

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Trial Panel II
Judge Charles L. Smith III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
Specialist Counsel for Rexhep Selimi
Specialist Counsel for Jakup Krasniqi

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to Prosecution Fourth Motion for Admission of Evidence Pursuant to Rule 155

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I. INTRODUCTION

1. The Defence for Messrs. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi (“Defence”) hereby responds to the Prosecution Fourth Motion for Admission of Evidence Pursuant to Rule 155 (“Motion”).¹

2. The Defence reiterates its concerns regarding untested evidence that has already been admitted onto the case record.² The Defence further recalls that the principle of orality should remain the general rule in order to ensure the fairness of proceedings, as it allows the Defence to confront the Prosecution evidence and to put its case to relevant witnesses.

3. This filing is submitted confidentially because it responds to a filing with the same classification.³

II. APPLICABLE LAW

4. The Defence relies upon its previous submissions regarding the applicable law.⁴

¹ KSC-BC-2020-06, F02152, Specialist Prosecutor, *Prosecution Fourth Motion for Admission of Evidence Pursuant to Rule 155*, 26 February 2024, confidential, with Annexes 1-7, confidential.

² KSC-BC-2020-06, F01391, Specialist Counsel, *Joint Defence Response to “Prosecution First Motion for Admission of Evidence pursuant to Rule 155”* (“Response to First Rule 155 Motion”), 22 March 2023, confidential, para. 2; F01718, Specialist Counsel, *Joint Defence Response to ‘Prosecution Second Motion for Admission of Evidence pursuant to Rule 155’*, 14 August 2023, confidential, para. 2; F01865, Specialist Counsel, *Joint Defence Response to Prosecution Third Motion for Admission of Evidence Pursuant to Rule 155 (F01804)*, 17 October 2023, confidential, para. 1.

³ Rule 82(4) of the Rules of Procedure and Evidence on the Kosovo Specialist Chambers (“Rules”).

⁴ Response to First Rule 155 Motion, paras 6-29.

III. SUBMISSIONS

5. Pursuant to Rule 155(5), if evidence goes to proof of the acts and conduct of the Accused, this may be a factor militating against the admission of such evidence, in whole or in part. This ensures a fair trial, preserving the reliability of the evidence and calls for cautious scrutiny.⁵ The Panel has held that the expression “acts and conduct of the Accused as charged in the indictment” refers to “the personal actions and omissions of the Accused which are described in the charges brought against him, or which are otherwise relied upon to establish his criminal responsibility for the crimes charged”.⁶

6. When evidence goes to proof of the acts and conduct of the Accused, the Defence’s inability to cross-examine witnesses whose statements are tendered through Rule 155 is an important consideration when determining admissibility,⁷ given the prejudice caused to the Accused’s right to examine or have examined the witnesses against him. The possibility for the Defence to cross-examine witnesses who can testify about the same or related events and circumstances must be considered the minimum safeguard to ensure the fairness of the proceedings.⁸ In a situation where the Prosecution seeks admission pursuant to Rule 155 of a witness’ statement whose evidence goes to proof of the acts and conducts of the Accused, and the Defence is unable to cross-examine other witnesses who can testify about the same or related events and circumstances, the prejudice is such that it outweighs the probative value of the proposed evidence, rendering it inadmissible pursuant to Rule 138(1).⁹

⁵ KSC-BC-2020-06, F01603, Trial Panel II, *Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 155* (“First Rule 155 Decision”), 14 June 2023, confidential, para. 15.

⁶ First Rule 155 Decision, para. 16.

⁷ KSC-BC-2020-06, F01864, Trial Panel II, *Decision on Prosecution Second Motion for Admission of Evidence pursuant to Rule 155* (“Second Rule 155 Decision”), 17 October 2023, confidential, para. 10.

⁸ Second Rule 155 Decision, para. 10.

⁹ *Infra*, paras 17-18, 35-36, 70.

7. The Panel has consistently rejected the admission of evidence relating to the Accused's acts and conduct tendered pursuant to Rule 155 because of the absence of corroboration, as the probative value was outweighed by the prejudicial effect that would result from its admission.¹⁰ Even when evidence of witnesses whose statements go to proof of the acts and conduct of the Accused was admitted, the Panel noted that the Defence would have the opportunity to test such evidence through other witnesses scheduled to testify on the same events or circumstances.¹¹

8. Additionally, the Panel has held that when the Prosecution fails to call a prospective witness on whose testimony the Panel relied to admit a witness statement under Rule 155, the Defence may seek reconsideration of the Panel's admission decision.¹² The obvious corollary is that the ability of the Defence to confront the allegations against the Accused through the cross-examination of other prospective witnesses is a decisive factor.

9. The Prosecution conflates the lack of opportunity for the Defence to cross-examine the witness whose statements are tendered pursuant to Rule 155 which, as the Panel has previously held, does not automatically preclude its admission,¹³ with the opportunity to challenge the evidence through other means, which the Panel has repeatedly found to be a decisive factor to the exclusion of evidence.¹⁴ A closer look at the decisions relied on by the Prosecution reveals that they relate to the lack of an opportunity to cross-examine a witness, rather than the Defence's ability to rebut

¹⁰ See e.g., First Rule 155 Decision, paras 107, 193; Second Rule 155 Decision, para. 47; KSC-BC-2020-06, F02013, Trial Panel II, *Decision on Prosecution Third Motion for Admission of Evidence pursuant to Rule 155* ("Third Rule 155 Decision"), 15 December 2023, paras 56-57.

¹¹ See e.g., First Rule 155 Decision, paras 90, 103, 203, 217; Second Rule 155 Decision, paras 41, 70; Third Rule 155 Decision, paras 31, 55.

¹² Second Rule 155 Decision, paras 11-12.

¹³ First Rule 155 Decision, para. 18.

¹⁴ Motion, para. 7.

allegations through the cross-examination of other witnesses.¹⁵ Contrary to the Prosecution submissions,¹⁶ the Defence contends that the absence of a fair opportunity to confront the evidence of a witness whose statement is tendered pursuant to Rule 155 through other means is a decisive factor relevant to its *admissibility*, as opposed to a matter of *weight*.

