

What does success look like?

Why Sri Lankan torture survivors want an internationalised justice process

Sri Lanka is at a crossroads in the quest for accountability for torture and other serious human rights abuses committed during the country's civil war (2002-9) and its aftermath. This briefing addresses the question of "what success looks like" for the internationalised justice process promised by the Sri Lankan government, from the perspective of Sri Lankan torture survivors in treatment at Freedom from Torture.

We offer it as a contribution to the consultation process announced by the government and hope it will be used to strengthen the justice process and ensure its credibility, especially among survivors.

### **BACKGROUND**

In September 2015 the UN Office of the High Commissioner for Human Rights (OHCHR) released the report of its major investigation into serious human rights abuses and associated crimes by both sides to the civil war and during its aftermath.

Many brave survivors and witnesses came forward to provide evidence and the UN has publicly paid tribute to their courage in doing so despite the trauma they have suffered and pressures and intimidation they faced.

Freedom from Torture also provided the UN investigators with a systematic review of extensive forensic evidence relating to 148 cases of torture perpetrated in Sri Lanka after the end of the civil war and documented by expert doctors in our Medico-Legal Report Service. We published this evidence in our report Tainted Peace: Torture in Sri Lanka since May 2009.

The UN investigation exposed "patterns of persistent and large scale violations" of international human rights and humanitarian law in Sri Lanka, including "particularly brutal use of torture by the Sri Lankan security forces, particularly in the immediate aftermath of the armed conflict when former LTTE members and civilians were detained en masse".

The UN concluded that there are "reasonable grounds to believe that this torture was committed on a widespread scale" in violation of Sri Lanka's international law obligations and potentially amounting to crimes against humanity or war crimes.

Any crimes need to be established by a court of law, but the UN noted that impunity remains "deeply embedded in Sri Lanka" despite the change of government in January 2015. For this reason, the UN High

Commissioner for Human Rights recommended that Sri Lanka create a **hybrid special court**, integrating international judges, prosecutors, lawyers and investigators. The High Commissioner emphasised that:

"Such a mechanism will be essential to give confidence to all Sri Lankans, in particular the victims, in the independence and impartiality of the process, particularly given the politicization and highly polarized environment in Sri Lanka."

This reflected Freedom from Torture's calls in Tainted Peace, based on discussions with Sri Lankan survivors of torture in treatment with us, for an accountability process including strong international participation at every stage and level. Survivors we have engaged with have been clear that this is the only way that they would be able to place trust in the process.

The new Sri Lankan leadership responded constructively to the UN report and worked with member states of the UN Human Rights Council to agree a consensus resolution recognising that accountability is essential to uphold the rule of law and build the confidence of the Sri Lankan people in the justice system and affirming "the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators".

Sri Lanka's Foreign Minister Mangala Samaraweera promised "a wide process of consultations involving all stakeholders, including victims" for the truth, reconciliation and justice mechanisms that Sri Lanka

will establish, including a judicial mechanism with special counsel to address the problem of impunity for human rights violations.

In its October 2015 resolution on Sri Lanka, the UN Human Rights Council also emphasised the importance of ensuring inclusion of victims and civil society, including non-governmental organisations, from all affected communities in the design and implementation in all the processes of truth-seeking, justice, reparations and guarantees of non-recurrence.

Freedom from Torture and Survivors Speak OUT believe it is vital that the voices of torture survivors remain at the heart of this process which is why we have worked with survivors to facilitate and present their insights on what is needed for the justice process to be credible and effective as a means of ensuring long-term stability and reconciliation in Sri Lanka.

### WHOSE VOICES ARE REPRESENTED HERE?

The views expressed in this briefing are those of a group of eight Sri Lankan survivors of torture who are in treatment with Freedom from Torture. All eight of these survivors are men. They are part of a wider group of Tamil clients, including women, who have chosen to make sustained contributions to Freedom from Torture's work to support accountability for torture committed in Sri Lanka.

This briefing draws on our longer term engagement with this wider group on accountability issues as well as two recent workshops for members of the group to discuss "what success looks like" for Sri Lanka's internationalised justice process, from their own perspectives.

