

**Transcript of Court Session 24 April 2007
PT Newmont Minahasa Raya**

1. Event: Reading of Verdict
 2. Day/Date: Tuesday/24 April 2007
 3. Judges:
 - a. HK I = Cory Sahunila Wane, S.H.
 - b. HK II = Ferdinandus, S.H.
 - c. HK III (Presiding) = R. Damanik, S.H.
 - d. HK IV = Darwo, S.H.
 - e. HK V = Lenny Wati Mulasimadhi, S.H.
 4. Registrars:
 - (i) Sientje S.H.;
 - (ii) Mansur Malakat; and
 - (iii) Herry Maramis.
 5. Public Prosecutor:
 - a. J1 = Purwanta Sudarmaji, S.H.
 - b. J2 = Muthmainah Umadji, S.H.
 6. Legal Counsel:
 - a. LMPP = Luhut M.P. Pangaribuan, S.H., LL.M
 - b. HM = Herbertus J.J. Mangindaan, S.H.
 - c. MK = Mochamad Kasmali, S.H.
 - d. HT = Hafzan Taher, S.H.
 - e. PS = Palmer Situmorang, S.H., MH.
 - f. OS = Olga Sumampouw, S.H.
- Legal Assistants:
- a. Ulyarta Naibaho, S.H.

PP: Hearing of a criminal case Number 284/Pid.B/2005/PN.Manado, Tuesday 24 April 2007 is about to begin, the Judges are entering the courtroom. Will the audience please rise.

[Panel of Judges enter the courtroom].

PP: You may sit down. Before the court begins, three minutes are given to photojournalists and electronic media to take pictures.

[The press is given the opportunity to take pictures].

--Unofficial Transcript of the Ruling Read Out in Manado Court on 24-April-2007--

HK III: Hearing of a criminal case Number 184/Generic Crime/2005/PN.Manado is in session and hereby open to public.

[Gavel is struck]

HK III: Will the Defendants PT NMR and Richard Bruce Ness take the seat provided. Before we begin the hearing we ask the Defendant, are you in good health today?

RBN: Yes, I am Your Honor.

HS: Ya. Yang Mulia saya sehat.

HK III: Pursuant to the hearing schedule, today is the reading of the decision in the case Number 284/Generic Crime/2005/PN.Manado. Before we read this decision, we ask both the Legal Counsel of Defendant I and II as well as the Public Prosecutor, do you still have anything else you would like to convey?

LMPP: From the Legal Counsel Team, we have nothing else to say, Your Honor. Thank you.

HK III: Done, yeah? From the Public Prosecutor?

J2: Same with the Public Prosecutor Team, nothing else needs to be conveyed.

HK III: Okay, so I will begin reading the decision in this case. Because the page count here is so thick, yeah, up to 260 pages, there may be things that we will skip, that I would not read in order to speed up... but as far as the legal considerations, all of it... yeah... okay?

[HK III read the decision]

HK III: Decision No.284/Generic Crime/2005/PN. Manado,

For justice, based on the believe in One God, Manado District Court examining and judging criminal cases on the first level with regular proceedings has handed the following decision in the case against Defendants, that is, Defendant I PT Newmont Minahasa Raya (PT NMR), in this case represented by one of PT NMR's directors; complete name, Richard Bruce Ness. Born in Minnesota, United States of America, 27 December 1949; sex, male; citizenship/nationality, United States of America; address Menara Rajawali 26th floor, Jl. Mega Kuningan Lot 5.1, Kawasan Mega Kuningan Jakarta or Jl. Wolter Monginsidi No.50, Manado, North Sulawesi; Religion, Islam; occupation, private sector, president director of PT NMR; education, business management. Defendant II, complete name, Richard Bruce Ness. Born in Minnesota, United States of America, 27 December 1949; sex, male; citizenship/nationality, United States of America; address Menara Rajawali 26th floor, Jl. Mega Kuningan Lot 5.1, Kawasan Mega Kuningan Jakarta or Jl. Wolter Monginsidi No.50, Manado, North Sulawesi; Religion, Islam; occupation, private sector, President Director of PT NMR; education, business management.

The Defendant is not detained in this trial. The Defendant is accompanied by an interpreter Ir. Harro Salim, an accredited translator from NAATI Australia and the Indonesian Government. Defendant II is counselled by a Legal Counsel, where for Defendant I... ouw... the Defendants are counselled by Legal Counsel Teams, for Defendant I, Luhut M. P. Pangaribuan, S.H., LL.M, Rahmat S. S. Soemadipradja, S.H., LL.M, Mochamad Kasmali, S.H., Herbertus J.J. Mangindaan, S.H., Nira Sari Nazarudin, S.H., LL.M from the Office of Luhut Marihot Parulian Pangaribuan Advocates, Plaza Bapindo, Citibank Tower Lt.23, Jl. Jenderal Sudirman Kav.54-55, Jakarta 12190 with the special letter of attorney dated 2 August 2005 registered in the Manado District Court Registry under number 405/SK 2005/PN.Manado, 4 August 2005.

Whereas Defendant II is counseled by Advocates Hafzan Taher, S.H., Palmer Situmorang, S.H, M.H., Olga Sumampouw, S.H., Ahmad Djosan, S.H. from the Office of Soemadipradja & Taher Advocates, Wisma GKBI Level 905, Jl. Jenderal Sudirman No.28, Jakarta 10210 pursuant to the special letter of attorney 2 August 2005 registered in the Manado District Court registry number 406/SK 2005/PN.Manado dated 4 August 2005.

The said District Court has read and studied the case files and all documents in the case files stating:

1. After reading the letter of case handover from Tondano District Attorney dated 5 July 2005 regarding the handover of case No. Reg. B1436/R112/TP207/2005, proceedings were opened against the defendants, and accepted at the Manado District Court registry, 11 July 2005.
2. Ruling by the Head of Manado District Court No. No.284/Pen.Pid/2005/PN.Manado dated 11 July 2005 regarding the appointment of the Panel of Judges to examine and adjudicate the case against the said defendants.
3. Ruling of the Presiding Judge of the Panel dated 14 July 2005 No.284/Pen.Pid/2005/PN.Manado regarding proceedings to examine the defendant after hearing the indictment from the Public Prosecutor dated 11 July 2005 read in the court session on 5 August 2005. After hearing the exceptions of Defendant I and II in court and after also hearing the charges/*requisitor* of the Public Prosecutor on 10 November 2006, which in the conclusion, in essence opined, charged, stated that:
 1. Defendant I PT NMR and Defendant II Richard Bruce Ness as the President Director of PT NMR have been proven legally and beyond doubt to have committed the crime of pollution and destruction of the environment as stipulated in and punishable under Article 41 (1) juncto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997 in the primary indictment for Defendant I and as stipulated in and punishable under Article 41 (1) of Law No.23 of 1997 in the primary indictment for Defendant II.
 2. To hand a punishment against:

- a. Defendant I PT NMR in the form of a fine in the amount Rp.1,000,000,000.00;
- b. Defendant II Richard Bruce Ness as the President Director of PT NMR in the form of 3 years imprisonment less time served by Defendant II and a criminal fine in the amount of Rp.500,000,000.00 subsidiary 6 months of imprisonment. To state that evidence coded P.A – I are still attached to the case file and rule that the Defendants pay a case fee, respectively, in the amount of Rp.10,000.00

Considering, that in response to the requisitor/criminal charges from the Public Prosecutor, the Legal Counsels for Defendants I and II, as well as the Defendant personally, have submitted notices of defense or *pledoi* dated 9 January 2007 and 25 January 2007, which in essence [have stated] the following:

1. Legal Counsel for Defendant I states that Defendant I PT NMR has not been proven legally and beyond doubt to have committed the crime of pollution and destruction of the environment as stipulated and punishable by Article 41 (1) juncto Article 45, Article 46 (1), Article 47 of Law No.23 of 1997 in the primary indictment;
2. To acquit Defendant I PT NMR of all indictments and charges or at the very least free [the Defendant] from legal charges; and
3. Establish the right to compensation and rehabilitation as stipulated by law.

Legal Counsel for Defendant II in essence stated:

1. Defendant I Richard Bruce Ness has not been proven legally and convincingly to have committed the crime of pollution and or destruction of the environment as stipulated in and punishable under Article 41 of Law No.23 of 1997 in the subsidiary indictment, Article 42 (2) of Law No.23 of 1997 in the more subsidiary indictment;
2. To acquit Defendant II Richard Bruce Ness of indictments and charges, and
3. Institute the right to compensation and rehabilitation as stipulated by law.

Indeed, that in addition to that, Defendant II Richard Bruce Ness personally delivered his own defense or *pledoi* that in essence stated the following: it is a lie that Buyat Bay is polluted because there has been no legal violation of pollution and destruction of the environment that can be considered a criminal act. Therefore, there is no environmental crime [committed] and [we] respectfully plead that pursuant to Article 1 (1) of 1991... Criminal Procedure Code (KUHAP) which stipulates that if the court is of the opinion that based on the court examination the defendant's wrongdoing in the acts being indicted to him are not proven legally and convincingly, then the defendant must be acquitted. Therefore, [we] respectfully ask the Honorable Panel of Judges to acquit the Defendant of all wrongdoings.

But, as the Defendant has stated above, the proceedings of this court has revealed other acts of crime or other illegal acts that have caused false prosecution of PT NMR and the Defendant himself by persons inside and outside of the legal system who do not care about their legal obligations.