W00067

10. The Defence does not dispute that W00067 is deceased and that her witness statements given to the ICTY¹⁷ and UNMIK¹⁸ are *prima facie* authentic. However, the portions of these statements which concern W00067's purported identification of Jakup Krasniqi in the Malishevë/Mališevo police station in July 1998 ("Portions") should not be admitted pursuant to Rule 155.¹⁹ The prejudice to the Accused by the admission of these Portions far outweighs their limited probative value, because they (i) go directly to the alleged acts and conduct of Mr. Krasniqi;²⁰ (ii) are highly incriminating in nature; (iii) are fundamentally contradictory and inconsistent, which diminishes their probative value; and (iv) contrary to the Motion,²¹ are uncorroborated and thus the Defence is denied a fair chance to challenge this allegation. Considered together with the Defence's inability to cross-examine W00067, these portions should be excluded pursuant to Rule 138(1).

¹⁵ See Motion, fns 25-26 citing Second Rule 155 Decision, para. 11, which relies on a previous finding that explicitly addresses the lack of opportunity to cross-examine a witness. See First Rule 155 Decision, para. 18.

¹⁶ Motion, para. 7.

¹⁷ K019-5141-K019-5146 RED2. See Motion, Annex 1.

¹⁸ SITF00062645-SITF00062667-ET RED. See Motion, Annex 1.

¹⁹ K019-5141-K019-5146 RED2, p. K019-5143; SITF00062645-SITF00062667-ET RED, Q&As 104-109, 116-117.

²⁰ Motion, para. 16.

²¹ Motion, para. 16(iii).

11. Despite admitting that the Portions go to proof of the acts and conduct of Jakup Krasniqi,²² the Prosecution claims that no undue prejudice is caused to the Accused by their admission because, *inter alia*, the evidence “is consistent with, and corroborated by documentary evidence and the statement of other witnesses in the case, some of whom have been and will be available for cross-examination.” This is fundamentally wrong; the evidence cited does not provide independent corroboration that Mr. Krasniqi was present in the Malishevë/Mališevo police station during W00067’s detention.

12. The evidence cited by the Prosecution as corroborative comprises four forensic documents concerning the remains of Tomislav and Saša Baljošević,²³ an ICRC list of missing persons,²⁴ a list of interviews given to OSCE including by W00067, none of which mentions Jakup Krasniqi’s presence at the Malishevë/Mališevo police station,²⁵ and an OSCE document which merely summarises and assesses these interviews.²⁶ None of these documents is capable of providing *any* corroboration – let alone independent - for W00067’s allegation that Jakup Krasniqi was present at the Malishevë/Mališevo police station in July 1998.

13. Similarly, none of the witnesses cited by the Prosecution provides independent corroboration to W00067’s allegations concerning Mr. Krasniqi. W00498, who is W00067’s son, testified that he has no direct or independent knowledge of the events of July 1998, and that everything in his testimony was told to him by his mother.²⁷ W00498’s evidence does not corroborate W00067’s account. W00498 merely claimed

²² Motion, para. 16.

²³ Motion, fn. 59, citing SITF00200250-00200296 RED; 019297-019303, pp. 019301-019303; SITF00200297-00200356 RED; SPOE00068507-00068514, pp. SPOE00068512-POE00068514.

²⁴ Motion, fn. 59, citing K046-3790-K046-3989, p. K046-3898.

²⁵ Motion, fn. 59, citing P00235.

²⁶ Motion, fn. 59, citing P00247.

²⁷ P01011, p. 4, lines 18-19, p. 32, line 21; KSC-BC-2020-06, Transcript of Hearing (“Transcript of 20 February 2024”), 20 February 2024, confidential, p. 12530, lines 14-22, pp. 12531-12532, lines 16-2, p. 12561, lines 12-13.

to be repeating W00067's account, although it was clear from his testimony that the account which W00498 claimed to have heard from W00067 differed fundamentally from W00067's statements.²⁸ W00498 eventually explained that what is written on paper does not reflect reality,²⁹ and regarding the alleged presence of Mr. Krasniqi in the Malishevë/Mališevo police station, conceded that "whether that is the Jakup Krasniqi or some other man with that name, I wouldn't know."³⁰ In short, W00498's evidence is not capable of providing independent corroboration to the tendered statements.

14. W02153 is the OSCE official who interviewed W00067 and others in January 1999. As he was not in Kosovo in July 1998,³¹ he simply relayed what he was told months later and cannot independently corroborate W00067's identification of Jakup Krasniqi.³² During his in-court testimony, W02153 acknowledged the limited reliability of any written record of his interaction with W00067,³³ stating that these records do not even mention Mr. Krasniqi.³⁴ He accepted that he took no step to verify any purported identification of Mr. Krasniqi,³⁵ recognised on two occasions that he confused [REDACTED] with Jakup Krasniqi,³⁶ and told the Prosecution that "he did not think Jakup Krasniqi was involved in any of this."³⁷ W02153's evidence clearly does not corroborate W00067's statements.

²⁸ See e.g. Transcript of 20 February 2024, p. 12537, lines 1-5; pp. 12538-12539; p. 12542, lines 4-9; pp. 12542-12543; pp. 12545-12546, p. 12554-12555.

²⁹ Transcript of 20 February 2024, p. 12537, line 5.

³⁰ Transcript of 20 February 2024, p. 12561, lines 8-9.

³¹ Transcript of 19 July 2023, p. 6130, lines 1-8.

³² KSC-BC-2020-06, Transcript of Hearing ("Transcript of 19 July 2023"), 19 July 2023, confidential, p. 6190, lines 7-13. See also p. 6167, lines 14-15.

³³ Transcript of 19 July 2023, p. 6161, lines 2-8.

³⁴ Transcript of 19 July 2023, p. 6162, lines 11-13.

³⁵ Transcript of 19 July 2023, p. 6162-6163.

³⁶ Transcript of 19 July 2023, p. 6170, lines 16-20; pp. 6192-6193.

³⁷ 4D00008, para. 2.

15. None of the other witnesses listed by the Prosecution are even remotely corroborative. W04278, W03780 and W04577 [REDACTED];³⁸ yet, none of them states that Jakup Krasniqi was there. W00092 and W02303 do not mention Jakup Krasniqi at all.