Both of the recent workshops were co-facilitated by Survivors Speak OUT (SSO), an activist network set up by and for former treatment clients of Freedom from Torture to speak out against torture and its impacts. Contributing to these debates is a means for these survivors to demand justice for themselves and other human rights abuse survivors and stand up against torturers who sought to make them silent.



A Tamil woman sits on a bus in Kilinochchi, Sri Lanka (Photo: Will Baxter)

### TORTURE SURVIVOR PERSPECTIVES ON THE CURRENT HUMAN RIGHTS SITUATION IN SRI LANKA

"Everyone could say there is a new government, but there have only been a few changes of faces at the top. Rape, torture and kidnapping are still happening, nothing has changed"

The group remains highly concerned about ongoing human rights violations in Sri Lanka, including evidence of torture since the change of government in January 2015 published by Freedom from Torture and reports from family members and other contacts in Sri Lanka and from various media sources.

They acknowledge positive steps taken by the new government, including commitments it made in Geneva to deliver justice, but warn that few reforms have been implemented yet.

"Everything is just by words and nothing is by action"

The group describes ongoing oppression at the community level in Tamil populated areas, especially

in the north and east of the country. While they welcome the return of some lands seized by the military, they say the army still dominates swathes of territory and the Criminal Investigation Department (CID) continues to operate a powerful surveillance network in villages. Peaceful political activity remains difficult.

"If anyone wanted to protest against the government they would not be allowed. The CID is monitoring, following to see who is getting involved in these actions"

Some members of the group report that the CID continues to harass and intimidate members of their families in Sri Lanka.

"The CID is still visiting houses... checking phones, looking at caller IDs, seeing if there are any international calls"

# IMPACT OF PRESIDENT SIRISENA'S RECENT REMARKS ABOUT INTERNATIONAL INVOLVEMENT IN THE JUSTICE PROCESS

At our first workshop the group pointed out that Sri Lankan governments have a bad habit of breaking promises made on the international stage and queried whether the new government would be any different. They warned that Sri Lankan politicians can be "cunning like foxes" and the international community must be vigilant to ensure the commitments made in Geneva are honoured fully.

Their worst fears appeared to be confirmed when on 21 January 2016, just days before our second workshop, President Maithripala Sirisena told the BBC that he would "never agree to international involvement in this matter" and that Sri Lanka has "more than enough specialists, experts and knowledgeable people in our country to solve our internal issues".

"Last time you showed President Sirisena's picture and I mentioned I didn't trust him at all... Now he decides he won't allow international involvement in the justice process. He has done exactly the same as our previous President"

"We have a Tamil saying that when you boil the milk and it is rising up, the cat comes and knocks it over. Everything was coming to a head on justice and Maithri has knocked it over"

"Maithri Sirisena knows what the outcome will be if international judges are involved. He is in a position to protect people who made the mistakes" "If President Sirisena is commenting to the international community like this - saying one thing and then another - just imagine what this means for an internal justice process"

Prime Minister Ranil Wickremesinghe subsequently told Channel 4 News that in fact international

involvement in the justice mechanism is "not ruled out", prompting a joint statement from 144 Sri Lankan civil society signatories calling on the government to issue a policy statement clarifying its position on the Human Rights Council resolution, and particularly its stance on the commitment to launching a hybrid justice process.

## EXPECTATIONS OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS

"Without UN involvement there will be no permanent resolution for the Tamil people"

There was a consensus in the group that the UN High Commissioner for Human Rights, Prince Zeid Ra'ad Al Hussein, should visit Sri Lanka to deliver a strong message to the President and Prime Minister about the need for Sri Lanka to comply with the commitments it made to the UN Human Rights Council and the consequences if it fails to do so.

"I want Prince Zeid to go 100%. We made a mistake before when [UK Prime Minister] David Cameron wanted to visit. I was one of those who argued he shouldn't go... but the benefits the Tamil people received afterwards were immeasurable"

"When Prince Zeid visits, he should tell the President that all help from the UN will stop if Sri Lanka doesn't comply with what the Human Rights Council has said"

The group wishes the High Commissioner to visit Jaffna, the Vanni and Batticaloa to speak, without any interference by the military, with people who are still affected by the legacy of the conflict and ongoing repression, ideally in their homes where they will be more free to share their views. They expressed concern that if the High Commissioner's programme is entirely shaped by the government, he will see a distorted picture of the current reality of the day-to-day life faced by the Tamil community.