Privately, the Defendant feels that justice will not be fulfilled by a not guilty verdict in favour of the company and the Defendant himself. The not guilty verdict will only resolve the evil accusations that PT NMR under the leadership of the Defendant has poisoned the community and cause pollution of the environment.

The not-guilty verdict will not resolve the problem of various criminals who have committed an extraordinary crime that has clearly paralyzed several government institutions, and have also spread misleading information to the public, which has callously caused splits in families, relocation of the people, disrupted local economy, and furthermore disrupted people's income and livelihoods. And not-guilty verdict also cannot restore the wrongful arrest against innocent people, the injustices that have taken away their human rights and legal rights by institutions that supposedly were formed to protect the basic rights of citizens. These institutions are the true backbone of the people and the basis for a great nation. Finally, I express my gratitude to the Honorable Panel of Judges for having given the opportunity to the Defendant to present evidence about this case and the justice and considerations given to the Defendant as the Defendant in this case.

Considering that with the defense or *pledoi* of the Legal Counsels for Defendants I and II as well as Defendant II's own *pledoi*, the Public Prosecutor have submitted a *replic* dated 23 February 2007 which in essence is as follows:

1. That the Defendant has been legally and convincingly proven to have committed a crime of pollution and or destruction of the environment as indicted and criminally charged by the Public Prosecutor; and
2. To ask the Panel of Judges of Manado District Court examining and adjudicating this case to decide as asked for by the Public Prosecutor in the notice of charges that was submitted and read before this court in an earlier court session and [in regards to] defense materials that were irrelevant to the Public Prosecutor's charges, they merit no response.

Considering, whereas the Legal Counsels for Defendants I and II as well as Defendant II personally have submitted their *duplic* which, in essence, is as follows. Legal Counsel for Defendant I stated:

1. Defendant I PT NMR has not been proven legally and convincingly to have committed a crime of pollution and destruction of the environment as stipulated and punishable by Article 41 (1) juncto Article 46 (1) and Article 47 of Law No.23 of 1997 in the primary indictment;
2. To acquit Defendant I PT NMR of indictments and charges, and
3. To institute the right to compensation and rehabilitation as stipulated by laws.

Legal Counsel for Defendant II stated:

1. Defendant Richard Bruce Ness has not been proven legally and convincingly to have committed a crime of pollution and or destruction of the environment as stipulated and punishable under Article 41 (1) Law No.23 of 1997 in the primary indictment and Article 43 (1) Law No.23 of 1997 in the subsidiary indictment, Article 42 (2) Law No.23 of 1997 in the even more subsidiary indictment.
2. To acquit Defendant II Richard Bruce Ness of indictments and charges,
3. To rule that Defendant II Richard Bruce Ness is entitled to a compensation and rehabilitation as stipulated by law.

Defendant II personally stated:

- a. To acquit the Defendant of all indictments and legal charges;
- b. To clear the defendant's name of all accusations made by the Public Prosecutor against the defendant or at least;
- c. To include in the court order the request to conduct investigation, and if there is enough evidence, to bring to trial those who are suspected to have misled the public by spreading false accusations regarding the condition of the environment and health around Buyat Bay.

These individuals include, but are not limited to:

1. Rignolda Djamaluddin, Jane Pangemanan, Raja Siregar for the spreading of Buyat rumor;
2. Members of the KLH Technical Team, especially Masnellyarti Hilman, who is fully aware and knowingly manipulated data and referred to non-existent regulations to create the illusion that a village must be relocated due to environmental pollution, which in reality never occurred.

Considering that the Defendant was brought before this court based on Public Prosecutor's indictment which reads as follows;

1. Specifically for Defendant I, primary, that Defendant I, PT NMR, represented by Richard Bruce Ness as the Director or one of the members of the board of directors of PT NMR, between October 1997 until 2004, or in the time which cannot be determined for certain, but at least in times during the period between October 1997 until 2004, in South Rataotok Village, Rataotok Sub-district, South Minahasa District, or at least in other locales that fall under the jurisdiction of Tondano District Court. But based on the Decision of the Chief Supreme Court Justice of RI No.KMA033/SK04/2005 dated 25 April 2005, the place for proceedings, according to the relative competence as to the authority to hold the proceedings, which should

have been held in Tondano District Court, was transferred to Manado District Court, and has in contravention of the law intentionally committed an act which has caused pollution and or destruction of the environment.

The act was committed by the Defendant by way of the fact that Defendant I PT NMR is a company whose business is mining and produces gold pursuant to the Contract of Work between the Government of RI and PT NMR Number B43/Pres11/1986 of 6 November 1986 and is registered as an industry producing toxic and hazardous waste (B3) as listed in PP No.85 of 1999 juncto PP No.18 of 1999 regarding management of B3 waste with the waste code D222. As to the chemicals used by Defendant I PT NMR to produce gold include, among others, cyanide. And then, the tailings waste produced contain, among others, mercury (Hg) and arsenic (As).

That Defendant I PT NMR in conducting its business activities was already aware that based on Law No.23 of 1997 regarding management of the environment, Article 14 (1), that is, to ensure the preservation of the environment no activity shall violate the quality standards or standard criteria for environmental damage. Further, Article 16 (1) stipulates that all responsible parties for a business or an activity are obligated to process the waste produced from the business and or the activity.

That Defendant I PT NMR in running its production activities in South Ratatotok Village, Ratatotok Sub-district, South Minahasa District, intentionally did not make efforts that should have been made to ensure the preservation of the environmental functions, and did not process waste produced by the business and or the activity properly to prevent causing damage and pollution of the environment as stipulated in Article 21 (1) Law No.5 of 1994 regarding industries.

This is evident because Defendant I PT NMR has disposed of and placed tailing in the seawater, in the environment, not below the thermocline layer or a layer of water marked by a temperature gradient that increases sharply [sic], but in the mixed layer, giving rise to two things, i.e.:

1. The liquid fraction of the tailing is immediately mixed by waves, currents and tides so the heavy metal content in the liquid is also spread vertically and horizontally;
2. The solid fraction of the tailings that can still be mixed by the waves, currents and tides so the heavy metals can still be released from the solid part and dissolved in the water and also spread. The results of pollution and or destruction of the environment include among others the degradation of the quality of seawater so it no longer functions according to its designation.

That Defendant I PT NMR which has been in operation since 1996 until 2004 has routinely submitted reports to the Department of Mining and Energy (DESDM) and KLH with regards to its Environmental Management Plan (RKL) and Environmental Monitoring Plan (RPL). In the RKL/RPL conducted by Defendant I PT NMR several parameters of the tailings that have been detoxified were found to have exceeded the quality standard limits established by Kepmen LH No.51/Men.LH/10/1995 Attachment C, i.e., CN 0.5 mg/liter, As 0.5 mg/liter, Hg 5/liter. And then since July 2000 the tailings quality standards based on Letter of State Minister of Environment to Bapedal No.B-1456/Bapedal/07/2000 dated 11 July 2000 with parameters As, Cn, Hg, Cu and Fe.

Whereas tailings that have been detoxified by Defendant I PT NMR in the RKL/RPL in October have exceeded the quality standard limits; November 1997 As exceeded quality standard limits; December exceeded quality standard limits, the CN; December 1997, As exceeded quality standard limits; January 1998, As exceeded quality standard limits; February 1998, As exceeded quality standard limits; March 1998, CN exceeded quality standard limits; March 1998, As exceeded quality standard limits; April 1998, As exceeded quality standard limits; May 1998, CN exceeded quality standard limits; June 1998, CN and As exceeded quality standard limits; July 1998, CN exceeded quality standard limits; July 1998, As exceeded quality standard limits; August 1998, WAD exceeded quality standard limits; August 1998, As exceeded quality standard limits; September 1998, As exceeded quality standard limits and so forth.

I think to make it short, this decision [*unclear*]... whereas what Defendant I PT NMR reported was 16 October 1997... jump to page 21... As exceeded quality standard limits; 16 July 1998, As exceeded quality standard limits; 22 January 1999, As exceeded quality standard limits, hence based on the implementation of RKL/RPL conducted by KLH B3 waste of Defendant I PT NMR was not detoxified well because the results of detoxification exceeded quality standard limits.

That with PP No.19 of 1999 regarding control of pollution or marine destruction, Article 18 requires that the disposal of B3 waste must have a minister's permit so Defendant I PT NMR who in its operation conducts the disposal of B3 waste must already have adjusted to the regulation. And then based on the Letter from the State Minister of Environment, Head of Bapedal No.B-1456/Bapedal/07/2000 on 11 July 2000 regarding the disposal of tailings waste to Buyat Bay signed by Dr. Sonny Keraf (State Minister of Environment/Head of Bapedal), Defendant I PT NMR was allowed to dispose of tailings waste into Buyat Bay with the following requirements:

1. Tailings waste disposed of by PT NMR into Buyat Bay at the rate of 5000 cu.m/day and must meet the following quality standards... it does say here about the quality standard according to the permit;
2. PT NMR is to conduct an *Ecological Risk Assessment* (ERA) study for tailings disposal into Buyat Bay involving various relevant institutions, including KLH/Bapedal, DESDM, Governor of North Sulawesi Province, Minahasa Regent, Bolaang Mongondow Regent, Mining and Energy Regional Office of North Sulawesi Province, NGOs, Universities and local community leaders;
3. The ERA must be completed by PT NMR within 6 months of the issuance of this letter;
4. To report the results [*sic*, progress] of the ERA study periodically at least once in a month, addressed to the State Minister of Environment/Head of Bapedal, with copies sent to the Minister of Mining and Energy, Governor of North Sulawesi Province and various relevant institutions.
5. Further information regarding the quality standard and disposal of tailings waste into Buyat Bay by PT NMR will be determined based on the results of the ERA study in point 3 above.