16. Corroboration is “evidence which tends to confirm the truth or accuracy of certain other evidence” and, to fulfil this function, “it must come from a source independent of any evidence which is to be supported by it” as [...] “corroboration only occurs when two pieces of evidence independently confirm the same fact.”³⁹ This is not the case for W00067’s allegation that Mr. Krasniqi was present at the Malishevë/Mališevo police station in July 1998. The only two witnesses who mention this allegation are W00498 and W02153, both of whom only provide hearsay evidence originating from the same source, namely W00067, who cannot be cross-examined by the Defence. This is not corroboration. The result is that if W00067’s evidence is admitted, the Defence is denied a meaningful chance to confront this allegation, which goes to proof of the acts and conduct of the Accused and to a central, contested issue in the case.

17. The Panel has stated that it will approach identification evidence, including that of Mr. Krasniqi, with the necessary caution.⁴⁰ The Panel has already excluded portions of statements of unavailable witnesses related to the identification of an Accused at an indictment location, noting the highly incriminatory nature of this evidence and the insurmountable prejudice deriving from the Defence not being able to cross-examine the witness on the circumstances of the identification.⁴¹ In these cases – and in all

³⁸ 059666-TR-ET Part 3 RED, pp. 2-7; 054769-TR-ET Part 1, p. 21, lines 10-20; 054769-TR-ET Part 4, pp. 1-2, lines 21-3; 106438-TR-ET Part 10 Revised RED2, pp. 1-2, lines 23-4; 088347-TR-ET Part 2 RED2, pp. 5-9.

³⁹ ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1263-AnxB-Red, Trial Chamber I, *Reasons of Judge Geoffrey Henderson*, 16 July 2019, paras 46-47.

⁴⁰ First Rule 155 Decision, para. 88.

⁴¹ First Rule 155 Decision, para. 107; Second Rule 155 Decision, para. 47.

instances in which the Panel rejected the admission of evidence going to the acts and conduct of the Accused⁴² - the Panel recognised that the lack of independent corroboration resulted in the Accused not having a fair opportunity to confront the account of the unavailable witness.⁴³

18. Conversely, whenever the Panel admitted Rule 155 evidence going to acts and conduct of the Accused, it did so because there was corroborative evidence and/or witnesses who are scheduled to testify on the same fact, affording the Defence a chance to rebut the witness' allegations through the cross-examination of other witnesses.⁴⁴ Consistent with these findings, the correct application of the Panel's discretion pursuant to Rules 155(5) and 138(1) requires that the Portions be excluded: the combined effect of uncorroborated evidence going to the acts and conduct of the Accused and the Defence's inability to challenge this central allegation through other witnesses creates a bar to their admission; their limited probative value is outweighed by the prejudice caused to the Accused.

19. In the Panel's balancing exercise pursuant to Rule 138(1), due consideration must be given to the additional factors identified below, which significantly reduce the probative value of W00067's purported identification of Jakup Krasniqi.

20. First, W00067's written accounts lack the detail required to substantiate a reliable identification. On her own account, the evidence relates to a traumatic experience⁴⁵ in which she was separated from her male family members and detained with her daughter-in-law and her young baby. W00067 herself stated that she was "in shock",

⁴² First Rule 155 Decision, para. 193; Third Rule 155 Decision, paras 56-57.

⁴³ First Rule 155 Decision, para. 107; Second Rule 155 Decision, para. 47.

⁴⁴ See e.g. First Rule 155 Decision, paras 103, 206, 217; Second Rule 155 Decision, paras 41, 70; Third Rule 155 Decision, paras 31, 55.

⁴⁵ Transcript of 19 July 2023, p. 6168, lines 2-5; Transcript of 20 February 2024, p. 12533, lines 7-19.

“confused” and unable to “recognise anyone”.⁴⁶ Any identification in those circumstances should be treated with extreme caution;

21. Second, in neither of her statements was W00067 asked about the circumstances of the purported identification of Mr. Krasniqi. The distance from which W00067 purportedly saw Mr. Krasniqi, the time of day, the lighting, the duration she was allegedly able to observe him for, whether it was in an open space or through a door, whether there was any obstacle impairing her vision etc. are all relevant questions which should have been put to W00067 to verify her purported identification. There is no trace of any such enquiry in the tendered statements. In the absence of such details, the probative value of the alleged identification is minimal.

22. Third, the Panel has already heard evidence that “Krasniqi” is a common surname in Malishevë/Mališevo,⁴⁷ and that others with the surname “Krasniqi” were in the local staff in Malishevë/Mališevo at the relevant time.⁴⁸ W00067 did not speak Albanian.⁴⁹ She based her identification on overhearing a guard using the name “Krasniqi”.⁵⁰ She was never confronted with the possibility that she mistook the name Jakup Krasniqi for a member of the Malishevë/Mališevo staff with the same surname, or with the results of investigations which identified Skender Krasniqi as a suspect in her case. Without the purported identification of Jakup Krasniqi being tested in this way, it cannot fairly be relied upon.

23. Fourth, when asked to describe the man she thought was Jakup Krasniqi, all that W00067 commented on was his height. Even then, she did so in contradictory terms,

⁴⁶ SITF00062645-SITF00062667-ET RED, Q&As 23-, 25.

⁴⁷ Transcript of 20 February 2024, p. 12556, lines 7-11.

⁴⁸ Transcript of 19 July 2023, p. 6183-6185, 6187, 6189, lines 20-25; Transcript of 20 February 2024, pp. 12556-12557.

⁴⁹ Transcript of 20 February 2024, p. 12524, lines 8-10.

⁵⁰ K019-5141-K019-5146 RED2, p. K019-5143; SITF00062645-SITF00062667-ET, Q&A 104.

claiming that he was “small”, “little” and “of average height.”⁵¹ When she was asked whether she could recognise Mr. Krasniqi in a picture, she answered that she would not know whether she could, and that she “doesn’t know anything”.⁵² Notably, when shown three pictures of Jakup Krasniqi, she did not recognise Mr. Krasniqi in any of them.⁵³ Her inability to identify Mr. Krasniqi drastically reduces the probative value of the alleged identification.

