

VERITAS

The Pursuit of Truth and Justice in BUYAT BAY

Response to Charges (Pledoi)

Case Number: PDM / TDANO / 05 / 2005

by: **Richard B. Ness**

Defendant II

1. OPENING REMARKS

Honorable Panel of Judges

Public Prosecutor,

Honorable members of this court:

First, I must ask the court's indulgence because Indonesian is not my first language and I have therefore elected to draft my own defense document, or Pledoi, in my native language which is English. And second, even though I am not a lawyer, over the last two years, I have found it in my personal interest to try and understand the legal aspects of this case. As a non-Indonesian citizen, I also find it exceptional that throughout the court process, I was given the opportunity to directly question the witnesses, to draw and express my own conclusions on testimony presented before this court, and now to write and present my own defense arguments. Unlike a professional lawyer, this is my first and hopefully last defense document I will ever have to write. I have to admit that I found writing this Pledoi a really challenging and difficult task and by far the most complicated document that I have ever written.

Throughout the drafting process, I have reviewed the Minutes of Investigation (BAP), the Indictment, the Charges and Evidence presented before this court. I would be less than honest if I did not admit that depending on which section of the document I was writing, my emotions altered depending on the allegation and the witnesses involved at that particular stage. I therefore beg the court's indulgence if at some points throughout this document that my writing depicts some anger, frustration, pity, and in some cases even contempt for some of the issues raised. I hope that the Honorable Panel of Judges can understand that these expressions of emotion are not directed at this court or the Honorable Panel of Judges, but rather at the subject matter or the individuals under discussion.

This Panel of Judges has been searching for the truth and I express my respect to the Honorable Panel for your patience and the work they have undertaken towards separating reality from pretense and facts from illusions. I have to

state that I have been treated very fairly before this court in an effort to find the real truth and while the trial can be deemed fair, the investigation, examination, indictment and the charges against me are certainly not fair or justified! The allegation that Buyat Bay is polluted is a sham, and only supported by falsehood and error. There were several opportunities to correct this travesty before the indictment was issued, but each time the opportunity was lost. If the law had been followed from the beginning, there would never have been an indictment; if the Prosecution had examined the evidence, there would have never been charges or a sentencing request and I would not have needed to write this pledoi. Although one can reflect back on what could have been but the reality is I am seated before this court, defending myself of a crime that never occurred.

At its essence, this proceeding is about one thing and one thing only: DID NMR POLLUTE BUYAT BAY? That is the single question that this Honorable Panel of Judges must answer to decide this case.

The issue of pollution is what started this whole debacle in July 2004. Certain NGO's asserted that NMR's tailings polluted Buyat Bay and caused health problems in area residents. The issue of pollution and health problems is what led Jane Pangemanan, in August 2004, to travel with local villagers, using funds supplied from a politician, to report NMR and six of its employees to the police. The issue of pollution is what led the New York Times to write a sensationalized article about NMR's operations in September 2004. The issue of pollution is what led the Police to jail five of my colleagues for 32 days in September and October of 2004. The issue of pollution is what motivated a deputy in the Ministry of Environment to twist facts in unprecedented ways to reach the conclusions in her November 2004 KLH report. The issue of pollution is what led to the indictment against me in this case.

DID NMR POLLUTE BUYAT BAY? No other allegations raised by the prosecutors in this case have any material relevance to this Honorable Panel of Judges in deciding whether I am a criminal who ha polluted the environment. Is there a thermocline in Buyat Bay? While of scientific interest to some people, this question is irrelevant in the context of whether a crime was

committed. Indeed, even if the prosecution were correct in asserting, without any credible evidence, that there is no thermocline, that does not mean a crime was committed. ERAs do not matter. Sediment ponds do not matter.

DID NMR POLLUTE BUYAT BAY? My freedom and fate rests on this respected Panel's answer to this question. I humbly and respectfully ask that the Honorable Panel of Judges answer this question based on an objective review of the evidence and not relying on the perceptions and assumptions of others. I know without any doubt in my mind that the answer to this fundamental question – DID NMR POLLUTE BUYAT BAY -- is "no." The rest of this pledoi summarizes the evidence, providing this Honorable Panel of Judges with the basis to agree with me.

