Dr. Wirjono Projodikoro, S.H. in his book *Asas-Asas Hukum Pidana di Indonesia,* PT. Eresco, Bandung, 1986, page 72, opinion of Prof. Dr. Barda Nawawi Arief.S.H,. in his book *Perbandingan Hukum Pidana,* Raja Grafindo Persada, Jakarta, 2002*,* page 87, opinion of Prof Dr. Roeslan Saleh, in his book *Perbuatan Pidana dan Pertanggungjawaban Pidana* (Dua Pengertian Dasar Dalam Hukum Pidana), Aksara Baru, Jakarta, 1983, page 79, opinin of Prof. Jan Remmelink*,* in his book *Hukum Pidana (Komentar atas Pasal-pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dengan Kitab Undang-Undang Hukum Pidana Indonesia),* Gramedia, Jakarta, 2003, page 85, opinion of Van Bemmelen J.M., *Hukum Pidana I Hukum Pidana Material Bagian Umum*, Bina Cipta, Bandung, 1987, page 233.

Given that the Indictment, as quoted above, clearly and explicitly states that Defendant II did not commit an act, then the element of committing an act (*actus reus)* was not fulfilled and Defendant II is not guilty and therefore there should be no convinction.

(3) Again, the Reply brings up the issue that tailings are B3 waste, the tailing permit, the ERA approval and the RKL/RPL reporting as seen under points 7, 14, 15, 16, 17, 22 and 23 of the Reply.

In actual facts, our Defense of Defendant II clearly details that tailings are not B3 waste (pages 71 to 75), NMR had a licence to place tailings (pages 36 to 41), there was no ERA obligation to obtain the approval from the government (pages 38 to 41) and that NMR had consistently reported the RKL/RPL and that the reports were received by the Department of Energy and Mineral Resources (formerly the Ministry of Mines and Energy) with copy to the Ministry of the Environment and the North Sulawesi government, among others (page 24). Therefore there is no need for us to spend time in addressing and repeating this issue.

What we need to reiterate once more is that, even if [for the sake of argument] tailings were B3, NMR did not have a permit to dispose of its tailings, the ERA was not approved and the RKL/RPL were not reported, the fact remains that – QUAD NON – the Public Prosecution Team was unable to prove pollution in Buyat Bay.

Starting from the Indictment, the Public Prosecution Team was already wrong in applying legal stipulations on pollution and environmental quality standards, the Public Prosecution Team did not deny its on page 38 which used the definition of Pollution and Environmental Degradation by showing the stipulations of Article 21 paragraph (1) Law no. 5/1994.

In proving the element of pollution under Articles 41-44 of Law No.23/1997, the Public Prosecution Team never used the definition of Pollution as regulated in relation to marine pollution. In considering the construction of the Indictment the indictment should only have referred to marine pollution, not air, not land, not even ground water pollution, but sea water pollution. Therefore in accordance to the construction/ flow of the criminal case in the Indictment, the Public Prosecution Team should have physicall proven (and not assumed) that marine pollution should follow the stipulations of Article 1 sub 12 and 14 of Law No. 23/1997 Jo. Article 1 sub 3 Government Decree No.19/1999 on Control of Pollution and or Marine Degradation Protocol. Throughout the trial the Public Prosecution Team did not use the quality standards and the pollution criteria contained in Government Decree no. 19/1999, and therefore the Indictmenr lost its legal basis.

That Article 14 paragraphs (2) and (3) of Government Regulation No.23/1997 already determined that criteria for environmental quality standards and degradation standards are regulated by Government Decree, if the Indictment is about marine pollution then the Public Prosecution Team should have upheld the criteria of pollution and or marine degradation. A detailed revision of the marine pollution criteria would have made it clear that all this was already regulated under Article 1 sub 2 Jo. Article 3 Jo Article 4 and the Elucidation jo. Articles 6 and 7 (and their elucidation) of Government Decree No.19/1999. Based on these legal determinations it should have been the duty of the Public Prosecution Team to provide empirical data on the life of the coral reef, the seagrass and mangrove in Buyat Bay. The reality is that throughout this trial, the Public Prosecution Team not once touched on or ever proved that pollution and marine degradation had occurred, in fact on page 25 of its Reply, the Public Prosecution Team did not manage to prove that fish had died or that the coral reef had been damaged. Therefore the argument of the Prosecution that pollution and or marine degradation had occurred was not the same as regulated under the law in Government Decree No.19/1999, and therefore the Prosecution argument that pollution and or marine degradation had taken place was not proven and Defendant II should be cleared of all charges.