24. Fifth, although the Prosecution seeks to selectively tender two statements of W00067, the number of statements given by W00067 to different institutions over the years is much higher. These statements are inconsistent, particularly regarding the purported encounter with Mr. Krasniqi. After the events of July 1998, W00067 gave a statement to the Serbian Police at the end of September 1998 and she did not mention Mr. Krasniqi.⁵⁴ On 9 January 1999, she was interviewed by OSCE and did not mention Mr. Krasniqi.⁵⁵ On 13 April 2000, she gave a statement to the “ABA/CEELI War Crimes Documentation Project (WCDP)”, in which she stated that they were visited by Jakup Krasniqi and that he introduced himself.⁵⁶ Less than two months later, on 7 June 2000, she was interrogated by the Investigative Judge of the District Court of Belgrade and did not mention Jakup Krasniqi.⁵⁷ In December 2000, she gave a statement to the ICTY in which she mentioned Jakup Krasniqi but specified that “he didn’t tell us his name”.⁵⁸ On 6 February 2003, she gave a further statement which did not mention Mr. Krasniqi.⁵⁹ Finally, on 10 June 2006, she mentioned Jakup Krasniqi to UNMIK

⁵¹ SITF00062645-SITF00062667-ET RED, Q&As 106, 109.

⁵² SITF00062645-SITF00062667-ET RED, Q&A 109.

⁵³ SITF00062645-SITF00062667-ET RED, Q&As 136, 138, 147. *See also* SPOE00194018-00194046 RED, pp. SPOE00194022, SPOE00194030, SPOE00194032, SPOE00194039.

⁵⁴ Transcript of 20 February 2024, pp. 12550-12551, lines 24-14, referring to U000-5328-U000-5329-ET RED3.

⁵⁵ P00235, pp. SPOE40010577-SPOE40010578.

⁵⁶ L000-9884-L000-9885 RED2, p. L000-9884 (emphasis added).

⁵⁷ Transcript of 20 February 2024, pp. 12551-12552, lines 24-3, referring to SPOE00195761-00195763 RED2.

⁵⁸ K019-5141-K019-5146 RED2, p. K019-5143 (emphasis added).

⁵⁹ Transcript of 20 February 2024, p. 12552, lines 21-25, referring to SITF00062540-SITF00062542-ET RED.

investigators, claiming that “he said something in Albanian” that W00067 did not understand, and ‘that was all’.⁶⁰

25. These statements were put to W00498 and W02153 in live evidence before the Panel.⁶¹ They are plainly inconsistent. Many statements do not mention Mr. Krasniqi at all. The statements which do purport to identify Mr. Krasniqi are inconsistent about the basis of the identification, *i.e.* whether the man introduced himself,⁶² or the witness overheard a name elsewhere.⁶³ The probative value of the Portions is drastically reduced by W00067’s markedly contradictory accounts in relation to Mr. Krasniqi.

26. These elements demonstrate the extremely limited probative value of the Portions. When weighed against the prejudice caused to the Accused by their admission without cross-examination or corroboration, the standard of Rule 138(1) has not been met and the Portions must be excluded to safeguard the fairness of the proceedings.

27. Subordinately, should the Panel admit the tendered Portions, fairness requires that *all* of W00067’s statements mentioned above⁶⁴ also be admitted. The Prosecution has stated that “it is in the interests of justice for the SPO to transparently provide the Panel as the finders of fact with the interrelated statement and testimony to enable a fair assessment.”⁶⁵ Applying this reasoning to W00067, the same interests of justice require that the Panel be provided with all W00067’s statements to enable a fair assessment. Contrary to the Prosecution’s submission,⁶⁶ the tendered evidence does

⁶⁰ SITF00062645-SITF00062667-ET, Q&A 107 (emphasis added).

⁶¹ Transcript of 19 July 2023, pp. 6171-6172, lines 15-2, 6178-6180, 6180, lines, 7-20; Transcript of 20 February 2024, pp. 12550-12553.

⁶² L000-9884-L000-9885 RED2, at L000-9884.

⁶³ K019-5141-K019-5146 RED2, p. K019-5143; SITF00062645-SITF00062667-ET, Q&A 108.

⁶⁴ *Supra*, para. 24.

⁶⁵ KSC-BC-2020-06, F02062, Specialist Prosecutor, *Prosecution Reply Relating to Rule 154 Motion F02005*, 15 January 2024, confidential, para. 3.

⁶⁶ *Contra* Motion, para. 16(ii).

not enable the Panel to assess the witness's demeanour and credibility; rather, it allows only a selective analysis of a small portion of W00067's evidence. A fair assessment of W00067's evidence requires that the totality of her statements be subject to the Panel's scrutiny.

28. Finally, should the Panel decide to admit SITF00062645-SITF00062667-ET RED, the Defence does not object to the admission of SPOE00194018-00194046 RED as an associated exhibit.⁶⁷

W00083

29. The Prosecution seeks admission of three statements totalling 114 pages, which contain significant duplication. These statements encompass a transcript and a video recording of the SITF interview dated 23 April 2013,⁶⁸ an ICTY witness statement dated 7 August 2000,⁶⁹ and a UNMIK witness statement dated 10 December 2005.⁷⁰ The Defence maintains that there is no reasonable justification for admitting duplicative material, especially in regards to the ever-growing trial record.

30. The Prosecution's argument that the overlapping statements permit a full assessment of the witness' evidence and credibility⁷¹ does not dispose of the fact that substantially *similar* statements do not provide any added value, but rather confusingly conflate the evidential record.

31. In terms of materials relating to W00083's unavailability, the Prosecution has produced no evidence as to when her memory issues started. It only substantiated

⁶⁷ Motion, para. 15.

⁶⁸ 000516-TR-ET Parts 1-2 RED; 000516-TR-ET Part 3; 000516b Parts 1-3.

⁶⁹ U000-0077-U000-0090 RED.

⁷⁰ SPOE00193614-00193638 RED.

⁷¹ Motion, para. 21.

W00083's unavailability with alleged memory loss evidenced through her daughter,⁷² who previously indicated that her mother suffers from dementia, noting that only W00083's prior statements where her memory was intact should be used.⁷³

32. Upon ascertaining the reliability and authenticity of W00083's SITF statement, concerns arise as to the cognitive capacity of the witness when the statement was taken. There are numerous occasions in which the witness appears confused or does not understand the questions she is being asked, starting with her puzzled answer on whether she understands the Serbian language used by the interpreter;⁷⁴ whether the same persons were in the room following a break;⁷⁵ whether she is subject to investigation;⁷⁶ and her wish to continue the search for her sons,⁷⁷ whose remains she had already received. It becomes evident that when this statement was taken, the witness' memory loss had already progressed. Combined with the fact that fifteen years had passed from the events in question, these constitute circumstances which compromise the reliability of the SITF statement. Despite this statement being the only one relied on by the Prosecution in its PTB, concerns regarding its reliability militate against its admission under Rule 155. It follows that the Defence opposes the associated exhibit being admitted in connection to this statement.