Therefore, please allow me to start this opening part of my defense by quoting two basic principles found in the Indonesian Constitution, known as Undang-undang Dasar 1945 or UUD 1945. Article 1 paragraph 3 of UUD 1945 (in an unofficial translation), states that "*the State of Indonesia is a state based on law*". Further, Article 28D paragraph 1 of UUD 1945 guarantees, in an unofficial translation, that "*every person shall have the right to receive recognition, security, protection and legal certainty based on fair and equal treatment before the law*".

For the last 2 years I, Richard Bruce Ness, along with PT Newmont Minahasa Raya (for convenience purpose I will use abbreviation of "NMR" throughout this defense document) have been indicted and prosecuted, and today I am sitting here before the Manado District Court on trial as Defendant II in conjunction with NMR as Defendant I, in a case that has no legal or factual basis. Sadly, I have to say that this is a gross violation of the two basic principles of the Indonesian Constitution as mentioned above. Let me explain why.

As the President Director of NMR and as such acting for and on behalf of NMR, I, alongside, the other members of the Board of Directors of NMR, have complied with all prevailing Indonesian laws and regulations imposed on NMR and/or me by, among others: (i) Contract of Work signed by and between NMR and the Indonesian Government for NMR's gold mining operations at Mesel, the Province of North Sulawesi, (ii) the laws and regulations on mining, (iii) the

laws and regulations on environmental protection, (iv) the laws and regulations that pertain to a limited liability company, (v) the laws and regulations on foreign capital investment, (vi) the laws and regulations on tax, duties, levies, and other payments to the Central and local governments, (vii) the regional laws and regulations of the Province of North Sulawesi, and (viii) the Articles of Association of NMR which were approved by the Indonesian Government.

Over the life of its operation, NMR, had obtained hundreds of licenses and permits from the Central and regional governments and during this period there were never any objections or accusations raised by any executive or other branches of the Indonesian Government, as a regulator and as a partner under the Contract of Work, which indicated that NMR is not fully licensed and permitted to carry out its business activities including its mining operations in the Republic of Indonesia. The operations of NMR in Indonesia are valid, legal and appropriately authorized by all legal and administrative standards imposed by the Indonesian Government and any and all its executive and other branches.

Furthermore, the discharge of tailing by NMR in Buyat Bay during the operations of NMR, which form the basis of the accusations of causing pollution leveled against me and NMR by the Police, Prosecution, certain people at the Ministry of Environment, and several NGOs was carried out strictly pursuant to the AMDAL study. The AMDAL was the environmental review of the project that was prepared based on the best scientific information available and was approved by the Indonesian Government before a single gram of tailings was placed into Buyat Bay. Moreover, after operations began and a new regulation required NMR to obtain a second approval from the Indonesian Government for the disposal of NMR's tailings, NMR applied for and was issued the KLH Minister's Permit in July 2000. The AMDAL of NMR was extensively discussed with the Indonesian Government and qualified experts for the purpose of maintaining sustainable environmental conditions and developments of the NMR Mine Site. Monitoring and sampling data required by the company's RKL and RPL was reported every quarter to the Indonesian Government since the start of NMR operations. Until NMR ceased its mining operations at the NMR Mine Site in 2004, there were never any complaints or claims from the

Indonesian Government on the environmental conditions of the Buyat Bay Area.

As the President Director of NMR, I and the other members of the Board of Directors of NMR, which was further approved and endorsed by the Board of Commissioners of NMR and shareholders of NMR, had continuously been assured that all regulatory and policy requirements of the Indonesian Government to operate the mines at Mesel, the Province of North Sulawesi, have been complied with to the full satisfaction of the Indonesian Government.

We at NMR are not only complying with the rules and regulations in operating our mines, but I as the President Director of NMR, together with my fellow directors and employees, have been committed to making sure that NMR performs in accordance with the best mining practices available in the mining industry not only in Indonesia, but also those applied by the most stringent jurisdictions in the world. It is in pursuance of this commitment that we chose to use the method of safely discharging the tailing to Buyat Bay.