Among other things, they want the High Commissioner to explore during his visit how the UN can play

a direct role in ensuring safety for survivors wishing to provide evidence in the internationalised justice process.

Regular UN oversight of the human rights situation is especially important to the group because of the catastrophic consequences of the UN's withdrawal from the war zone towards the end of the civil war and the opportunity this afforded for the government to dispose of war crimes evidence.

"After 2009, Sri Lanka didn't allow any of the international organisations to give their helping hands to the people because they didn't want the international community to know what happened. They wanted to destroy evidence and attack victims"

The group hopes that any visit by the High Commissioner will be followed by missions to Sri Lanka by other international human rights monitors.

"It's not just Prince Zeid's visit that will help the people. We need more international experts to visit to help understand what is happening in Sri Lanka"

Freedom from Torture is calling on the UN Special Rapporteur on Torture and the UN Secretary-General's Special Representative on Sexual Violence in Conflict to arrange to visit Sri Lanka as quickly as possible to raise with the government these reports of ongoing torture, including sexual torture, in peacetime Sri Lanka and devise a strategy to end these practices.

# WHY JUSTICE FOR TORTURE SURVIVORS IS IMPORTANT FOR THE FUTURE OF SRI LANKA

The vital importance of justice is a recurring theme in discussions we have with torture survivors from Sri Lanka and many other parts of the world. We asked this group why justice is so important to them. They provided a range of views but most stressed the value of justice as a safeguard against recurrence of widespread torture in Sri Lanka.

"Justice is important so that the things that happened to survivors of torture don't happen again"

"If the people who committed these mistakes are punished they will be scared to commit the same mistakes again" The group also emphasised the intrinsic value of truth-telling as a way of exposing and validating their experiences. They expressed hope that this would help peace-building and lay groundwork for a sustainable political settlement for the Tamil people.

"One day if the justice process happens, the international community will know what happened and there will be a permanent resolution for the Tamil people"

# WHAT ARE THE CRITICAL SUCCESS FACTORS FOR THE INTERNATIONALISED JUSTICE PROCESS?

The following six critical success factors emerged during our two workshops with the group about the internationalised justice process promised by Sri Lanka at the UN Human Rights Council.

1) Justice and a political settlement for the Tamil people must go hand in hand

The group discussed the risk of a political settlement being offered in lieu of or as an excuse for deferring the justice process. They feel strongly that both are needed and both are needed now. As one member of the group said "It is like a mango tree - if you are going to shoot the mango, they have to fall in pairs".

"If the government of Sri Lanka wanted to give rights instead of justice, they would have done this 30 years ago. It will never happen. We need to have the justice process, without excuse"

"We've had 30-35 years of this history, with so many changes in the political

leadership and in policies... but none has given a resolution on the rights of the Tamil people. We want to emphasise that people need to be punished but the main point is we need to get our rights sorted out"

The group hopes that the constitutional reform process being led by the new government will recognise that Sri Lanka is a country of diverse cultures, all of which much be respected equally. They view this as an important means of safeguarding the peace.

 A majority of the judges must be international and half of the domestic judges must be chosen by the Tamil community

In September 2015, following discussions with our Sri Lankan clients, Freedom from Torture and the Survivors Speak OUT network travelled to Geneva to emphasise to member states of the Human Rights Council that only an internationalised justice process would win the confidence of survivors.

#### Pressure for an internationalised justice process

Freedom from Torture recommendation in our Tainted Peace report, informed by the views of Sri Lankan torture survivors in treatment with us:

"In order to satisfy the international community and win the confidence of victims, including those from the Tamil minority, the process must include strong international participation at every stage and level".1

Recommendation of the UN High Commissioner for Human Rights:

"The High Commissioner remains convinced that, for accountability to be achieved in Sri Lanka, it will require more than a domestic mechanism. Sri Lanka should draw on the lessons learned and good practices of other States that have succeeded with hybrid special courts, integrating international judges, prosecutors, lawyers and investigators. Such a mechanism will be essential to give confidence to all Sri Lankans, in particular the victims, in the independence and impartiality of the process, particularly given the politicization and highly polarized environment in Sri Lanka." 2

Consensus resolution of the UN Human Rights Council supported by Sri Lanka:

"The Council... Welcomes the recognition by the Government of Sri Lanka that accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the justice system... and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators".3

Freedom from Torture, Tainted Peace - Torture in Sri Lanka since May 2009 (August 2015), page 66. A/HRC/30/61, para 88. A/HRC/RES/30/1, para 6.