That in response to the Letter of State Minister of Environment/Head of Bapedal No.B-1456/Bapedal/07/2000 dated 11 July 2000 regarding disposal of tailings waste into Buyat Bay, Defendant I PT NMR has completed the ERA study on 11 June 2001 and Bapedal has discussed the study with the involvement of experts from LIPI, UI and representatives from relevant institutions.

Environmental experts and Bapedal have concluded that the ERA Study of Defendant I PT NMR cannot be accepted because there are a number of deficiencies, including:

1. The protocol of the study does not follow common ERA procedures;
2. The quality of data used is insufficient;
3. Data used do not represent seasonal variations, and
4. Did not involve relevant institutions as required by the Letter from the State Minister of Environment/Head of Bapedal No.B-1456/Bapedal/07/2000 dated 11 July 2000 regarding the disposal of tailings into Buyat Bay. With the non fulfilment of ERA requirement by PT NMR, the Minister of Environment/Head of Bapedal did not issue the permit for tailing dumping [sic] into the sea, but Defendant I PT NMR continue to carry out tailing dumping [sic] since 2001 until 2004 without a permit.

With the disposal of tailings, even though it has been detoxified but the fact is that it still exceeded the quality standard limits established and continued conduct tailing dumping [sic] into the sea without a permit causing pollution and destruction of the environment, according to BAP of Criminal Laboratory of Puslabfor Mabas Polri, number 4171KTF/2004 dated 27 September 2004, where the results have concluded the following:

1. Seawater samples [from] Buyat Bay have exceeded the quality standard limits pursuant to Attachment III of KepMen LH No.51 of 2004 regarding seawater quality standards for marine biota;
2. Tailing of Defendant I PT NMR have degraded the quality of seawater in Buyat Bay;
3. Sludge from the sediment pond of Defendant I PT NMR has degraded the quality of Buyat River water;
4. Marine biota samples from Buyat Bay have been contaminated by mercury and arsenic;
5. Residents of Dusun Buyat have been contaminated by mercury (Hg) and arsenic (As)... the acts of Defendant I as stipulated and punishable under Article 41 (1), juncto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997. Subsidiary... so that there is no repetition... the subsidiary [indictment] the acts of the Defendant have violated laws as stipulated and punishable under Article 43 (3)

juncto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997. And even more subsidiary the indictment against Defendant I is violation of Article 42 (1) juncto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997, and even more subsidiary indictment against Defendant I is violation of Article 44 (1) juncto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997. So that was for Defendant I.

Specifically for Defendant II, primary is violation of Article 41 (1) juncto Article 45, Article 46 (1) and Article...

[Recording stopped]

HK III: ... Article 42 (1) of Law No.23 of 1997, and even more subsidiary violation of Article 44 (1) of Law No.23 of 1997...

Yeah, so let us be brief and consider the Indictment to have been read in its entirety because this part is integral to this decision.

Considering, that with respect to the reading of the indictment by the Public Prosecutor, Defendants I and II have said that they have understood the Indictment and through their Legal Counsel have proposed the Exception or Objections to the Public Prosecutor's indictment.

Considering, that the substance of the Exception/Objection, in essence Defendant I asked that the Notice of Indictment be dropped by law or at the very least is ruled inadmissible because it did not follow the stipulations of Article 156 (1 J 140) juncto Article 143 paragraph 2 and b juncto paragraph 3 of KUHAP with all the legal consequences. Exception from Defendant II, one, stating accepting the exception of Defendant II Richard Bruce Ness, stating that the indictment should be dropped by law or at least to state that the indictment shall be rendered inadmissible. The said exception was read in court on 19 August 2006.

Considering, that with regard to the exception or the objections of the Legal Counsels of the Defendants, the Public Prosecutor submitted a response which in essence stated that the Indictment of the Public Prosecutors against the defendants have included careful and clear elaborations about the crimes being indicted by specifying the time and the place of the crimes committed... therefore asking the Panel of Judges to reject the objections of the Legal Counsels for Defendant I and Defendant II and declare that the Indictment of the Public Prosecutor has followed Article 143 (2) and to proceed with the main proceedings of the case.

Considering that with regard to the Exception/Objection of the Legal Counsel Team for the Defendants, the Panel of Judges has handed a ruling on 20 September 2006 which in essence reads... to [proceed] with the trial; to reject all objections of the Legal Counsel for Defendant I and Legal Counsel for Defendant II; to order to continue the examinations of criminal case No.284/Pid.B/2005/PN.Manado; to defer specifying the trial fee until the final decision is handed in this case.

Considering that later in the hearings testimonies from witnesses from the Public Prosecutor have been heard, including among these witnesses from the Public

Prosecutor are experts, in total 34, i.e. Witness Rasit Rahmat, Juhria Ratonbahe, dr. Jane Pangemanan, M.Kes, Ahyani Lombonaung, Masna Stirman, Marjan Ismail, Mansur Lombonaung, Surtini Papatungan, Nurbaya Pateda, Juhri Lombonaung, Ricky Telleng, Sul Manoppo, Herson Bawole, Yahya Lombonaung, Yogi Kriswarsono, Dolfi Nicolas, Sigfried Lesiasel, Ir. Witoro Sularno, Ir. Sigit Reliantoro, Msc., Dr. A Sonny Keraf, Ir. Isa Karmisa Adhiputra, Dra. Masnellyarti Hilman, Sc, Ir. Dibyo Kuntjoro, Sofian Simangunsong, Ir.Sulistiowati, MM, Dr. Abdul Gani Ilahude, MMA, Apu, Ir. Yudhi Prabangkara, Dr. Ir. Rachmansyah, Ms, Dr. Rignolda Djumuluddin, Dr. R. Budiawan, Drs. Munawardin, MM., Prof. Dr. Muladi, S.H., Prof. Yayat Dahiyat, Dr. Warlan Yusuf, S.H. The testimonies of these witnesses have been included completely in the decision of this case and are considered to have been read.

And then, witnesses were also presented by the Legal Counsel for Defendant I and Defendant II, including the experts, totalling 27, i.e. Ir. C. David Sompie, Ir. Jerry Kojansow, Madjid Esing, Robert Sasuhuhe, Rahima, H. Dahlan Ibrahim, Yantje Aring, Madjid Andaria, Salim Ani, Dr. Keith Bentley, Prof. Safri Nugraha, S.H., LL.M, Prof. Dr. Andi Hamzah, S.H., Prof. Dr. Daud Silalahi, Dr. Munim Idris, Sri Bimo Andi Putro, dr. Sandra Rotty, dr. Joy Rattu, Phd, Prof. dr. Winsy Waraouw, SpKK, Ir. Washington Tambunan, Ir. Ngadja Ginting Soeka, Ir. L.T.X. Lalamentik, Ir. Inneke Rumengan, Dr. Ir. Rudi Sayoga Gautama, Dr. Ir. Andojo Wurjanto, Ir. James Paulus, Msi, Shakeb Afsah, Nabel Makarim. Also documentary evidence submitted by the Public Prosecutor were coded P.1 – P.42, whereas [documentary] evidence submitted by Legal Counsel for Defendant I and Defendant II were given the code T.1 – T.107. Testimonies of the defendants, that is Defendant I and Defendant II, were also heard during the proceedings.

We invite one of our members [of the Panel] to continue the reading...

HK II: Considering that from the testimony of a *de charge* witnesses, experts, documentary evidence, and evidence entered by the Public Prosecutor, as well as documentary evidence entered by the defendants through their legal counsels, the following facts have been gathered:

1. PT NMR began its exploration activities in 1986 in the Contract of Work region in Minahasa and Bolaang Mongondow, North Sulawesi. The Contract of Work was signed between PT NMR and the Government of RI in 1986. PT NMR's exploitation activities began in March 1996 and its operations have ended in 2004. Based on PP No.51 of 1993 which was amended by PP No.27 of 1999 regarding AMDAL, before PT NMR can commence with its exploration and production activities PT NMR must first conduct an AMDAL study and secure a permit to conduct production activities as well as construction activities. In order to meet that requirement PT NMR then conducted a feasibility study and an AMDAL study. Because the environmental feasibility study and AMDAL study of PT NMR was approved by the Government of Republic of Indonesia then a permit for operations and mining activities was obtained and [these activities] could be conducted, including submarine placement of tailings in Buyat Bay, that is, in the thermocline layer. AMDAL Commission considered on-land tailings placement had greater risks compared to submarine placement after studying the mining location of PT NMR.
2. PT NMR has secured a complete permit to carry out its mining operations, including the permit to store and manage B3 [waste], especially STP (Submarine Tailings Placement) for PT NMR has been permitted since AMDAL was approved by the Government. With a change in Environmental Law from Law No.4 of 1982 to Law No.23 of 1997 with a provision for a 5-year transition period, that is, until

2002, which required PT NMR to obtain a new permit, then PT NMR submitted an application for a permit in 2000, as soon as the implementing regulation of that Law was issued, that is, PP No.19 of 1999. The Minister of Environment or the Head of Bapedal, Dr. Sonny Keraf, through his letter has given the approval or permit, that is, [letter] No.B-1456 dated 11 July 2000.