We at NMR, went beyond the basic call of duty, to perform and are still performing well above the basic minimum that is expected of us and have always tried to be responsible and good citizens and neighbor to the people of Buyat and Ratatotok by undertaking several community development programs which have no doubt increased the quality of life for a substantial number of the people at Buyat and Ratatotok.

It is therefore ironic, that I, as a private individual, who in my official capacity as the President Director, had assisted NMR in complying with all the prevailing laws and regulations of the various branches of the Indonesian Government and am now being dragged through the process of being sued by the very same government for crimes that never occurred. And NMR, a responsible company that has complied with all the laws and regulations, which has performed admirably as a corporate citizen is being held responsible for acts that they did not commit. It is even more ironic if we compare that individuals and corporations that have complied with the laws and regulations are being prosecuted on false grounds, while a big number of individuals and corporations that have illegally been stealing billions of US\$ from the state-fund

in the framework of the Bank Indonesia Liquidity Assistance before and during the economic crisis in Indonesia continue to remain untouchable. Illegal mining and illegal logging activities that have caused great losses to the state's income, environment and morale are not considered a priority for legal action by the law enforcers. Many other violations of laws and regulations that we could read, hear and witness in the everyday life in Indonesia, including corruption cases that have caused a great deal of embarrassment to Indonesia, including the labeling of Indonesia by many international organizations as one of the most corrupt countries in the world, are not indicted, nor prosecuted, and now are even forgotten but instead NMR and I have been the focus of these law enforcers.

NMR and/or I have been accused and prosecuted for acts that the Prosecutors claim we have been involved in knowingly, willingly and/or purposely, such as the followings: (i) not making any effort to guarantee preservation of environment, (ii) discharging tailing as a B-3 waste to Buyat Bay without a valid permit, and as consequences thereof: (a) Buyat Bay is highly polluted with mercury and arsenic, (b) there exist no thermocline in the waters of Buyat Bay, (c) fishes are not safe for human consumption, (d) people have suffered illnesses and even died. These accusations are not just wrong and baseless, they are preposterous! If the Police and Prosecution's investigation was conducted using proper and correct scientific methods, they would have logically concluded that Buyat Bay was never in any way polluted by NMR, and as such there is no need to issue an indictment or pursue any prosecution against NMR and me.

As I testified in court, in order to guarantee the preservation of the environment at the mining site and surrounding areas, NMR had: (1) performed AMDAL studies pursuant to the requirements and parameters set forth in the prevailing laws and regulations, (2) conducted voluntary TCLP testing and monitoring to verify and ensure no adverse environmental impact occurred, (3) monitored detoxification systems every 2 hours on a voluntary basis, (4) reported daily averages to the Government above and beyond monthly requirements set forth in the RKL/RPL, (5) extensively utilized domestic academic institutions to strengthen quality assurance of the monitoring process, (6) used world

renowned experts from international firms such as Lorax, Sheppard Miller, Rescan, and others to conduct analyses of environmental performance and give advice on best practices , (7) operated responsibly to react to any upset conditions, and informed of any such disruption to the relevant authority, (8) placed occupational health, safety and environment ahead of production and profitability (9) extensively implemented training programs for employees to insure that only qualified personnel were in control of the process, (10) practiced a commitment to continual improvement in all areas, including health, safety and environmental performance, (11) maintained a commitment to health, education, infrastructure and economic growth of the region.

By doing this, it is evident and again amply demonstrated during the testimonies by NMR's personnel and expert witnesses who are independent scientists from domestic and international universities, research centers and organizations that the tailings discharged were not a B-3 waste, the levels of mercury and arsenic in the waters of the Buyat Bay are well below the standard parameters, thermocline does exist, the waters of Buyat Bay are clean and even cleaner than the Atlantic and the Pacific Oceans, fishes are safe for consumption, human health bio-markers are within normal range, and as a result the people in communities surrounding the mines are healthier than the national average (and this in a place where earlier no medical facilities were available). The fundamental fact remains, BUYAT BAY IS NOT POLLUTED. Without pollution there is no crime, and the charges, the consequent request by the Prosecution for a three year prison term for maintaining a perfectly clean bay is a despicable act!