The group made clear at our workshops that they had initially wanted a purely international justice process, for example trials at the International Criminal Court. They acknowledged, however, that this would not have been acceptable to the Sri Lankan government and powerful states that have traditionally backed it on these matters. In this light, the group regards the hybrid model recommended by the UN High Commissioner for Human Rights, and affirmed by the Human Rights Council, as a "good compromise".

"All the Tamil people have been asking for international justice. We don't have trust in local justice. What the Human Rights Council has recommended is good"

"In reality when we were talking about international justice, China and Russia opposed it"

"Initially all the Tamil people wanted international justice but Sri Lanka has always said it will be national; rather than that happening, at least this is better than having domestic justice"

The fact that the hybrid model was always a compromise is one reason why the recent backtracking by President Sirisena on the involvement of international judges (see above) is seen by these torture survivors as such a betrayal.

The group remains adamant that only an internationalised justice process is acceptable and makes the following specific recommendations:

#### Judges must be independent and impartial and perceived as such

The group emphasised the problem of entrenched corruption in the Sri Lankan legal system "even among Tamil judges" and discussed the importance of strong anti-corruption guarantees.

"When the Rajapaksa regime existed, whatever the judges decided had to reflect what Rajapaksa said. We need to make sure that the judges aren't saying what the government wants them to say"

"Independence and impartiality means the judges must not be corrupt"

#### A majority of the judges must be international and these international judges must not be of Sri Lankan origin

There was a lengthy discussion within the group about the exact proportion of international judges required for them to trust the process, with views ranging from 50% to 90%. There was a consensus, however, that anything less than 50% would be unacceptable.

The group also made clear that the international judges must not be of Sri Lankan origin.

#### Half of the domestic judges must be selected by the Tamil community

Agreeing a formula for selecting the domestic judges was identified by the group as of vital importance to the legitimacy of the internationalised justice process.

The group considers that half of the domestic judges should be chosen by the Tamil people. They say that discussions are already underway among Tamil leaders, including faith leaders, about suitable candidates. The candidates do not necessarily have to be Tamil but the group was clear that they must enjoy the trust of the Tamil community.

## 3) 'Big fish' responsible for torture and other international crimes must be tried

The group feel strongly that a credible justice process must include investigation and prosecution of the most senior leaders responsible for international crimes, as well as others who perpetrated crimes.

In addition to torture, specific abuses the group wants investigated include extrajudicial killings of those who surrendered during the final phase of the war, enforced disappearances, use of phosphorous and other banned chemicals during the war, and the bombing of safe zones.

### "We want to make sure that those who ordered the crimes are held to account"

Specific leaders they want to see tried include former President Mahinda Rajapaksa, his brother and former Defence Secretary Gotabaya Rajapaksa, former army chief Sarath Fonseka "and the leaders under them in the chain of command".

Although he currently enjoys broad immunity as an incumbent head of state, the group suggested that President Sirisena should also be investigated "because he was in charge during a period of the war". The group speculated that this could be one reason why the President is resisting participation of international judges.

The group was very clear that senior Tamils responsible for international crimes must also be prosecuted. They referred in particular to former LTTE commander Vinayagamoorthy Muralitharan, otherwise known as Colonel Karuna.

"Tamils responsible for international crimes also need to be prosecuted. Even though they are Tamil people, they did not stand with the Tamil people. Everyone who committed crimes needs to be punished"

Sri Lankan law does not currently provide for command or superior responsibility as a basis for criminal liability. The group is calling on the Sri Lankan government to implement the UN High Commissioner for Human Rights' recommendation for new legislation to be enacted to allow for this, with retroactive effect.

Commenting on this gap in Sri Lankan law, one member of the group noted "We are not surprised - the law is created to protect them [i.e. political and military leaders]".