33. The UNMIK statement provides the most comprehensive account of the events in question, also due to W00083 receiving the remains of her sons in 2004.⁷⁸ It is therefore more suitable for admission under Rule 155, than the ICTY statement.

⁷² 119096-119096.

⁷³ 119095-119095.

⁷⁴ 000516-TR-ET Part 1 RED, p. 1

⁷⁵ 000516-TR-ET Part 3, p. 1.

⁷⁶ 000516-TR-ET Part 1 RED, p. 4

⁷⁷ 000516-TR-ET Part 3, p. 3.

⁷⁸ 000509-000512-ET, P. 000510

Should the Panel decide to admit the UNMIK statement, however, it is imperative that any excerpts pertaining to Jakup Krasniqi⁷⁹ be excluded from the record.

34. W00083 was shown a photograph where she identified Jakup Krasniqi,⁸⁰ although she was not sure if it was him or the “one who was in the Hague or released”.⁸¹ She then claims that she recognised Jakup Krasniqi from a meeting between Mr. Krasniqi and OSCE representatives in Dragobil/Dragobilje, although it is unclear whether she personally witnessed this, or saw it on TV.⁸²

35. Moreover, W00083 claimed that she read in an article by “Zejak” concerning the killing of people in Lapushnik/Lapušnik that Jakup Krasniqi “left somewhere with a group of prisoners, over a certain lake” and therefore would have knowledge of their whereabouts.⁸³ Besides the vague, unsupported nature of this statement, it is notable that neither the indictment nor the SPO PTB contains any allegation that Mr. Krasniqi was personally involved in alleged crimes at Lapushnik/Lapušnik. Nor there is any corroboration for W00083’s baseless claim, whether by the alleged article, which was not produced as an associated exhibit to the statement,⁸⁴ or by the evidence of any other Prosecution witness. W00083 has not mentioned Jakup Krasniqi in her prior or subsequent statements, and the excerpts relating to Jakup Krasniqi bear no link to the events the evidence of W00083 centres on.

36. Consistent with the Panel’s previous approach,⁸⁵ these excerpts must be excluded pursuant to Rules 155(5) and 138(1) as they are unfounded, unreliable,

⁷⁹ SPOE00193614-00193638 RED, pp. 12-13, 24.

⁸⁰ SPOE00193614-00193638 RED, p. 12.

⁸¹ SPOE00193614-00193638 RED, p. 12.

⁸² SPOE00193614-00193638 RED, pp. 12-13

⁸³ SPOE00193614-00193638 RED, p. 24.

⁸⁴ See Motion, Annex 2.

⁸⁵ First Rule 155 Decision, paras 107, 193; Second Rule 155 Decision, para. 47; Third Rule 155 Decision, para. 56.

irrelevant to the charges, and uncorroborated. Considering that they go to proof of acts and conduct of the Accused, and that the Defence has no fair opportunity to confront W00083's unfounded allegations, their extremely limited probative value is outweighed by the prejudice which their admission would cause to the rights of the Accused.

W00900

37. W00900 is one of two witnesses whose evidence concerns the disappearance of Boban Dedić from Rahovec/Orahovac in June 1999. W00900, who is deceased, was Boban's mother, and asserts that she was with him at the time of his initial detention. W00208 was Boban's father and alleges that he himself was briefly detained when he went looking for his son. W00208 has already testified in this trial.⁸⁶ A third witness that is relevant to these allegations is W04745, a local KLA commander. His evidence, as it relates to W00900, is discussed below.

38. The Prosecution proposes four items for admission through this witness: W00900's 2001 ICTY statement;⁸⁷ the audio-video recording of her 2014 SITF interview;⁸⁸ the relevant certificates and declarations attached to her SITF interview;⁸⁹ and the transcript of her SITF interview.⁹⁰ The Defence objects to the admission of the SITF interview on grounds of reliability, it being clear that what appears to be a verbatim transcript contains significant amounts of paraphrasing, throughout.⁹¹ It requests that the Prosecution be ordered to produce a new transcript of the interview, accurately reflecting the words spoken throughout the interview.

⁸⁶ Transcript of 2 November 2023.

⁸⁷ K020-8261-K020-8267 RED2.

⁸⁸ 009862b Part 1 RED; 009862b Part 2.

⁸⁹ 009857-009861-ET Revised RED.

⁹⁰ 009862-TR-ET Part 1 RED2; 009862-TR-ET Part 2.

⁹¹ See, e.g., 009862-TR-ET Part 1, p. 19, line 10 to p. 20, line 7 compared to 009862b Part 1 RED 53m56s to 56m01s.

39. The Defence does not oppose the admission of the remaining three items, however, it is obliged to draw the Panel's attention to mischaracterisations of W00900's evidence in the Prosecution's submissions. A review of the relevant accounts cited by the Prosecution indicates less corroboration – and more contradiction and ambiguity – than that the Prosecution would have the reader believe. These circumstances limit the weight that can be afforded to the evidence. Moreover, to the extent that her evidence is not corroborated by an independent source, it cannot be relied upon in reaching a conviction.

40. For instance, the Prosecution alleges that, according to W00900's evidence, W04745 came to their home with four uniformed KLA soldiers on 16 or 17 June 1999 and demanded that they hand over their keys. However, in W00900's SITF interview, which the Prosecution does **not** cite, when asked about W04745, the witness responds, "I heard of him, but I cannot remember."⁹²

41. The Prosecution also relies on W00208's and W04745's evidence as corroborative evidence for the allegation that W04745 and uniformed soldiers came to her house. However, in W00208's SITF interview, he initially says that no one else was present when W04745 came to his house, before becoming confused and uncertain, when the Prosecution interviewer asks a leading question suggesting that in fact his wife was present, responding with the words, "she must have been, or she was, she must have been. That is what I am saying, one keeps forgetting things."⁹³

⁹² 009862-TR-ET Part 1 RED2, p. 29 (words used by interpreter in audio-visual recording ERN 009862b Part 1 RED: "I heard about him but I cannot recall." See 1h26m35s).