3. In addition to annual work plan, PT NMR is also required to submit a quarterly Environmental [Management] Plan [RKL] report and Environmental Monitoring Plan [RPL] report to the Department of Mining with copies to KLH. The RKL and RPL reports contain the company's performance, monitoring processes and environmental management as well as other activities pertaining to operational activities of PT NMR, including tailings placement and detoxification process. All of it have been conducted on time and have been received well by the authorities.
4. Based on the RKL and RPL report from PT NMR, based on a monthly average, not a daily average, although the daily average is still reported in the RKL and RPL report, and from that report it was known that PT NMR's tailings never exceeded quality standard limits.
5. Monitoring [of the effects] of mining activity on the environment by PT NMR is conducted by two departments, that is, monitoring of detoxification results in the mill is conducted by PT NMR's Metallurgical Department and in the environment by PT NMR's Environmental Department.
6. To extract gold, PT NMR uses cyanide and has never used mercury. Mercury found in the extraction process of PT NMR are chemical compounds found naturally in nature.
7. Throughout PT NMR's operations in 1998 there has been a tailings pipe leak and PT NMR has reported that incident to the Department of Mining and Energy through letter No.RM-WI/10-98/046 dated 6 October 1998.
8. Pursuant to Article 22 of Minister of Mining and Energy Decree No.1211/1995, a *Kepala Teknik Tambang* [Technical Chief of the Mine] must report examinations, including tailings, at least every six months. Whereas for RKL/RPL, the monitoring is conducted at least once in three months, same as what other mining companies do, such as Freeport and Arutmin, where the monitoring employs a monthly average and not daily.
9. And then through his letter No.B-1456 dated 11 July 2000 the Minister of Environment ordered PT NMR to conduct an ERA study and this ERA has been submitted and received by KLH on 11 January 2001, exactly 6 months after Minister of Environment's letter No.B-1456 dated 11 July 2000 was issued.
10. The Government, in this case the Provincial Government of North Sulawesi, Regional Office of Mining and the Department of Mining have often conducted studies on the environment around Buyat Bay, including receiving RKL/RPL reports and annual work plans from PT NMR. But the Government has never found any exceedances of quality standard limits. Similarly, KLH had also conducted studies on Buyat Bay and never found pollution in excess of environmental quality standards. The results of KLH Integrated Team study

published on 14 October 2004 on KLH site, www.klh.go.id concluded that mercury and arsenic levels in Buyat Bay were not in excess of the quality standards established by the Government.

11. PT NMR's tailings after being detoxified through its waste processing installation are no longer B3 because PT NMR has conducted TCLP tests, toxicology tests as well as characteristics tests on the tailings. The characteristics tests for PT NMR was conducted by an international laboratory, that is, ATAA International located in Colorado and based on laws applicable in Republic of Indonesia, no person is allowed to place B3 waste into the environment.
12. The seawater in Buyat Bay has not exceeded the quality standard limits (attachment 3, Decree of Minister of Environment No.51 of 2004 regarding seawater quality standards for marine biota and tailings). This is also based on studies conducted by the Government and other institutions, including:
 1. Study in 1999, based on the Letter of Assignment from Vice Governor No.660.1/BBDL/I/777/99 and KLH studies in 2003 and 2004.
 2. Studies conducted by independent research institutions, including Minamata Institute (WHO), ALS Indonesia and CSIRO, and others.
 3. PT NMR RKL/RPL reports since 1996 until 2004.
 4. Studies by various universities.
13. There is no connection between PT NMR's mining activity with arsenopyrite concentrations in the ground water of residents' wells in Buyat Pantai or in Buyat Village. Levels of arsenopyrite in the groundwater originated from natural rocks and are localized, that is, from alluvial sediments.
14. Thermocline in Buyat Bay is at an average depth of 43 meters, whereas PT NMR tailings are placed at depth of 82 meters based on examinations using an instrument called CTD in 2005. Similarly, an earlier study by an AMDAL Team, and KLH's own study.
15. Skin conditions suffered by a number of residents of Buyat Pantai are the same as skin conditions in other areas, that is, dermatitis, scabs and eczema. And skin diseases suffered by Buyat Pantai residents are not related to heavy metal poisoning.
16. Minamata Institute (WHO) in essence [found that]:
 1. The total and metal concentrations of mercury in the hair of Totok Bay residents are higher than those of Buyat Bay.

2. The total mercury in water and soil samples in Totok Bay [indicate] higher contamination of mercury than it is in Buyat Bay;
 3. The total and cyanide concentrations show that the environment in Buyat Bay and Totok Bay are not contaminated by cyanide;
 4. The total concentration of metals in the hair of Buyat Bay and Totok Bay residents cannot be said to have caused poisoning.
-
17. Results of examination by Center for Forensic Laboratories, National Police Headquarters (Puslabfor Mabes Polri) about seawater pollution in Buyat Bay contain weaknesses, because in addition to sampling methods of seawater or sediment by the investigators that did not meet the protocols, improper sealing and storage, the laboratory was also not accredited, and the result of sample testing also differed significantly from testing of the same samples that were split in two with ALS Indonesia laboratories in Bogor that is accredited, or with other independent research institutions, both national and international.
 18. The *Peer Review* team only reviewed studies by various parties on Buyat Bay but has never conducted its own studies directly in Buyat Bay. The Peer Review Team was formed unofficially because there was no letter of appointment from the Minister of Environment at that time, i.e., Nabel Makrim, and results of its review were also rejected by several parties who have conducted those studies, including KLH, DESDM, as well as various universities who followed or were involved in the studies.
 19. The highest person responsible in mining operations is the Kepala Teknik Tambang and in PT NMR throughout its operations the Kepala Teknik Tambang is the General Manager.
 20. Evaluation results on PT NMR RKL/RPL reports all this time has never [given rise to] reprimands or written warnings from authorized institutions, including KLH, and the result of field studies from authorized institutions, not one concluded that there was pollution above environmental quality standards found in Buyat Bay. And the Minister of Environment has never issued orders to PT NMR to conduct an environmental audit after controversy [surfaced] about pollution in Buyat Bay.
 21. To this day there is not yet a designation from the government, in particular a Regional Regulation about the designation of Buyat Bay waters through spatial planning arrangement for waters in North Sulawesi and the Regional Government has never ordered the residents of Buyat Pantai Village to relocate or prohibit people from consuming fish or other catch from Buyat Bay. The relocation of a number of residents to Duminanga village was on the recommendation of a number of NGOs and agreed to by the residents themselves, and was not the initiative of the Regional Government.
 22. The Public Prosecutor refused to execute the Panel of Judges' ruling to conduct a repeat examination by involving accredited government laboratories or [other] independent accredited laboratories in the waters of Buyat Bay both on the water and the sediment on the seabed of Buyat Bay, specifically in the sampling points

of previous Police investigators with unclear reason and even by staging a resistance to Manado High Court against the Panel of Judges' ruling.

23. Gold mining around Buyat Bay area has been conducted since long ago, both by Dutch companies or other artisan miners.
24. There has been a settlement between PT NMR as one party with the Government of Republic of Indonesia (Government of RI) through the Coordinating Minister for [People's] Welfare as the other party laid down in a Goodwill Agreement to settle or end the civil lawsuit in South Jakarta District Court, one of the stipulations of which is to conduct monitoring on the condition of Buyat Bay waters for ten years into the future paid for by funds given by POT NMR, including a contribution to the local community to promote their wellbeing.
25. The accuracy of the results of studies conducted by Dr. Rignolda Djamaludin and friends are doubtful because besides the fact that he is only a mangrove expert, [the studies] did not involve other independent institutions, both national and international.
26. Results of RKL/RPL reports during PT NMR operations would receive a green rating had it been enrolled in [KLH's] PROPER Program.
27. Baby Andini suffered an illness due to lack of nutrition and was examined by a doctor, given medication, but because the parents never controlled back with the doctor, and apparently because the medication prescribed by the doctor was never taken again, her condition deteriorated, causing her eventual death. Whereas recommendations to conduct an autopsy on her body to determine the cause of death with more certainty was refused by Andini's parents.
28. On the investigative and indictment stages the defendants had asked for their right to be heard and that a Dossier of Investigation or BAP be made to a *de chargé* witnesses according to law or KUHAP [Procedural Law] but the investigator and prosecutor never fulfilled that request.

Considering that before the Panel of Judges considers the Public Prosecutor's Indictment material in the case against Defendant I PT NMR and Defendant II Richard Bruce Ness, first of all the legal principles of this case will be considered which are characteristic or pertain particularly to the field of environmental law.

Considering that in Law No.23 of 1997 regarding Environmental Management, which is the basis for Public Prosecutor's Indictment in this case, several mechanism for dispute resolution are recognized, i.e.:

1. Administrative law resolution;
2. Civil law resolution;

3. Mediation/ADR;
4. Criminal law resolution.

Considering that the above [mechanism] for dispute resolution is known as subsidiarity principle which is a legal principle specific for environmental law enforcement in Indonesia as elaborated in the general explanation of Law No.23 of 1997 regarding environmental management, in point 7 paragraph 5 which reads... "as a support for administrative law the application of criminal law shall still consider the principle of subsidiarity, that is, criminal law shall be applied if sanctions from the fields of law, such as administrative sanctions and civil sanctions and sanctions from alternative environmental dispute resolution are not effective and/or the severity of the wrongdoing of the perpetrator is relatively great and/or the impact of the act is relatively great and/or the act has caused public unrest.