(4) In the Reply, under points 2, 12, 13 and 30, the Public Prosecution Team responded to our Defense of Defendant II in relation to the subsidiary principle, the process of investigation, the habeas corpus case and the retraction of dr Jane Pangemanan's police report.

In terms of actual facts the presentation of our Defense of Defendant II in relation to procedural issues of the investigation of this case is to show that from the beginning this case was "forced" into becoming a *"cause celebre",* as indicated in the testimony of expert witness Nabiel Makarim, who stated that this was a target case. These were the issues addressed by the Public Prosecution Team in its Reply and not the issue of pollution and therefore there is no need for us to respond in our Rejoinder.

(5) With regard to the *Goodwill Agreement* discussed by the Public Prosecution Team under point 3 of the Reply, we respond that:

The *Goodwill Agreement* is an agreement of good intentions between the government of Indonesia and NMR. To make it clear to the Public Prosecution Team, the background of the *Goodwill Agreement* states that:

"- PT Newmont Minahasa Raya determined that the Mesel mining operation to-date did not cause environmental pollution and health problem and that in future there would be no pollution nor negative health impacts.

- PT Newmont Minahasa Raya and the Government of Indonesia recognize that there are other parties voicing different views regarding present impacts on the environment and the potential for future negative effects. Therefore PT Newmont Minahasa Raya and the government of Indonesia have agreed that further studies, monitoring and scientific analysis are required to reach a final conclusion".

Against the background of the aforementioned issues, NMR with good intention entered into the agreement where there are two issues for consideration by the Public Prosecution Team: (i) that the government of Indonesia itself, including the Office of the Attorney General recognised that pollution was not proven; (ii) that proving whether or not pollution had taken place would require considerable time - not just weeks or months but years. Therefore the argument that "resampling was irrelevant, given that NMR tailing disposal and mining activities had ceased since 2004 and that the physical and chemical conditions of the water would be considerably different" (page 14, Reply), is a fabrication and totally unfounded and this issue has been extensively addressed in the Defense and in the opening section of this Rejoinder.

(6) Points 5, 8, 9, 18, 19, 20 and 21 of the Reply argue that based on the testimonies of Prosecution witnesses and experts, Buyat Bay is polluted.

As previously detailed in our Defense of Defendant II and in this Rejoinder, the testimonies of witnesses and experts, the Police Headquarter Forensic Laboratory's BAP and the Integrated Team Report submitted by the Public Prosecutor Team may not be accepted as evidence that the sea and rivers of Buyat Bay have been polluted.

(7) Under Point 10 of the Reply, the Public Prosecution Team challenged NMR to prove to this court that NMR has obtained a green rating based on the PROPER methodology.

Once again, it is apparent that the Public Prosecution Team did not listen carefully to the unfolding of the trial and did not carefully review our Defense.

First, the PROPER metod was created by Shakeb Afsah, an expert in quantification who specifically handled the PROPER program in the Ministry of the Environment. The expert witness called by Defendant II did not only have expertise in PROPER but in fact had created the PROPER system for the Ministry of the Environment and that therefore based on the witness' processing of data submitted by NMR the fact that NMR would have received a green rating is entirely justifiable.

Second, Article 4 of Minister of the Environment Decree no: 127/ 2002 regarding the Evaluation Program of the Company Performance in Environmental Management regulates that, "every responsible company and or activity can voluntarily apply to the State Minister for the Environment to have its environmental management performance evaluated". Therefore, had NMR provided data to the State Minister for the Environment and had the data been evaluated, the results would not have been a manipulation but the accurate result of NMR rating under PROPER.

Why NMR did not enter the PROPER program? Because when the PROPER program was launched, NMR was already in mine closure mode and therefore unable to enter the PROPER program, and Ministry of the Environment's officials were appraised of this (testimony of expert witness Nabiel Makarim, page 1574 of the transcript).

The essence of the simulation that had NMR entered the PROPER programme it would have received a green rating is that according to empirical data contained in the RKL/RPL and based on periodical and continuous studies, NMR tailings did not pollute Buyat bay and Buyat river (testimony of expert witness Nabiel Makarim, page 1574 of the transcript).