⁹³ 007631-TR-ET Part 4, pp. 5-6.

42. In his account cited by the Prosecution, W04745 never confirmed that Božana was present, speaking of “they”⁹⁴ and “the family.”⁹⁵ Nor does W04745 provide corroboration for the claim that he or KLA soldiers accompanying him demanded that the keys to the house be handed over.

43. The Prosecution asserts that W04745 told W00900 not to worry and that her son was safe. This conversation allegedly took place in front of W04745’s house.⁹⁶ W04745 – the supposed utterer of the statement - does not provide any corroboration for this allegation. Moreover, this incident is absent from W00900’s account given to SITF in 2014, during which interview she appears to only vaguely recognise W04745’s name.⁹⁷

44. Finally, it should be noted that W00900 is the only source of evidence in this case for Boban Dedić’s initial detention. While W00208 also provides evidence on this topic, the source of his evidence is W00900⁹⁸ and, as such, there remains just one source of evidence on this issue.

W04358

45. The Prosecution tenders the audio/video recording and transcript of SPO interview [REDACTED],⁹⁹ the minutes from the testimony of W04358 in the case [REDACTED]¹⁰⁰ and the record of the [REDACTED].¹⁰¹ Additionally, the Prosecution

⁹⁴ 083217-TR-ET Part 11, Revised RED, p. 8, lines 18-20.

⁹⁵ 083217-TR-ET Part 11, Revised RED, p. 8, lines 11, 15.

⁹⁶ Motion, para. 26.

⁹⁷ *Supra*, para. 40.

⁹⁸ U000-0009-U000-0016 RED2, p. 5.

⁹⁹ 059671b Parts 1-3 RED; 059671-TR-ET Parts 1-3 RED2.

¹⁰⁰ iSITF00181066-00181123, pp. SITF00181066-SITF00181093); SITF00181124-00181156, pp. SITF00181124-SITF00181139.

¹⁰¹ SPOE00125605-00125617.

seeks admission of three associated photo exhibits,¹⁰² two of which are already exhibits and, therefore, the application in respect of those is moot.

46. The Defence objects to the admission of W04358's evidence in its entirety.

47. The evidence of W04358 is central to allegations in the indictment. W04358 gives unique evidence concerning the acts and conduct of alleged subordinates to the accused, within the JCE, who have allegedly committed crimes for which the accused are said to be responsible.¹⁰³ As such, this evidence is pivotal to the Prosecution's case, and the evidence of W04358 cannot be fairly admitted into evidence untested.

48. The assertion by the Prosecution that the evidence of W04358 "is consistent with, and corroborated by, statements of other witnesses in the case"¹⁰⁴ is incorrect. W04358 gives unique evidence, the substance of which is not, and cannot, be independently corroborated by any other witnesses in this case. There are no other witnesses who can give direct evidence about (i) W04358's arrest; (ii) the events he experienced and witnessed during his detention; and/or (iii) the identification of those he allegedly saw whilst in detention.

49. Firstly, the Prosecution suggests that W04358's evidence can be corroborated by [REDACTED];¹⁰⁵ [REDACTED]. However, their evidence is based entirely upon hearsay information they received from W04358. Neither [REDACTED] nor [REDACTED] saw W04358 be arrested, beaten or detained, nor were they present with him in detention. They have no direct knowledge of his treatment in detention, or events that occurred during his detention. At most, [REDACTED] and [REDACTED]

¹⁰² P00098; SPOE00208269-00208279; P00254.

¹⁰³ [REDACTED].

¹⁰⁴ Motion, para. 38.

¹⁰⁵ Motion, para. 38.

can provide supporting evidence of the simple fact of W04358 and [REDACTED]. This forms only a tiny fraction of the evidence W04358 provides.

50. For the same reasons, neither [REDACTED], nor [REDACTED] can properly corroborate W04358's claimed sighting of detainees, or events that took place, in [REDACTED].¹⁰⁶

51. As regards [REDACTED], he was never told by W04358 who he saw in detention. [REDACTED] "[REDACTED]." [REDACTED] "[REDACTED]."¹⁰⁷ [REDACTED].¹⁰⁸ With respect to [REDACTED], the Defence notes that the evidence [REDACTED] gives regarding the presence of other detainees in [REDACTED] is based entirely upon what W04358 told [REDACTED].¹⁰⁹ Moreover, [REDACTED] is currently listed as a Rule 153 witness.¹¹⁰ Given [REDACTED],¹¹¹ it is unlikely that the Defence will be able to effectively cross-examine [REDACTED]. This compounds the prejudice suffered by the Defence, given that the central and material aspects of W04358's evidence cannot be challenged in-court.

52. Secondly, the Prosecution suggests that W04358's evidence may be corroborated by [REDACTED].¹¹² The Defence notes that [REDACTED],¹¹³ [REDACTED]. As such their evidence is in direct conflict.

¹⁰⁶ Motion, para. 32 referring to 059671-TR-ET Part 1 RED2, pp. 24-25; 059671-TR-ET Part 2 RED2, pp. 24-26, 28-30; SITF00181066-00181123, p. SITF00181080.

¹⁰⁷ P00096, para. 20.

¹⁰⁸ [REDACTED].

¹⁰⁹ 059673-TR-ET Part 1, p. 22.

¹¹⁰ KSC-BC-2020-06, F01594/A02, Specialist Prosecutor, *Annex 2 to Prosecution Submission of Updated Witness List and Confidential Lesser Redacted Version of Pre-Trial Brief ("Witness List")*, 9 June 2023, confidential, p. 278.

¹¹¹ See generally, 119145-119145 RED.

¹¹² Motion, para. 38.

¹¹³ 095034-095135.

53. The only relevant aspect of [REDACTED],¹¹⁴ [REDACTED],¹¹⁵ [REDACTED], [REDACTED].¹¹⁶

54. Regarding [REDACTED], the Prosecution provides no references to his live testimony which they suggest is capable of corroborating W04358. Again, the only potentially relevant aspects of [REDACTED] testimony are where he states that he heard [REDACTED],¹¹⁷ [REDACTED].¹¹⁸ In any event, the Defence submits that [REDACTED] is neither reliable nor credible; his evidence before this court demonstrated this much. His evidence cannot be relied upon as corroboration for the central elements of W04358's evidence.