Considering that in the context of environmental law enforcement, therefore it is clear in the general explanation of Law No.23 of 1997 above that criminal law shall be applied when administrative law, civil law and mediation/ADR have been carried out by the government and a sanction has been imposed against the perpetrator but was not heeded, or not effective.

Considering that the principle of subsidiarity placed criminal law as *ultimum remedium*, that is, that the exercise of criminal law to conduct inquiry, investigation, questioning and sentencing shall be imposed if other avenues have failed. Therefore, the definition of *ultimum remedium* considers criminal law as the last resort, that is, criminal punishment shall only be imposed if other legal sanctions are inadequate in remedying an environmental case.

Considering that, because of the nature of environmental criminal law as *ultimum remedium* in controlling and managing the environment that is repressive [sic] in nature, then ways to enforce environmental law through administrative law, civil law and mediation/ADR shall be...

[Recording stopped]

MH: ... who was one of the team members who drafted Law No.23 of 1997 in court as an Expert of Environmental Law, in essence explained that with the subsidiarity principle in the environmental law, then a case in environmental law is termed a "dispute", which carries the meaning that criminal sanctions only act in support of administrative law.

Administrative sanctions, civil suits and mediation/ADR must first be exercised, and only as a last resort if the above do not succeed can criminal law instruments be applied as *ultimum remedium*. This principle of subsidiarity is in the context of realizing environmental management that is environmentally conscious which was one of the considerations in the formation of Indonesian environmental law (Law No.23 of 1997 regarding Environmental Management). This is also consistent with the explanation by other Experts of Environmental Criminal Law who gave his testimony in court, who was also a member of the team that drafted Law No.23 of 1997 such as Prof. Dr. Andi Hamzah, S.H., Prof. Dr. Muladi, S.H., both of whom did not deny that the principle of subsidiarity is recognized and is applicable in environmental law enforcement in Indonesia.

Considering that both in the general explanation to Law No.23 of 1997 regarding Environmental Management and the opinion of Experts of Environmental Law and Experts of Criminal Law as explained above recognize that criminal law process in the enforcement of environmental law is the last resort in law enforcement, or *ultimum remedium*, after administrative law, civil law, mediation have been applied but were not effective or not abided by the business actor in the sense that sanctions from administrative law, civil law and mediation have been imposed but were not heeded by the business actor;

Considering that even though enforcement of environmental law recognized in Law No.23 of 1997 regarding Environmental Management is the principle of subsidiarity it does not mean that this principle cannot be set aside as attested to by Prof. Dr. Andi Hamzah, S.H., Expert in Criminal Law in court. The principle of subsidiarity is not absolute. This principle can be set aside... can be set aside only if it meets certain requirements, as it is in the Netherlands. Criminal law becomes *primum remedium* when the business actor is a convict who has committed a violation or a crime repeatedly in environmental law;

Considering that from the above mentioned elaboration, the Panel of Judges will consider whether in this case against the business actor PT NMR as Defendant I and Richard Bruce Ness as Defendant II the principle of subsidiarity has been applied or that it has met the requirements to bypass the principal of subsidiarity and turn criminal law enforcement into *primum remedium*, which will then be analyzed through juridical facts obtained in the proceedings of this case;

Considering that in the general explanation to Law No.23 of 1997 regarding Environmental Management, limitatively it was said that in order to bypass the principle of subsidiarity in the sense that criminal law becomes *primum remedium* is with the following requirements:

1. Sanctions from other fields of law, such as administrative sanctions, civil sanctions and alternative environmental dispute resolution are not effective; and/or
2. The severity of the wrongdoing of the perpetrator is relatively great; and/or
3. The effects of the act are relatively great; and/or
4. The act has caused public unrest.

Considering that because the matter of subsidiarity principle is also a crucial matter between the Public Prosecutor on the one hand and the Legal Counsel for defendants on the other hand, the Panel of Judges will next consider the criteria for setting aside the principle of subsidiarity as elaborated above;

Considering that even though the exception to the subsidiarity principle is alternative in nature, the Panel of Judges will considers this matter as a whole so that it will be clear whether the principle of subsidiarity shall be exempted in this case as elaborated in the following:

1. Sanctions from other fields of law, such as administrative sanctions, civil sanctions and alternative environmental dispute resolution are not effective.

Considering that a fact has been revealed in court that PT NMR has routinely and periodically conducted environmental monitoring around the mining location the results of which are reported to the government in the form of RKL and RPL every quarter, but PT NMR has also conducted daily monitoring and the results were also reported to the Government even though this daily reporting was not the obligation or the requirement (see Evidence T.I-100), the RKL/RPL reports never received negative response or warnings or reprimands from the

government with regards to the management or monitoring of the environment conducted by PT NMR;

Considering that in addition to that, because the business of gold mining of PT NMR was based on the Contract of Work with the Government of Indonesia which has also been approved by the House Representatives of Republic of Indonesia then in itself the realization of the Contract of Work certainly gave rise to rights and obligations that are binding to both parties, in this case PT NMR and the Government;

Considering that throughout the implementation of the Contract of Work, PT NMR... from PT NMR's obligation, in essence, to preserve the environment (*vide* Article 2 paragraph 3 and 4 of the Contract of Work), whereas the obligation of the Government of Republic of Indonesia is to inform, warn and reprimand in writing to allow for time to remedy the negligence (*vide* Article 20 (1) of the Contract of Work) in the case of violation of PT NMR. But because the Government in all this time has never given warnings or reprimands, much less sanctions, against PT NMR with regard to mining activities, in particular regarding environmental management. This indicates that PT NMR has all along been carrying out its obligations in preserving the environment.

Considering that from the testimony of Witness Witoro Soelarno, Witness Sigit Reliantoro, Witness Isa Karmisa, Expert Witness... Expert and Witness Washington Tambunan, Witness Ngadja Ginting Soeka, Witness David Sompie and the Defendant's own testimony that in essence have all explained that throughout PT NMR mining activities since 1996 until the closure in October 2004, [PT NMR] has never received warning, reprimands, much less administrative sanctions in regards to the management and monitoring of the environment;

Considering the above considerations of the above court facts, it can be concluded that PT NMR has never received reprimands, warnings and administrative sanctions about the management and monitoring of the environment regarding talings waste, which is PT NMR's waste;

Considering that it is true in the case of PT NMR, in this case Defendant I, PT NMR and Defendant II, Richard Bruce Ness,

Considering that it is true that in the case of PT NMR, in this case Defendant I, PT NMR, and Defendant II, Richard Bruce Ness, there has been an effort in upholding the law through the avenue of civil law, both by the government and individuals and apparently all have ended in a settlement because of lack of evidence to state that PT NMR has committed pollution or destruction of the environment around the mining area in Pantai Buyat, South Minahasa, North Sulawesi;

Considering that for further clarification refer to the court decisions that were entered as evidence of Legal Counsel for Defendant I and Defendant II coded T.I-4, T.I-5 and T.I-6;

Considering that the upholding of the civil law has been resolved and laid down in a Goodwill Agreement signed between the parties PT NMR and the Government of Republic of Indonesia represented by the Coordinating Minister for People's Welfare, Aburizal Bakrie, on 16 February 2006;

Considering that in the Contract of Work, as special arrangement between the Government of Republic of Indonesia and PT NMR, it has been agreed that in case of a dispute then it would be resolved through mediation or arbitration which

shall be the legal avenue that will be applied first before moving on to legal process that pertain to the environment;

Considering that from the about consideration there is no reason to say that sanctions of administrative law, civil law, mediation/ADR have been put together and were not effective or that PT NMR failed to abided by them;

Considering that with the above juridical factors, the Panel of Judges has concluded that it has not been proven that the case with Defendant I, OT NMR and Defendant II, Richard Bruce Ness, has fulfilled the criteria that sanctions from other fields of law, i.e., administrative, civil and mediation/ADR, were not effective and not abided by PT NMR requiring action or enforcement of criminal law which is the *ultimum remedium*. Therefore, this reason must be set aside and declared not proven.

2. The severity of the perpetrator's wrongdoing is relatively severe.

Considering that this criteria in the view of the Panel of Judges to measure and determine the severity of the perpetrator's wrongdoing *in cassu* Defendant I, PT NMR and Defendant II, Richard Bruce Ness, falls under the category of relatively severe certainly must employ several parameters, among others, whether actions have been taken in the form of reprimands, warnings or measures to enforce administrative law, civil law and mediation, but was not effective or failed;

Considering that this criteria is *accessory* to the issue of enforcement of administrative law, civil law and mediation where facts show that since PT NMR was in operation or exploitation since 1996 until closure in 2004 [PT NMR] has never received warnings or reprimands or administrative sanctions, especially for management and monitoring of waste disposed of into the environment;

Considering that in addition to that, according to RKL/RPL reports submitted to the government, the levels of heavy metals in the tailings have never exceeded quality standard limits agreed to or set by the government, because tailings, before they are placed in the sea, first go through a process called detoxification;

Considering that to assess [whether] the severity or the wrongdoing of the perpetrator is relatively severe in the preliminary process this case was still premature so it cannot be made as reference as an exception to the subsidiarity principle, that is, to immediately apply instruments of criminal law in this case;

3. The effect of the act is relatively great.

Considering that the primary focus for this criteria is whether

Considering that the primary focus for this criteria is [to establish] whether comprehensive studies [and] examination and each of the disciplines... from each of the disciplines pertaining to the environment *in cassu*... in this case... and then based on the results of these studies [and] examination it can be concluded that the impact of the wrongdoing falls under the category great or not, or in other words, pollution and/or destruction of the environment has occurred.