I did not break any laws but I can go on with a long list of violations of laws and regulations that relate to the prosecution against NMR and me. These violations of the laws and regulations are a clear breach of human rights as set forth by any standard, whether under Indonesian laws or any international convention on human rights. These violations include: (a) wrongful allegations by the Police based on two different police reports registered under the same number submitted by Dr Jane Pangemanan (these reports were eventually revoked by Dr Pangemanan on February 3, 2005), (b) wrongful detention of employees of NMR, (c) wrongful investigation process since the prevailing laws

and regulations clearly require the investigator of a potential environmental case to be a Task Force or a Legal Enforcement Team established by relevant institutions, and not the police force, (d) the police has breached the subsidiary principle adopted by the prevailing laws and regulations, as the subsidiary principle restricts the use of criminal law in environmental cases (such use is allowable only under certain specified conditions that must be supported with evidence that such principle can be waived or ignored) and clearly not appropriate in this case because criminal sanctions should only be applied as a last resort, (e) my right and the right of NMR to present evidence and call a *de charge* witness were denied by the police, (f) the police removed the testimony and evidence presented by a *de charge* witness that provided evidence favorable to NMR and me, (g) the police imposed illegal or irregular travel bans on my colleagues and me in this case, and continued to do so despite the writ of Habeas Corpus that was issued by the South Jakarta District Court, (h) the Prosecution continued to prosecute regardless of all these violations made by the police, (i) the annulment of the Habeas Corpus Writ by the Supreme Court despite the fact that such an act is prohibited by the Law on Judiciary, (j) the Court Order issued by the Panel of Judges of the District Court of Manado for re-sampling Buyat Bay was illegally challenged by the Prosecution. I will explain all such violations in more details in the other parts of my defense; I have listed only 10 violations of the law by the government in investigating the Buyat controversy as a few examples of such conduct. Clearly there have been other crimes committed during the process, but to my knowledge, none were committed by me or the company.

Having lived in Indonesia for more than 25 years, as an individual and now as an executive of an international company that has heavily invested in Indonesia, I have been following Indonesian politics with great interest; I have had a firm belief and high expectations that democratization processes and reform efforts in many aspects of government, business and society would rebuild Indonesia into a new Indonesia. I try to believe that a democratic society will achieve a legal and judicial system that will uphold and protect the principles of fairness and equal treatment before the law; a legal and judicial system that is free from political and other pressures and corrupt practices. I

also notice the importance of Non-Government Organizations (NGO) in shaping Indonesia into a desirable state for everyone. Their roles in fighting for the welfare of the people and public interests, and to act as an oversight body in the application of good governance principles and providing a just system of checks and balances must be supported. But I guess, the idealistic objectives of having a democratic society, an independent judiciary (in terms of increasing professionalism and integrity among the police, prosecution and the legal profession in general) and responsible NGOs do not always ensure the rule of law and equal justice for everyone. This case is obviously a clear example that regardless of the processes of reform, NMR and I have become victims of the wrongful application of law and justice, as well as unprofessional conduct and bad ethics of several individuals in the government agencies, police, prosecution and NGOs. Even some elements of the mass media have joined the bandwagon and have irresponsibly published incorrect, misleading and hateful comments, opinions and conclusions in various local and international forums.

If I contemplate the reason for my presence here in this court room as Defendant II, (as I had explained in my testimony before this court and also in my responses to the testimonies of the fact witnesses and experts), I cannot help but come to the conclusion that everything was initiated by the hateful efforts of certain individuals and/or organizations. These initial players were from some NGOs and others who work within the government system but the situation was then escalated by the unprofessional conduct/acts of the police. Their acts such as how they carried out their sampling and how these samples were then analyzed in their laboratory were clearly irregular. The last straw that has brought us to the climax of unfairness was perpetrated by wrongful accusations and charges being brought forth by the Prosecution. These efforts of fabrication were used by certain politicians for their own benefits and quite against their function as government officials in Indonesia to serve the public's interests. It is clear to me now, that this trial involving myself and NMR is a complete frame-up and is enmeshed with political interests; and based totally on perception, not fact or admissible evidence. This was further indicated by the testimony of the former Minister of environment, Nabel Makarim, who

stated that NMR and I became a target of certain people and was further emphasized in a press statement made by the Director General of the Department of Mines confirming that the case was the result of “hanky-panky” by NGOs.