55. There is no crossover of evidence which would enable [REDACTED] evidence to be corroborative of the vast majority of the evidence given by W04358 in relation to what he says about his time in detention and what he witnessed.

56. Finally, the Prosecution cites the [REDACTED],¹¹⁹ [REDACTED] concerning the same issue.¹²⁰ This evidence is relevant to [REDACTED], but is irrelevant in terms of corroborating the evidence W04358 provides.

57. W04358 is the only witness in the case who gives direct evidence on important issues. Whereas the sole or decisive rule does not explicitly require the exclusion of uncorroborated evidence – prohibiting only the reliance on such evidence for a conviction - the Defence submits that in this instance W04358's evidence should be excluded, given the significance of the uncorroborated allegations, the Prosecution's

¹¹⁴ [REDACTED].

¹¹⁵ See e.g., P00653.3, p. 6, lines 18-21; [REDACTED].

¹¹⁶ P00653.5, p. 23, lines 2-10.

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

¹¹⁹ SPOE00068624-00068634; SPOE00073399-00073428.

¹²⁰ SPOE00125979-00126002.

heavy reliance on this witness, and the prejudice to the Defence through the absence of any opportunity to test the inconsistencies in his evidence.

58. Firstly, the evidence of W04358 is sole and decisive in relation to the case of [REDACTED]. W04358 is the only witness in the case who is alleged to have seen [REDACTED] (i) actually in detention and (ii) being beaten by the KLA.¹²¹

59. Secondly, W04358 is also the only witness in the case who is alleged to have seen [REDACTED].¹²²

60. Finally, in the SPO PTB, the evidence of W04358 is relied on to substantiate numerous important propositions.¹²³ W04358 is central to the Prosecution's case in terms of the allegations at [REDACTED].

61. The Panel is unable to properly assess W04358's demeanour as the only video recording available is a Prosecution interview in which W04358's evidence was not taken in full and not tested by cross-examination.¹²⁴ There is no video or audio recording of his evidence [REDACTED].

62. Further, the account W04358 has given includes inaccuracies and inconsistencies, which have not been challenged in cross-examination. For instance, W04358 told [REDACTED], that he did not see people being beaten. Rather, W04358 [REDACTED]. He stated, in terms, that "[REDACTED]."¹²⁵ W04358's purported identification of detainees and KLA soldiers has also not been properly challenged. The Defence notes, yet again, that W04358's [REDACTED] interview shows that he

¹²¹ 059671-TR-ET Part 1 RED2, pp. 23-24; 059671-TR-ET Part 2 RED2, pp. 4-5, 20-21, 26, 29.

¹²² 059671-TR-ET Part 1 RED2, pp. 24, 27; 059671-TR-ET Part 2 RED2, p. 4.

¹²³ [REDACTED].

¹²⁴ See, 059671b Parts 1-3 RED.

¹²⁵ SITF00301497-00301501 RED2, pp. SITF00301498.

did not know who [REDACTED] at the time he was detained. He claims to have learned their names after the fact, pursuant to “[REDACTED].”¹²⁶ W04358 repeated this during his interview with [REDACTED], where W04358 has stated [REDACTED]. Again, W04358 suggested that he found out their names from later descriptions.¹²⁷ These purported identifications are inherently unreliable.

63. While W04358 was the subject of cross-examination in [REDACTED], this cross-examination was limited and conducted by those representing persons allegedly directly responsible for the crimes on the indictment. Cross-examination by those alleged to have superior responsibility would necessarily be distinct.

64. The prejudice caused by the admission of the evidence of W04358 is high and more importantly, incurable. The Defence is unable to challenge the evidence provided by W04358 by other means, as there are no other witnesses who can attest to the same events. As the defendants in this case are not charged with direct responsibility, but superior responsibility, they are also unable to provide evidence to challenge the account of W04358. This evidence is unique and decisive in this case in material respects and incapable of challenge; as such it cannot be fairly admitted under Rule 155.

W01504

65. The Prosecution alleges that W01504’s health condition prevents him from testifying orally, on the ground that his 2018 SPO interview was interrupted due to health issues which have since worsened, W01504 having suffered [REDACTED].¹²⁸ The fact that the witness may have had health issues in 2018 does not prejudice his

¹²⁶ SITF00301497-00301501 RED2, pp. SITF00301499.

¹²⁷ SPOE00125605-00125617, pp. SPOE00125611-SPOE00125613.

¹²⁸ Motion, para. 49.

current condition. In support of its assertions, the Prosecution has only disclosed to the Defence a one-sentence note dated January 2023 pursuant to which “[REDACTED],”¹²⁹ without any medical evidence. The Prosecution further relies on a confidential and *ex parte* filing, KSC-BC-2020-06/F02097 and F02097/A03, but despite the Prosecution’s mention that it does not object to its reclassification as confidential,¹³⁰ this has not been made available to the Defence. The Defence requests to be provided with this filing and its annex. In the alternative, the Defence invites the Panel to review with caution the documents submitted by the Prosecution to determine whether it has established that W01504 is unavailable to testify pursuant to Rule 155(1); a mere statement during a phone call is insufficient to establish unavailability.

66. The Prosecution seeks to tender W01504’s [REDACTED], and his SPO interview.

67. W01504’s testimony, related to his alleged detention and that [REDACTED], constitutes a core element of the Prosecution case since he discusses the presence and action of two alleged JCE members in this alleged detention site, [REDACTED], who would have arrested him, and [REDACTED], who would have been in charge of this prison and would have interrogated and released him.

68. If W01504’s unavailability is established, the Defence does not challenge the admissibility of his evidence through Rule 155 – with the reservations below -, since, as of now, [REDACTED] and [REDACTED], his purported co-detainees, should testify in court about this incident. The Defence notes that the other “corroborative” witnesses, as per the current Prosecution witness list, would not appear in court.¹³¹

¹²⁹ 111207-111207.

¹³⁰ Motion, fn. 166.

¹³¹ [REDACTED].