Considering that from the facts of the proceedings in this case there has not been one study result that the waste from PT NMR's mining business before this case was brought up or processed indicating that the acts of PT NMR *in cassu* Defendant I and Defendant II throughout its operations has caused pollution and/or destruction of the environment, much less one that is considered relatively great, either conducted by Government Research Institutions or Official

Laboratories or by Independent Research Institutions or Laboratories and International Research Institutions or Laboratories;

Considering that as expressed by Witness or Expert Nabel Makarim, the former Minister of Environment for the period of 2001-2004 in court, who explained in essence that while serving as the Minister of Environment [he] never given reprimands, either verbally or in writing, to PT NMR mining business because according to the Expert/Witness PT NMR's documents have fulfilled all permit regulations applicable in Indonesia, including management and placement of [its] tailings waste.

That since the issue of pollution in this criminal trial surfaced was when the Expert Witness served as minister. Therefore in order to ascertain whether or not there is pollution or destruction of the environment the Expert/Witness on two occasions formed independent teams – whose membership comprised of representatives from Government Institutions, Academia, and NGOs – respectively in 2003 and 2004 to study and assess the environmental conditions around PT NMR mining operations, where the results of both studies of assessments by Independent Teams concluded that levels of mercury and arsenic around PT NMR operation area in Buyat Bay, Totok Bay, Totok River and Buyat River were below quality standard limits, meaning that there is no pollution;

Considering that in addition to that, a number of national and international research institutions have conducted studies and assessments of water quality and heavy metal levels in the seawater and humans around PT NMR operation location, including Sarpedal Laboratories, Sam Ratulangi University, Minamata Institute, WHO, ALS Indonesia Laboratories, CSIRO, whose reports were entered as documentary evidence in this case, and in essence arrived at the same conclusion, that based on their studies heavy metals, or mercury and arsenic, present in the seawater and in humans are still below that quality standard limits;

Considering also that in order to determine the severity of the effects of the perpetrator's actions, the government, in this case Ministry of Environment, should have first conducted an environmental audit, but even that, in the course of this case, was never conducted;

Considering that in addition to that, based on TCLP testing, toxicity and characteristic tests conducted by a number of laboratories whose report have also been entered as documentary evidence in this case, on the tailings waste of PT NMR that were detoxified before being disposed of into the environment or into Buyat Sea with the pipe depth of 82 meters, are not considered B3 waste;

Considering that the only study or laboratory testing indicating that the tailings waste produced by PT NMR's mining business contain heavy metals that have exceeded the quality standard limits are results of Puslabfor Laboratories of National Police Headquarters. However, the results of this study need to be carefully looked at. The report of this testing activity has become investigative and conclusive in nature because it seemed to be conducted by the National Police Headquarters to complete PT NMR case file, and it was apparent that the result of that examination went on to conclude that PT NMR's tailings has exceeded the quality standard limit [for] marine biota and that residents of Buyat Pantai Village have been contaminated by mercury (Hg) and arsenic (As). Such an examination report is in contrast to the testimony of Forensics Expert Dr. Mun'im Idris [who said] that any laboratory, including police laboratory, does not have the authority to draw conclusions from the results of its examination.

In addition to that, there was also a controversy about sampling methods and test results, among others, [the fact] that in the Sampling Dossier it was written that 24 sample bottles were taken, but in the Dossier of Test Results of Puslabfor

Mabes Polri there were 34 bottles examined, whereas what was entered as evidence in court were 29 bottles. In addition to that, inconsistencies were found in regards to the finding. On the one hand it was reported that mercury (Hg) and arsenic (As) levels were high in the seawater but low in fish. Whereas if the levels were high in the water... seawater, if the study were consistent, then it should have been high in fish too. Moreover, Puslabfor Mabes Polri Laboratories is not yet accredited, which is an absolute requirement for a special laboratory examining samples in an environmental case as stipulated in the Decree of the Head of Bapedal No.113 of 2000;

Considering that based on the abovementioned elaborations there is no sufficient ground... not yet sufficient juridical ground to state that PT NMR *in cassu* Defendant I, PT NMR and Defendant II, Richard Bruce Ness, have fulfilled the criteria that the effects of the actions were relatively great, as a condition to bypass the principle of subsidiarity.

4. The actions have caused public unrest.

Considering that what needs to be understood first is the meaning and the intention of the phrase 'causing public unrest' in the context of environmental law enforcement;

Considering that as explained by Prof. Dr. Andi Hamzah, S.H., Expert of Environmental Criminal Law in court, that what can be categorized as causing public unrest are facts where the effects of the act clearly have caused people to become restless and cannot live in peace such as the Chernobyl case in Russia [sic, Ukraine] and Lapindo mud flow in Sidoarjo;

Considering that Prof. Dr. Silalahi, S.H., expert in Environmental Law explained in court that the definition of causing public unrest is if the function of the environment is at threat and not the people, meaning that the unresting matter shall be seen from the environmental perspective. Statements published in mass media cannot be interpreted as something that has caused unrest because it has to pertain to the environment, such as the Bhopal case in India where clearly there has been environmental destruction;

Considering that as explained by Expert Witness Nabel Makarim, the former Minister of Environment, that it seems that from the onset PT NMR has been made a target by certain parties who carried the issue of pollution in Buyat Bay, Minahasa. This was evident from the shifting of issues that were brought up. Beginning from Minamata issue, and after it was not proven then it shifted to polluted water, polluted fish, and after all were disproved then the issue of sediments were brought up;

Considering that the testimony of Expert Witness, Nabel Makarim, seems to be consistent with the reporting of local media Manado Post of 11 August 1995 reporting that PT NMR has committed pollution in Buyat Bay, whereas PT NMR itself only began its mining operations in 1996. It is impossible that PT NMR would have polluted before it went into operations, that is, in 1995 as reported by Manado Post;

Considering that there was such great attention from government officials, attorney general officials, and the police in this case, that is because government officials are inseparable from their tasks and responsibilities as the guide and servant of the people. Therefore, attention from the officials cannot be seen as part of public unrest. To the contrary, attention from officials indicate the controversial nature of this case;

Considering that regarding the relocation or the displacement of Buyat Pantai residents to Dominanga was the will of the community itself, because neither the central government, nor the regional governments all the way to the government of Buyat Pantai Village, never recommended, much less ordered the people of Buyat Pantai to relocate to other places for reasons as explained by Witnesses Village Chief of Buyat Pantai, Robert Sasuhuhe, H. Dahlan Ibrahim, Majid Andaria, Salam Ani and Witness Jantje P. Aring;

Considering that according to testimony of witnesses Rasyid Rahmat, Surtini [Paputungan], Nurbaya Pateda, Masna Stirman, Marjan Ismail, Mansur Lombonaung, Juhria Ratonbahe who in essence all stated that their relocation from Buuyat Pantai to Dominanga was their own will because of the issue of all kinds of strange diseases in Buyat Pantai as a result of PT NMR's tailings waste. But due to the civil suit from those witnesses against PT NMR which ended in a goodwill agreement where in essence they realized that they were provoked by a group of people or non-governmental organizations who spread the rumor of strange illnesses without accurate data or evidence (see evidence T.I-5, T.I-6 dan T.I-7);

Considering that in the meantime dr. Jane Pangemanan who had stated in court that the illnesses suffered by Buyat Pantai residents that she had ince said was due to PT NMR waste, actually to this day the exact cause of those diseases are not known. And because of that mistake dr. Jane Pangemanan retracted her report from Mabas Polri and settled in the civil case against PT NMR (evidence T.I-4). Whereas dr. Sandra Rotty, dr. Joy Rattu, Prof. dr. Winsy Warouw, who had directly conducted studies and assessments of the health conditions of Buyat Pantai residents, have all explained and concluded in court that the illnesses suffered by Buyat Pantai community and in the surrounding area are common illnesses suffered by coastal communities and has no connection with PT NMR tailings waste;

Considering that from the above elaboration there is no sufficient ground to concluded that the actions of Defendant I, PT NMR and Defendant II, Richard Bruce Ness, have caused public unrest;

Considering that from the abovementioned legal consideration... the legal consideration of the Panel of Judges as mentioned above, there is no sufficient ground to state that this case has met the criteria to be immediately elevated to criminal law enforcement, which is the exception to the subsidiarity principle as the last resort or *ultimum remedium*, which has a special nature or *lex specialis* in the Indonesian Environmental Law recognized by Law No.23 of 1997 regarding Environmental Management;

Considering that this is also consistent with what has been expressed by Prof. Dr. Daud Silalahi in court as an expert in Environmental Law, one of the members of the team that drafted Law No.23 of 1997, from his testimony it can be concluded that the Public Prosecutor's indictment against Defendant I, PT NMR, and Defendant II, Richard Bruce Ness, is not very appropriate. This error occurred because the understanding of the Environmental Management Law of 1997 was not perfect, and the Expert further stated that there are two important principles in the Environmental Management Law that were disregarded in the case of alleged pollution in Buyat Bay. They are:

1. The principle of subsidiarity and the principle of resolving alleged environmental pollution must first consider administrative, civil, mediation resolution and criminal trial shall be the last resort;
2. The ERA study is not yet stipulated in laws and regulations in Indonesia. ERA study is a scientific study and is not a legal obligation.