#### The internationalised justice process must also cover torture <u>after</u> the end of the civil war in May 2009

The group considers that the internationalised justice process must include torture and other serious human rights violations committed after the end of the civil war in May 2009.

The strength of views among our Sri Lankan clients on this issue informed the following recommendation in our Tainted Peace report:

"The [accountability] process must cover torture and other serious human rights abuses and associated international crimes committed by both sides to the armed conflict and by the Sri Lankan government in the years of 'peace' since the fighting ended."

5) The safety of victims and witnesses must be assured via a specialist internationalised and gender-sensitive programme built into the justice mechanism

The group pointed out that reprisals against victims and witnesses are a longstanding problem in Sri Lanka as demonstrated by crackdowns on those who spoke out during separate visits to the north of the country in 2013 by UK Prime Minister David Cameron and the UN High Commissioner for Human Rights at the time, Navi Pillay.

A new victim and witness protection law was passed by the Sri Lankan parliament in 2015 but the government has already promised a review following extensive criticisms.

The group agrees with the UN High Commissioner for Human Rights that the hybrid justice process requires its own witness and victim protection programme. They consider that such a programme should be run by UN or other international staff because victims and witnesses do not trust the ability of the Sri Lankan government to ensure safety.

"In all the villages, there are intelligence officers who could be noting who is talking to investigators. This needs to be sorted out. A full safety net is required"

Specific recommendations made by the group include:

 All the army camps, including at village level, must be decommissioned

"The reason we want the camps removed is that the army will threaten people not

to participate, so they would be used to stop people giving evidence to the justice process"

- Any interviews with victims and witnesses in the community must take place when the army is not in the vicinity because they are known to be perpetrating violations still.
- Intermediaries should be used to gather evidence as an additional means of security.

"If a foreigner goes to a village to conduct an interview, everyone will know. A trusted intermediary should be used from the community to record the testimony and pass it to investigators"

 Survivors of torture should be involved in facilitating testimony from other victims and witnesses

"because they will understand and be trusted and would never tamper with the evidence"

The group pointed out that many Sri Lankan survivors of torture and other abuses living in exile have already provided detailed evidence to the UN and wondered if a careful process could be used to transmit this evidence to the hybrid justice mechanism. Any such process would require specific consent, navigation of confidentiality issues, and guarantees of safety for family members in Sri Lanka. The group is highly concerned about the risk for many who gave evidence of forcible removal back to Sri Lanka and called for safeguards against this.

The group also suggested that asylum should be provided abroad for victims and witnesses who are most at risk.

"Whether providing evidence inside or outside Sri Lanka, our identities must be protected"

Although this group comprised only men, there was much discussion of the special needs of female victims and witnesses including vulnerabilities arising from the stigma attached to sexual violence and

ongoing security challenges for women and girls, including widows of the disappeared.

"If the CID visits a widow's house, her neighbours will not treat her the same afterwards because they will assume she has been violated sexually"

"A young girl who has been raped by the military or intelligence agents doesn't want to say because she can be separated from her community"

"Sexual violence allegations should be investigated with victims and witnesses in a secret way, on a secret basis"

The group acknowledged that sexual violence is also perpetrated against many men and boys in Sri Lanka and that, even if "100% safety is guaranteed, survivors [male or female] could be reluctant to disclose sexual violence".

More than seventy percent of the 148 men and women whose cases were documented in our Tainted Peace report disclosed different forms of sexual torture (71%, 105 people), including rape in many cases.

### 6) Redress must be delivered to survivors

The right to redress for victims and survivors is very important to the group. They wish to see convictions of those guilty of torture and other international crimes, compensation for victims including families of the disappeared and assistance to restore their livelihoods (e.g. via grants to start businesses), and guarantees of non-recurrence.

"I have seen many videos of widows pleading for help, for example some money to buy a sewing machine or chickens to start a farm, so that they can look after themselves. When I see this, I cry because I am not in a position to help"

Against the backdrop of the Sri Lankan government's commitment in Geneva to expand provision of psychosocial support for victims, the group discussed the right to rehabilitation guaranteed by the UN Convention Against Torture. They specifically mentioned

the importance of access to therapeutic services, such as those they are receiving at Freedom from Torture, and a "sustainable social service" to support communities on an ongoing basis. They also talked about the needs of disabled survivors for medical assistance, including in some cases prosthetic limbs.