It is unfortunate that the Indonesian Government has failed to see the real issues in this case and has failed to exercise any control over the various political factions that are rampant in its system. I have seen various laws and agreements which express that the republic of Indonesia is one Government, comprising of central and regional administrative branches, however, in reality this is not true. I have encountered many different and non-unified faces all claiming to represent the Government. This is obvious from the fact that the various ministries and departments of this government do not have any consensus over the issues involved in the Buyat case. Each of them has held a separate position on these issues which has led to compounding of the confusion that has resulted in this case. The Department of Mines and Mineral Resources as the technical department in-charge of the operations of NMR, as well as responsible for supervising NMR’s compliance with Environmental Regulations, has never found any problems with the operations of NMR including the way NMR has discharged and managed the wastes resulting from its operations. It has also been shown by the Minister of Coordination of Economic Affairs and the Minister of Coordination of People’s Welfare in their facilitation and signing of a Goodwill Agreement that it could be safely interpreted that Buyat Bay is not, nor proven to be, polluted, and as such a long term monitoring effort needs to be done to satisfy the outcry by certain NGOs and government officials. However, at the same time, the Ministry of Environment has proactively been involved in pushing the case forward, and has made all the efforts, including providing and guiding the Prosecution and some expert witnesses to testify so as to create a public perception, before the court as well as in the media that Buyat Bay is polluted and such pollution has adversely affected the health of the people in the Buyat Bay region. This creates confusion as to who is the real “Government”; hence despite the fact that it is within the power of the current administration to stop the indictment and act consistently with the prevailing laws and regulations and agreement

(Contract of Work) to which the Government and NMR are parties, the case against me and NMR continues.

However, like I stated earlier, one can reflect back on what has happened to bring this case to where it stands today, but the reality is that I am seated before this court defending myself of a crime that never occurred. I can not comprehend what mental gymnastics went on inside the heads of the Prosecution that led to the initial indictment and subsequently the charges being filed, followed by a request for a three-year jail term on such irrational and fictitious claims. Their persistence and failure to use common sense has lead the prosecution team into concluding that Buyat Bay is polluted and the means through which they have proven pollution beyond reasonable doubt defies all rational logic. After a reading of this Pledoi and then the arguments presented by the defense counsel for Defendant I and Defendant II, there should be no room left for any doubt that Buyat Bay is not polluted and that there has been a gross miscarriage of justice. During one of the breaks in this court session, I would ask if the Prosecution is willing to go talk to my wife who has sat through all the court sessions and explain to her how they manage to sleep at night. She has often wondered if the prosecutors have knowingly/consciously brought an innocent man to court for not following the rules of law when actually they have sworn to uphold the law and not surrender to political or other pressures to pursue this case. In most cases, these type of actions by the upholders of the law would be a cause of immense emotional turmoil.

Let me complete my opening statements by quoting from some recent statements from the President Susilo Bambang Yudhoyono before the DPR on the 16th of August 2006; I believe these are relevant to this case, and here is an unofficial translation of what he said: *“On the other hand, the law enforcers should be careful in receiving and reviewing any reports, so as to not create wrongful law enforcement measures. We have to be able to prevent slander, and defamation of character of individual that may detrimentally affect the pride and dignity of innocent people. I have also instructed that the coordination of law enforcement shall be done properly so that it won’t result in repeated*

investigation by various institutions, as this matter may affect effectiveness in our work and the business sector”.

Further: “Development in the field of law shall be in line with our joint commitment to honor fundamental human rights. We should be thankful that based on our joint efforts, the legal norms that relate to human rights have now been more complete. We had ratified the International Covenant on Civil and Political Rights and International Covenant on Economic, Social; and Cultural Rights. We have made genuine efforts to develop, protect and honor human rights. Praise be to Allah, during the last two years, there had never been any cases that may be classified as gross human rights violation. This good condition needs to be managed and maintained.”

I agree fully with what has been said by the President Yudhoyono before the DPR. I just hope that these statements shall eventually be applied to me and NMR in this case so that as the President desires, a “gross human rights violation” does not occur.

Thank you.