69. The Defence stresses that none of W01504's proposed statements were subject to cross-examination and judicial questioning, which affects their weight and probative value.¹³² For instance, the Defence may have wanted to explore the reasons for his arrest, his purported identification of [REDACTED], and to ask him to clarify inconsistencies, *i.e.* [REDACTED],¹³³ since this could put in question [REDACTED].¹³⁴

70. Regarding W01504's SPO interview, the Defence objects to the admission of an excerpt which alleges [REDACTED].¹³⁵ Such an assertion is vague, unsubstantiated and wholly uncorroborated. W01504 was not present and thus his knowledge of this alleged event is extremely limited. Further, this allegation is not included in the indictment or the Prosecution's Pre-Trial Brief. The Defence will have no fair opportunity to confront this potentially incriminating account. The probative value of this excerpt is outweighed by its prejudicial effect; therefore, the Panel should exclude this portion of the witness's evidence.¹³⁶

71. The Defence further questions the necessity of tendering W01504's [REDACTED], since they are redundant and would unnecessarily burden the record.

72. The Defence notes that W01504's [REDACTED] does not seem to have been given under oath since the part entitled "Declaration" about false testimony, is neither dated nor signed,¹³⁷ which affects the statement's reliability. With regard to the [REDACTED],¹³⁸ the Defence objects to its admission on the ground that it does not form an integral part of W01504's [REDACTED]: said statement neither refers to the

¹³² See, for instance, First Rule 155 Decision, para. 178; Second Rule 155 Decision, para. 69.

¹³³ SPOE00110375-00110386 RED2, p. SPOE00110378; U003-1213-U003-1229 RED2, p. U0031215; 054060-TR-ET Part 3 RED2, pp. 14-15.

¹³⁴ SPOE00110375-00110386 RED2, p. SPOE00110378; 054060-TR-ET Part 3 RED2, pp. 16-17.

¹³⁵ 054060-TR-ET Part 3 RED2, p. 10, line 9 to p. 11, line 4.

¹³⁶ See, *inter alia*, First Rule 155 Decision, paras 107, 193; Second Rule 155 Decision, para. 47; Third Rule 155 Decision, para. 56.

¹³⁷ SPOE00110375-00110386 RED2, pp. SPOE00110376, SPOE00110382.

¹³⁸ SPOE00110375-00110386 RED2, p. SPOE00110375.

[REDACTED] nor specifies that W01504 was asked to identify [REDACTED] and did so.

W01914

73. The Prosecution seeks to rely on W01914's interviews with the Prosecution¹³⁹ and [REDACTED]¹⁴⁰ to corroborate an incident in Klečkë/Klečka in [REDACTED]. The Defence objects to the admission of these materials, given the centrality of the allegations to charges in the Indictment¹⁴¹ and the SPO PTB.¹⁴² Other witnesses¹⁴³ have spoken to the [REDACTED],¹⁴⁴ to secure the release of W01914 and [REDACTED]. Only W01914's evidence speaks to the specifics of the point at which he was detained,¹⁴⁵ and how he and [REDACTED] were treated.¹⁴⁶ The prejudicial effect of admitting this evidence absent the ability to conduct cross-examination, outweighs any probative value.

74. There are also discrepancies between the two statements provided by W01914, which merits further exploration in cross-examination. For example, in his SPO interview, W01914 described a [REDACTED],¹⁴⁷ but this is not discussed in his [REDACTED] statement. The witness described being questioned [REDACTED],¹⁴⁸ [REDACTED].¹⁴⁹ In his [REDACTED] statement, W01914 mentions that

¹³⁹ 064727-TR Part 1 Revised-ET, Parts 1-5; 064727b Parts 1-5 RED.

¹⁴⁰ SPOE00078820-00078851 RED2, pp. SPOE00078820-SPOE00078830.

¹⁴¹ Indictment, para. 161.

¹⁴² SPO PTB, para. 504.

¹⁴³ W04067; W03724; W02153.

¹⁴⁴ 076841-076856, paras 33-35; 085942-085979, paras 40-42; 075959-075992 RED, paras 49-56.

¹⁴⁵ 064727-TR Part 1 Revised-ET, p. 10, line 21 to p. 13, line 16; SPOE00078820-00078851 RED2, pp. SPOE00078822-SPOE00078823.

¹⁴⁶ 064727-TR Part 2 Revised-ET, p. 5, line 2 to p. 9, line 11; SPOE00078820-00078851 RED2, p. SPOE00078824.

¹⁴⁷ 064727-TR Part 3 Revised-ET, p. 6, line 24 to p. 7, line 12.

¹⁴⁸ SPOE00078820-00078851 RED2, p. SPOE00078825.

¹⁴⁹ 064727-TR Part 3 Revised-ET, p. 8, lines 10-13.

[REDACTED].¹⁵⁰ However, this is not mentioned in his SPO interview. Absent the ability to conduct a cross-examination, and given that W01914's allegations are so central to charged crimes but are lacking in corroboration from other witnesses, to admit these statements would be unduly prejudicial to the Defence.

75. The Defence has assessed the medical note provided to substantiate W01914's inability to provide testimony *viva voce*.¹⁵¹ The medical note states that W01914 is [REDACTED].¹⁵² However, the Defence appears not to have been provided with additional information [REDACTED] suggesting that W01914 would be unfit to testify. Given the fundamental importance of his testimony to the trial, additional information should have been disclosed to the Defence to substantiate W01914's medical condition.

76. Finally, the Defence notes that in W01914's statement, he emphasised, "[REDACTED]."¹⁵³ This suggests that W01914 would be motivated *not* to testify in-person. The Defence considers that, absent specific details provided by a psychologist, and given the singular importance of the information provided by the witness, the Panel lacks complete information regarding W01914's ability to testify.

77. Regarding the associated exhibits, the Defence acknowledges that these amount to an inseparable and indispensable part of W01914's statements. Were the Panel to admit W01914's statements, the Defence does not object to their admission.

IV. CONCLUSION

¹⁵⁰ SPOE00078820-00078851 RED2, p. SPOE00078826.

¹⁵¹ Motion, para. 58.

¹⁵² 111210-111211-ET, p. 111211.

¹⁵³ 064727-TR Part 5 Revised-ET, p. 6, lines 13-14.

78. For the above, the Defence respectfully requests that the Panel dismiss the Motion.

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Respectfully submitted on 8 March 2024



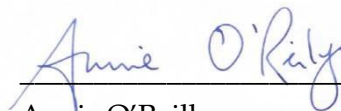
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