(8) Regarding B3 waste mentioned under point 15 pages 18-19 of the Reply, the Public Prosecution Team drew an assumption from the testimony of one expert witness, Sulistiowati and from an article in Kompas of 24th December 2004. If we pay close attention, the Public Prosecution Team used the Kompas article to prove something that although it might have been known, it nonetheless required to be proven based on facts and charged on the basis of material evidence. A newspaper article may not be used in evidence at least because the way in which this evidence was submitted did not fulfill the criteria of the Code of Criminal Procedure. On the Kompas article regarding mercury disposal, this was not part of the indictment and its veracity was not examined throughout this trial. That leaves the testimony of expert witness Sulistiowati herself, which, being an opinion, does not need to be accepted by the Judge, in fact the principle of *unus testis nullus testis* applies – an expert opinion that is simply an opinion cannot be justified to state that tailings are B3 waste because expert witness Sulistiowati admitted to never having studied NMR tailings and never having been to Buyat Bay or to the NMR mine in Mesel, while according to written law, the determination that a type of waste is B3 waste, must be done through laboratory analysis as stipulated under Article 7 paragraph (5) Government Regulation No.85/1999 which states:

> *"Waste coded D221, D222 and S 223 may be declared B3 waste **only after** characteristics and or toxicology testing have been made"*

The words "only after testing" in these legal stipulations above, determine that the expert witness, opinion or fiction may not be allowed as the basis to determine whether a waste is B3 or not, in relation to the testimony of Prosecution witness Witoro Soelarno, who stated that the waste from a gold mine is not necessarily the same as the waste of another gold mine and that therefore to determine the criteria specific handling and studies are required and [it is not determined] by general regulations. On the other hand, in the testing results since the preparation of the AMDAL, in implementing the RKL/RPL ot the study of the North Sulawesi Provincial Government or the testimony of expert witnesses James Paulus, Washington Tambunan it has been proven in this court that tailings are not B3 waste and that in the B3 waste storage and transportation permit issued by the Ministry of the Environment to NMR, there is no mention of NMR tailings being B3 waste.

3. CONCLUSIONS

Honorable Panel of Judges,

Public Prosecution Team and members of this Court,

In closing this Rejoinder, allow us once again to present the conclusions of the facts disclosed throughout this trial where the legal facts show that the Indictment and the Charges against Richard Bruce Nessas Defendant II have been completely unfounded as stated in the following:

First, Defendant II was not the party technically tasked and responsible for NMR mining operation. Furthermore that when the Defendant joined NMR in 1999 as President Director he entered into the mainstream of an ongoing system that was already performing well.

Second, NMR was in possession of all permits required to conduct its mining operation, including the permit to place tailings on the seabed of Buyat Bay. Specifically, with regard to placement of tailings on the seabed of Buyat Bay, NMR had been permitted [to do so] since the government approval of the AMDAL. However, because of changes to Environmental legislation from Law 4/1982to Law 23/1997 which stipulated a compliance transition period of 5 years till 2002 for NMR to obtain a new permit, NMR submitted an application to obtain a new permit in 2000, soon after the implementing regulations of these stipulations, namely, PP No.19/1999, were issued. Although there was still time to submit the application to conform with the required permit pursuant to new Law No.23/1997, for the placement of tailings on the seabed of Buyat Bay, [NMR submitted its application] earlier than required. The Minister for the Environment/ Head of Bapedal Dr. Sony Keraf replied in writing that with letter B-1456 of 11th July 2000 the permit could be considered granted. Prof. Dr. Safri Nugraha, SH LL.M confirmed that the letter from Minister Sony Keraf was a permit as it was disclosed in this court and in addition former minister for the Environment Nabiel Makarim who replaced Sony Keraf also stated that he did not need to issue a tailing placement permit because Sonny Keraf's letter [in itself] was a permit for submarine tailing placement in Buyat Bay.

Third, from an analysis of the facts below it can be concluded that NMR did not cause pollution:

- Tailings are not B3 waste as proven by: (i) NMR testing from 1997 to 1999 showed that tailings were not B3 waste; (ii) results of TCLP conducted by the North Sulawesi Provincial Government in 1999 also showed that tailings were not B3 waste; (iii) AMDAL and the Ministry of Environment approved the placement of tailings on Buyat Bay seabed, meaning that tailings were not B3 waste otherwise tailings could not have been placed or disposed of in the sea;

(iv) the North Sulawesi Government Study of 2004 confirmed that tailings were not B3 waste; (iv) Defense witnesses James Paulus, David Sompie and Prosecution witnesses Dibyo Kuntjoro and Siegfried Lesiasel in this open court stated that tailings were not B3 waste.

