
**Briefing notes:
Exceptions
Rick Ness and PTNMR**

Agenda

- What is an Exception?
- Indictment = failure to follow rule of law
- Highlights of Rick Ness Exception
- Highlights of PTNMR Exception

What is an Exception?

- Indonesian criminal law grants a criminal defendant the right to challenge indictment on the basis it is legally deficient on grounds such as:
 - it fails to follow the rule of law
 - it was prepared in violation of due process.
- Article 143(2) of Law on Criminal Procedure (LCP) requires indictment set out “**an accurate, clear, and complete explanation**” of the crime.
- If indictment is legally deficient Court must declare indictment void by **operation of law**.
- Each of Rick Ness and PTNMR will submit exception at next court hearing in Manado on August 19.

Indictment = Failure to follow rule of law

- Criminal indictment should not be issued as a matter of law:
 - Law 23/1997 based on “Subsidiary Principle” - requires administrative, ADR, and civil actions take place before criminal charges, which are a last resort.
 - Government has already brought civil proceedings.
- Indictment based on an investigation which ignored Indonesian law:
 - Joint Decree 77(a) issued under Law 23/1997 requires environmental cases be investigated by specialist environmental investigators.
 - Police disregarded this law and conducted own investigation.
 - South Jakarta District Court held police investigation illegal. Decision overturned on appeal by police and case handed to prosecutor without proper investigation.

Indictment = Failure to follow rule of law

- Indictment based on incomplete and biased evidence:
 - Both Rick Ness and PTNMR denied right to present evidence and expert/witness testimony during police investigation, a right provided for in Articles 65 and 116 of LCP.
 - Evidence and testimony obtained by police favorable to Rick Ness and PTNMR not included.
- If Indonesian law followed, criminal indictment should not have been issued.

Highlights of Rick Ness Exception: No Criminal Liability for President Director

- Indictment alleges:
 - Rick Ness as President Director of PTNMR is **personally** subject to criminal liability for alleged unlawful acts of PTNMR.
- Indictment is legally deficient (inaccurate) because:
 - **No provision of Indonesian criminal law** deems a President Director automatically responsible for unlawful acts of a company.
- A “leader” of criminal activity (including a President Director) may be responsible for criminal acts of subordinates under Article 46(1) of Law 23/1997 **only** if he/she issues an “order” or personally “acts.”
 - No allegation that Rick Ness gave an order
 - Indictment states Rick Ness failed to act

Highlights of Rick Ness Exception: No Criminal Liability for Failure to Act

- Indictment alleges that Rick Ness is criminally liable for failure to act.
- Articles 41-44 of Law 23/1997 require an “act” that causes “pollution”.
- Indictment alleges only that “acts” or “action” of PTNMR caused pollution. Allegations against PTNMR are repeated in those sections of the indictment directed at Rick Ness.
- Indictment is legally deficient because it does not allege any “action” or “active conduct” by Rick Ness as required in Articles 41-44.

Highlights of PTNMR Exception: Contract of Work

- Indictment ignores rights of PTNMR under Contract of Work:
 - PTNMR's Contract of Work requires notice of any default by PTNMR and provides for a right to cure the default (Art. 20)
 - No notice given by Government that it considered PTNMR: (1) had polluted; (2) did not have valid STP Permit; or (3) contravened the law.
 - Any dispute between PTNMR and the Government is to be resolved by mediation or arbitration (Art. 21).
 - These rights, granted by the Government, are important to investors, particularly in the natural resource sector.

Highlights of PTNMR Exception: Allegations: inaccuracies and inconsistencies

- Articles 43 and 44 of Law 23/1997 apply only to discharge of substances to “surface water” (ie. fresh water) not to seawater. These articles are not applicable to PTNMR’s activities.
- Allegations in indictment are inconsistent:
 - PTNMR alleged not to have STP permit but then alleged to have violated permit by exceeding effluent concentrations stated in permit.
 - Alleges STP permit issued 11 July 2000 under GR 19/1999 and that tailings are B3 waste. Permits under GR19/1999 cannot be issued for disposal of B3 into ocean.

Summary: Indictment should be declared null and void as a matter of law

- Indictment based on incomplete and improper police investigation. **Failure to follow rule of law.**
- Indictment **ignores rule of law:**
 - No legal basis for President Director criminal liability for corporate acts
 - No legal basis for criminal liability for failure to act
 - Violates Subsidiary Principle on which Law 23/1997 based
 - Violates Contract of Work protection for foreign investors
 - Many of the allegations are inaccurate/inconsistent
- Indictment is **imprecise, unclear and incomplete** in violation of the requirements of Article 143(2)(b) LCP.
- Under Article 143(3) of LCP, indictment should be declared **null and void.**

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