Considering that whereas Prof. Dr. Andi Hamzah, S.H., as the expert in Environmental Criminal Law has stated in court that PT NMR cannot be punished based on the ERA study because ERA study is still a draft law or an academic draft. Witness Sonny Keraf also explained that regulation about ERA study in Indonesia is still a draft proposition;

Considering that the expert views on the ERA study as elaborated above is consistent with the principle of criminal law recognized in Article 1 (1) of the Criminal Code which reads "No act can be punished except based on pre-existing criminal stipulations in law regarding that act." *Nullum delitium saina prevalia* [sic];

Considering that even though from the point of view of laws and regulations that pertain to this case, in particular Law No.23 of 1997 regarding Environmental Management as *lex specialis* in the Environmental Law with the legal principles contained therein, such as the principle of subsidiarity, have been disregarded or not applied properly as considered above...

[Recording stopped]

HK III: ... as such, is a flaw in the indictment that can have fatal consequences (see Article 163 of KUHP) because the Indictment serves as the bases for examination. But in seeking the material truth in this case the Panel of Judges will still consider the Indictment as considered in the following:

Considering that the articles of Public Prosecutor indictment against Defendant I, PT NMR and Defendant II, Richard Bruce Ness, are as follows:

For Defendant I, PT NMR, the primary indictment was as stipulated in and criminally punishable under Article 41 (1) juncto Article 45, Article 46 (1), Article 47 of Law No.23 of 1997 with the following elements:

1. The element of any person;
2. The element of in contravention of the law;
3. The element of intentionally;
4. Element number four, causing pollution and or destruction of the environment.

Subsidiary indictment as stipulated in Article 43 (1) juncto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997 with the following elements:

1. Any person;
2. The element of who intentionally releases or disposes of matters, energy and/or other components that are dangerous or toxic, onto or into the ground, air or surface waters;
3. The third element... the element of knowingly or has reason to know [that it] can cause pollution and/or destruction of the environment... the environment... or endanger public health or human life.

Whereas the even more subsidiary indictment as stipulated in Article 42 (1) juncto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997, with the following elements:

1. The element of any person;
2. The element of due to [his/her] negligence; and

3. The element of causing pollution and or destruction of the environment.

And the even more subsidiary indictment as stipulated in Article 44 (1) junto Article 45, Article 46 (1) and Article 47 of Law No.23 of 1997, with the following elements:

1. The element of any person;
2. The element of due to [his/her] negligence committed the act of releasing or disposing of matters, energy and/or other components that are dangerous or toxic onto or into the ground, air or surface waters;

The third element is,

3. Knowingly or has reason to know that it may cause pollution and/or destruction of the environment or endanger public health or human life.

Whereas specifically for Defendant II, Richard Bruce Ness, the primary [indictment] is as stipulated in Article 41 (1) of Law No.23 of 1997 with the following elements:

- 1 Any person;

Second element,

- 2 In contravention of the law;

Third element,

- 3 Intentionally;
- 4 Caused pollution or destruction of the environment.

Whereas the subsidiary indictment against Defendant II as stipulated in Article 43 (1) of Law No.23 of 1997 with the following elements:

first,

1. The element of any person;

second,

2. The element of who intentionally discharges or disposes of matters, energy and/or other components that are dangerous or toxic, onto or into the ground, air or surface waters;
3. The element of knowingly or has reason to know [that the action] may cause pollution and or destruction of the environment or endanger public health or human life.

The even more subsidiary indictment as stipulated in Article 42 (1) of Law No.23 of 1997 with the following elements:

- 1 The element of any person;
- 2 The element of due to negligence;
- 3 The element of causing pollution and/or destruction of the environment hidup.

Even more subsidiary indictment as stipulated in Article 44 (1) Law No.23 of 1997 with the elements:

- 1 The element of any person;
- 2 The element of due to negligence committed the act of releasing or discharging matters, energy and/or other components that are dangerous or toxic onto or into the ground, air or surface waters;

Third element,

- 3 Knowingly or has reason to know that it can cause pollution and/or destruction of the environment or endanger public health or human life.

Considering that in essence articles of the Indictment are directed against Defendant I, PT NMR, and Defendant II, Richard Bruce Ness, are the same, only distinguished by the legal subject;

Considering that the entire substance of Public Prosecutor's Indictment, beginning from the primary indictment to the even more subsidiary indictment, from the indictment against Defendant I, PT NMR, and Defendant II, Richard Bruce Ness, as elaborated above, there are essential elements or primary elements or main elements that are the same, that is, the element of causing [pollution] and/or destruction of the environment;

The primary indictment Article 41 (1) of Law No.23 of 1997 and even more subsidiary indictment Article 42 (1) of Law No.23 of 1997, where both elements are to cause pollution and/or destruction of the environment as it is in the subsidiary indictment of Article 43 (1) of Law No.23 of 1997 and even more subsidiary indictment of Article 44 (1) of Law No.23 of 1997;

Considering that in essence the criminal element stresses on the issue of pollution and/or destruction of the environment, even though in the primary indictment and even more subsidiary indictment, where the act will be proven if it has caused the consequences, whereas in the subsidiary indictment and even more subsidiary indictment it is formal, where the act has the potential to cause pollution and/or destruction of the environment has been proven;

Considering that because the main criminal element in the entire Public Prosecutor indictment against Defendant I, PT NMR, and Defendant II, Richard Bruce Ness, is the element of pollution and/or destruction of the environment as elaborated in the above, the Panel of Judges shall first consider this element before it considers other criminal elements, because according to the Panel of Judges, the other elements are accessory to the element of pollution and/or destruction of the environment;

Considering that before considering the element of pollution and/or destruction of the environment, first of all several definitions in the environmental law shall be explained;

Considering that the definition of the environment encompasses the entire space with all matters, forces, conditions and living beings, including humans and their behavior, that affects the sustainability of life and the wellbeing of humans and other living beings. (Article 1 (1) of Law No.23 of 1997);

Considering that pollution of the environment is the introduction of organisms, matters, energy or other components into the environment by human activity, thus degrading the quality to a certain level that causes the environment to cease functioning according to its purpose (Article 1 (12) of Law No.23 of 1997). Whereas destruction of the environment are acts that can cause direct or indirect changes to the physical and/or biological characteristics causing the environment to stop functioning in supporting sustainable development (Article 1 (14) of Law No.23 of 1997);

Considering that referring to the definition of pollution and destruction of the environment, then in order to determine the degree of pollution and destruction of the environment, must be done through assessment and studies that are valid from various disciplines of science. Therefore, in order to obtain material truth in this case, the Panel of Judges will consider all facts obtained in court through testimonies of witnesses, experts, and results of studies from various research institutions, laboratory results, including results of examinations by Forensic Laboratory (Puslabfor) of National Police Headquarters;

Considering that Defendant I, PT NMR, and Defendant II, Richard Bruce Ness, were brought before the court for [allegedly] having committed pollution and/or destruction of the environment that are based on the following primary facts:

1. Results of examination of the criminal laboratory, center for forensic laboratory, National Police Headquarters No. Lab. 4171/KTF/2004 dated 27 September 2004 with the conclusions:
 1. Samples of Buyat Bay water have exceeded the quality standard limits pursuant to Attachment 3 to the Decree of Minister of Environment No.51 of 2004 regarding quality standards for marine biota;
 2. Tailings of the Defendant, PT NMR, have degraded the quality of seawater in Buyat Bay;
 3. Sludge from the sediment pond of PT NMR has degraded the quality of Buyat River water;
 4. Marine biota samples from Buyat Bay are contaminated by mercury (Hg) and Arsenic (As);
 5. Buyat Pantai residents are contaminated by mercury (Hg) and arsenic (As).