"There are people, mainly from the LTTE, who lost their legs and sustained other serious injuries in the war. People are scared to talk to or help them because they are worried about reprisals from the intelligence agencies. Some are ending their lives because they cannot access what they need"

"Help needs to be tailored to people's skills and experience. With the right help, the memories of torture will recede with time"

Help from the international community will be welcomed but must be delivered fairly and safely. Concerns were expressed about surveillance activity conducted by the Sri Lankan authorities under the guise of delivering aid.

"After the tsunami [in 2004] many international agencies came to Sri Lanka and helped to bring aid over two years. The same should have happened after 2009. If it had, people's lives would be very different now"

"If any international organisation wishes to provide help, this should be delivered directly and not through the government because it would swallow up so much of the resources and would interfere with who benefited. My family was on a list to receive help from the Indian government in building houses for victims, but they were taken off the list because of alleged LTTE connections. So that assistance programme was not impartial"

The group also emphasised the importance, from a wider perspective on "justice", of a sustainable political settlement for the Tamil people to guarantee respect for their rights in the future (see above), and the return of stolen land and other assets.

### **CONCLUSION**

Since 2009 the international community has been calling for a credible and effective justice process for serious abuses committed during the Sri Lankan civil war and beyond. Between 2009 and 2015, the Sri Lankan government failed to deliver such a process.

The international community therefore warmly welcomed the new Sri Lankan leadership's public acknowledgement that accountability is essential to reconciliation and the rule of law and for building the confidence of all communities in Sri Lanka in the justice system. The government agreed, via a consensus resolution at the UN Human Rights Council, on the importance of involving international judges and other personnel in a Sri Lankan justice mechanism to

investigate allegations of human rights and international humanitarian law.

The government also promised to consult widely on this justice mechanism, including among survivors. Amidst mixed messages from the President and Prime Minister about whether Sri Lanka will honour the agreement reached in Geneva, this briefing outlines six critical success factors for the justice process from the perspective of survivors of torture in treatment with Freedom from Torture. Among the other factors set out, these survivors are clear that for the process to be credible and for it to contribute to long-term peace and stability in Sri Lanka, the participation of international judges is non-negotiable.



A billboard featuring Sri Lanka's then President Mahinda Rajapaksa stares down at passersby on a street in Jaffna (Photo: Will Baxter)

#### Freedom from Torture

Freedom from Torture is the only UK-based human rights organisation dedicated to the treatment and rehabilitation of torture survivors. We do this by offering services across England and Scotland to around 1,000 torture survivors a year, including psychological and physical therapies, forensic documentation of torture, legal and welfare advice, and creative projects.

Since our establishment in 1985, more than 57,000 survivors of torture have been referred to us, and we are one of the world's largest torture treatment centres. Our expert clinicians prepare medico-legal reports (MLRs) that are used in connection with torture survivors' claims for international protection, and in research reports, such as this, aimed at holding torturing states to account. We are the only human rights organisation in the UK that systematically uses evidence from in-house clinicians, and the torture survivors they work with, to hold torturing states accountable internationally; and to work towards a world free from torture.

#### Survivors Speak OUT network

Survivor Speak OUT (SSO) is the UK's only torture survivor-led activist network and is actively engaged in speaking out against torture and about its impacts. Set up by survivors of torture, for survivors of torture, SSO uses first-hand experience to speak with authority for the rights of torture survivors. The network is supported and facilitated by Freedom from Torture and all network members are former Freedom from Torture clients.

To find out more about Freedom from Torture and the Survivors Speak OUT network please visit www.freedomfromtorture.org

Or follow us on Twitter @FreefromTorture and @SSOonline

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#### Tainted Peace: Torture in Sri Lanka since May 2009



This briefing follows our publication "Tainted Peace: Torture in Sri Lanka since May 2009" which exposed entrenched torture practices since the end of the Sri Lankan civil war and argued that torture eradication is one of the most urgent tasks facing the new leadership of Sri Lanka.

Download the full publication at: www.freedomfromtorture.org/srilanka-report

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