- Sea water in Buyat Bay did not exceed the quality standards pursuant to Attachment III of Minister of the Environment Decree no. 51/2004. NMR monitoring results reported in the RKL/RPL from 1996 to-date show that sea water in Buyat Bay did not exceed determined quality standards. Studies by a number of independent institutions of undoubted credibility such as CSIRO, WHO and other independent institutions such as the North Sulawesi Independent Team and the Ministry of the Environment in 2004 supported this fact.
- NMR tailings did not degrade sea water quality in Buyat Bay because it was still below quality threshhold as proven by ALS laboratory analysis. A number of credible international institutions such as WHO, Minamata Institute and Lorex Environmental from Canada and other established teams, such as the North Sulawesi Independent Team and the Ministry of the Environment team stated the same. It was in fact proven in this court that had NMR taken part in the Ministry of the Environment PROPER program, based on the last three years of RKL/RPL reports, NMR would have obtained a green rating, meaning that "it has made environmental management efforts and has achieved results higher than the established criteria pursuant to applicable legislation".
- The life of Buyat Bay's marine biota remains stable and not polluted by heavy metals – arsenic and mercury – as resulting from the study of expert witness Dr. Ir. Inneke Rumengan, MSc. And expert witness Ir. Lalamentik.
- There has been no fish depletion in Buyat Bay as stated by witnesses Madjid Essing, Rahima and Haji Dahlan Ibrahim.
- The ground water (hidrogeology) of Buyat river is not polluted as testified by Dr. Rudi Sayoga in the study of the Final Report of the Hidrogeology System in Buyat, North Sulawesi.
- There are no strange medical conditions in Buyat Bay. Rashes and lumps suffered by the local residents are not strange illnesses but are the symptoms of known conditions. This was proven by the study of the head of the Ratatotok Puskesmas, dr. Joy Rattu and Prof. Winsy Warouw. This fact has also been supported by studies conducted by the Department of Health. In fact

some local residents, namely, Dahlan Ibrahim, Jantje Aring, Madjid Andaria, and Salam Ani who also testified in this case, made similar statements.

The heavy metal – mercury and arsenic - ontent in the blood of Buyat Pantai residents was within normal limits as cnfirmed by ALS laboratory analysis, studies by the Ministry of the Environment, Police, CSIRO, WHO/ Minamata Institute, UNSRAT, Department of Health, the Ratatotok Puskesmas, dr Sandra Rotty head of the Ratatotok Puskesmas and Dr. Keith Bentley.

Based on these legal that the primary charges violated Article 41 paragraph (1) Law No.23/1997, the subsidiary charges violated Article 43 paragraph (1) Law No.23/1997, the more subsidiary charges violated Article 42 paragraph (2) Law No.23/1997 and even further subsidiary charges violated Article 44 paragraph (2) Law No.23/1997 has not been proven.

As there are no facts supporting law violation in the form of pollution and or environmental degradation causing damage to humans or the enviroment, there is no environmental crime for which Defendant II should be held liable. Therefore we submit that the Honorable Panel of Judges decide that:

(1) It has not been proven conclusively and beyond reasonable doubt that Defendanty II Richard Bruce Ness committed the crime of "pollution and or environmental degradation" as penalized and regulated under Article 41 paragraph (1) Law No.23/1997 in the primary charges, Article 43 paragraph (1) Law No.23/1997 in the subsidiary charges, Article 42 paragraph (2) Law No.23/1997 in the more subsidiary charges and Article 44 paragraph (2) Law No.23/1997 in the even more subsidiary charges.

(2) Clear Defendant II Richard Bruce Ness of all indictment and charges.

(3) Determine that Defendant II Richard Bruce Ness is entitled to compensation and rehabilitation [of his good name] as determined by legislaiton.

Manado, 9 March 2007

Respectfully, the Defense Team of Defendant II

Richard Bruce Ness

(1) Palmer Situmorang, S.H., M.H.

(2) Hafzan Taher, S.H.

(3) Olga Sumampow, S.H.

(4) Ahmad Djosan, S.H.