Based on the evaluations of PT NMR RKL/RPL reports to the Ministry [sic] of Energy and Mineral Resources and Ministry of Environment several PT NMR tailings parameters that have been detoxified were found to have exceeded the quality standards established. That PT NMR has disposed of tailings, categorized as B3 waste, into the environment or the sea without a permit from the Minister of Environment;

Considering that based on the above PT NMR as Defendant I and Richard Bruce Ness as Defendant II have been indicted to have committed pollution and destruction of the environment in the mining location in Buyat Bay;

Considering that as explained in the considerations above, that in order to determine whether pollution and destruction of the environment has occurred one needs an assessment and a study that is scientific, comprehensive, detailed and thorough in nature from various scientific backgrounds, particularly those that pertain to environmental issues. This is done considering that one of the considerations in the drafting of Law No.23 of 1997 regarding Environmental Management that the manager of the environment in the context of sustainable development that is environmentally-oriented must be based on legal norms by considering the public awareness and the global environmental developments, as well as international legal instruments pertaining to the environment, or in other words, that international standards or parameters for environmental quality standards cannot be disregarded;

Considering that in addition to that, Decree of MPR RI [People's Consultative Assembly], MPR 2000 stresses that in the enforcement of laws that is consistent and responsible and one that guarantees and respect human right, thus for those

reasons the Panel of Judges will carefully consider the most relevant juridical facts in this case;

Considering that furthermore the Panel will consider the results of Puslabfor Mabas Polri examination No. 4171/KTF/2004 dated 27 September 2004, as compared to other relevant studies and assessments from several institutions, both national and international, that are used as evidence in this case;

Considering that no matter what the results of studies and assessments that were conducted around Buyat Bay with regard to the levels of heavy metals, mercury, arsenic and cyanide dissolved in seawater present in marine biota and those that have contaminated humans, i.e.:

1. Analyses of ALS laboratory, an accredited laboratory to examine environmental samples, or split samples taken from Police Investigator samples taken on 28 July 2004. That metals... seawater... metals in the seawater, metals in the sediment or soil, are still below the quality standard limits established in Attachment 3 of the Decree of the Minister of Environment No.51 of 2004 (See Evidence T.I-39), and this is consistent with the testimony of Expert Sri Bimo Andi Putro;
2. Results of study by North Sulawesi Government Independent Team, March 2000, comprising of members from Bapeda... Bapedalda, North Sulawesi Regional Parliament, Expert Team from North Sulawesi Regional Office of Mining, UNSRAT, PT NMR and NGOs. And the results of the study concluded that concentrations of elements Hg, As, Pb and Sb in the seawater and sediment from Buyat Bay are still below the quality standard limits, pursuant to the Decree of the Minister of Population and Environment No.02/MenKLH/I/88, thus, chemically, it did not indicate pollution in Buyat Bay (see evidence from Defendant I, PT NMR/T.I-134). This conclusion is supported by witness or expert testimony... witness and expert Inneke Rumengan MSc, and expert and witness Ir. James Paulus, MSc, who both explained that based on studies conducted the levels of metals in the seawater and sediment in Buyat Bay are still below the quality standard limits;
3. Studies by WHO, in this case, Minamata Institute in 2004, indicating that the total and methyl mercury concentrations in the hair of Buyat Bay and Totok Bay residents are not sufficient to cause poisoning (Evidence T.I-68 from PT NMR), and it is also consistent with the testimony of expert and witness Keith Bentley, a researcher from WHO, that the concentrations of all heavy metals examined in the hair and blood of the communities around Ratatotok, Buyat Pantai and Belang Villages are at a concentration tolerated by International Program on Chemical Safety or IPCS;
4. Results of study by Commonwealth Scientific and Industrial Research Organisation or CSIRO in 2004, in essence concluding that findings of the study in Buyat Bay in August 2004, the seawater was below the quality standard limits based on the Decree of the Minister of Environment No.51 of 2004 and No.2 of 1988 (Evidence from PT NMR, T.I-14 a, b, c and d, and T.I-13 a, b). This is consistent with the testimony of expert witnesses, experts and witnesses, i.e., Nabel Makarim, dr. Inneke Rumengan, Msc, Ir. James Paulus, Msc;
5. Results of studies by Ministry of Environment in Buyat Bay in October 2004, as confirmation to the results of studies of Ministry of Environment in September 2003, whose membership include staff from the Ministry of Environment, NGOs, academics, concluding that water in Buyat Bay are

not polluted. All parameters for water quality are well below the quality standard limits (Evidence T.I-14 a, b, c). And this is consistent with the testimony of witnesses and experts Nabel Makarim and dr. Inneke Rumengan, MSc and Ir. James Paulus, MS.

6. Findings of the North Sulawesi Independent Team in 2004, conducted in July 2004, that the concentrations of arsenic and mercury in the marine sediment, marine biota and seawater are still below the quality standard limits. This is also consistent with the testimony of witnesses and experts dr. Andojo Wurjanto and Ir. James Paulus, MSc, dr. Inneke Rumengan, Msc and Ir., dr. Rudi Sayoga and Ir. L. X. Lalamentik, MSc.
7. Results of study by Public Health Audit Team, Department of Health in 2004, whose members include experts from University of Indonesia, that is from the Public Health Faculty, Math and Sciences Faculty and Medical Faculty, experts from Sam Ratulangi University, that is, from the Medical Faculty and Marine and Fisheries Faculty, and experts from Gadjah Mada University, that is, from the Medical Faculty, and experts from Airlangga University, that is, from the Public Health Faculty. The study was conducted in October until November 2004, concluding that levels of mercury and antimony in the hair and blood of the local population in Buyat Bay were below quality standards established by WHO or IPCS. And there was no... there was not enough evidence to conclude that neuropathy, lymphoma and dermatitis in Buyat area or in the study area can be related to heavy metals Hg, As and Sb. And this is consistent with the testimony of witness dr. Sandra Rotty from Puskesmas Ratatotok.
8. Results of dermatological study from Sam Ratulangi University in 2001 concluding that diseases suffered by people around Buyat Bay are mainly caused by [lack of] hygiene and sanitation and nutritional factors as commonly observed in other coastal communities in North Sulawesi and also in Indonesia... but also in Indonesia... and there are no signs of mercury or arsenic poisoning. Consistent with the testimony of expert witness, Prof. dr. Winsy Waraouw, dr. Sandra Rotty and dr. Joy Rattu.
9. Results of studies by the Social Studies Team of Manado State University (UNIMA) in 2004 in Buyat Bay, in essence concluding that the total levels of mercury and arsenic in the water of Buyat Bay are still below the quality standard limits pursuant to the Decree of the Minister of Environment No.51 of 2004.
10. Results of the studies on Buyat River, and Hydrogeology by an Expert Team from ITB together with Gadjah Mada University in 2005, concluding that the chemical analyses of water do not indicate effects of mining activity to the quality of ground water in Buyat Village. And this is consistent with the testimony of expert witness, dr. Rudi Sayoga.
11. Results of study by ALS Laboratories in 2006 as a confirmation to the results of ALS study in 2004, concluding that the water in Buyat Bay show that mercury and arsenic in the seawater and sediment are below the detection limit... Decree of the Minister of Environment No.51 of 2004. And levels of mercury in Buyat River are still below the detection limit. Government Regulation No.82 of 2001. Consistent with the testimony of expert witness Sri Bimo Andi Putro.
12. Results of RKL/RPL testing with PROPER method from KLH, had PT NMR been enrolled in the PROPER program, would result in [an assessment of] PT NMR having carried out efforts in managing the

environment and achieve better results than what is required with a green ranking, as attested to by expert witness Shakeb Afsah during proceedings.

Considering that based on valid evidence elaborated above, that is, results of studies and assessments of national and international research institutions, and supported by witness and expert testimony as mentioned above, then it can be concluded that the levels of mercury, arsenic and antimony in the seawater, water of Buyat River, sediment, marine biota, and humans, were still below the quality standard limits, pursuant to the Decree of the Minister of Population and Environment No.2/Men-KLH/1988, Decree of the Minister of Environment No.51 of 2004 and Government Regulation No.82 of 2001. Additionally, the sludge [from] PT NMR sediment pond has no connection with the seawater of Buyat Bay and has not polluted Buyat River and wells in Buyat Village. And it has not been proven that parameters in the tailings of PT NMR reported in RKL/RPL of PT NMR that were detoxified have exceeded the quality standards established;

Considering that the results of studies by national and international research institutions as mentioned above have very significant difference with the results of the criminal laboratory testing of National Police Headquarters No.4171/KTF/2004 dated 27 September 2004 which concluded that the seawater, marine biota and humans have been contaminated by mercury and arsenic exceeding the quality standard limits, whereas examinations and studies using similar parameters as stipulated in the Decree of the Minister of Environment No.51 Tahun 2004, Decree of the Minister of Environment No.2/Men-KLH/88 have also been carried out in the same time period in 2004;

Considering that from the comparisons and prior elaborations of the above studies, the Panel of Judges views that the results of examinations of the Forensic Criminal Laboratory of the National Police Headquarters can no longer be upheld. In addition, there are no other study to support the findings of Puslabfor, and that examination, as elaborated earlier, is investigative and conclusive in nature to complete the case file. Therefore, the Panel of Judges can accept the conclusion that the levels or concentrations of heavy metals mercury, arsenic and cyanide in the seawater, river ater, ground water, sediment, marine biota and humans in Buyat Bay and surrounding areas are all below the quality standard limits established by the government;

Considering that with the study findings, research by various national and international institutions, in essence [concluding] that in Buyat Bay and surrounding areas the seawater and sediment, marine biota and humans are not contaminated by heavy metals and are still below the quality standard limits established by the government as stipulated in the Decree of the Minister of Environment No.51 of 2004 and No.2/Men-KLH/88 and Government Regulation No.82 of 2001. This shows that the process of tailings waste processing performed by PT NMR with the detoxification system, meaning, the process of returning the minerals to its natural state, and other stable compounds have been conducted well. It was also proven that when the characteristic tests or TCLP tests were performed on the tailings by the North Sulawesi Provincial Government, testing at ALS Laboratories and by PT NMR itself, with the similar result that PT NMR tailings are not considered B3 waste. This conclusion is also consistent with the testimony of expert witness Ir. James Paulus, MSc, Ir. Washington Tambunan, Ir. David Sompie, Ir. Dibyo Kuntjoro and Sigfried Lesiasel;

Considering that with the results of studies and results of TCLP testing as mentioned above have shown that PT NMR tailings are placed in the seabed of Buyat Bay and are not dissolved due to waves, currents and winds. This also proves that PT NMR tailings are placed in the thermocline layer zone;

