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Alexandra Tarzikhan
alexandratarzikhan@gmail.com

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THE EUROPEAN UNION AGENCY FOR ASYLUM: A PROMISING IMPROVEMENT OR VESTIGE OF THE EUROPEAN ASYLUM SUPPORT OFFICE?

By Alexandra Tarzikhan¹

ABSTRACT

Refugee Status Determination (“RSD”) is the process by which States or international entities determine who is offered international protection, which status they receive, and who is excluded from protection under Article 1(F) of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”). There is much evidence, however, to suggest that recognition processes are beset with problems and that States need consistent and fair institutional processes to conduct this determination. In over 50 countries, it is the UN Refugee Agency (“UNHCR”) that conducts the RSD, including when States are not a party to the Refugee Convention and/or where they lack a fully functioning national asylum procedure. However, regional bodies like the European Asylum Support Office (“EASO”) are playing an increasingly important role in influencing national asylum decisions in Europe. EASO has been criticized by lawyers and refugee advocates for overstepping its mandate and failing to meet fundamental standards for asylum interviews among other broader human rights violations. In November 2021, the European Council adopted a regulation establishing the European Union Agency for Asylum (“EUAA”), which aimed to turn EASO into a fully-fledged agency. On January 19th, 2022, the new agency replaced EASO. The focus of this paper will be to assess the critiques against the expanded role of EASO by examining, as a case study, its role in the

“hotspots” in Greece and to determine if the new EU Agency for Asylum provides any room for improvement.

INTRODUCTION

According to the 1951 Refugee Convention, a refugee is “a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him—or herself of the protection of that country, or to return there, for fear of persecution”.¹ To be recognized as a refugee under international law, an individual undergoes an administrative and legal procedure known as the Refugee Status Determination (“RSD”) process.² The primary difference between the terms “asylum-seeker” and “refugee” is that asylum seekers are in the process of seeking international protection and have not been recognized as having a refugee claim yet.³ This means that “not every asylum seeker will ultimately be recognized as a refugee, but every recognized refugee is initially an asylum seeker.”⁴ States have the primary obligation to determine an asylum seeker’s refugee status. In countries that are not signatories to the Refugee Convention or that do not have the legal frameworks or institutional capacity to administer the RSD process, UNHCR can step in.⁵ In addition to international law, the RSD

¹ Alexandra Tarzikhan has a dual degree in Law and a Master's Degree in Public Health from Northeastern University School of Law and Tufts University School of Medicine (Dec '18). She received a Bachelor of Science degree in Health Sciences with a minor in Law and Public Policy from Northeastern University in May 2015. From September 2019 until September 2022, Alex served as the Schuette Clinical Fellow in Health and Human Rights and was associated with the Center for International Human Rights (CIHR) at Northwestern Pritzker School of Law, where she designed and supported health and human rights projects around the world through the Northwestern Access to Health Project. Before joining the CIHR, she worked in refugee camps in Lebanon, Jordan, and Greece. In 2018, she gave a TEDx talk at Tufts to raise awareness and humanize the refugee crisis and uses her social media page called Meet a Refugee to share refugee stories. Alex grew up in Syria and speaks Arabic, English, French, and Spanish. Her interests lie in the fields of Human Rights, Global Health, Migration, and Climate Change. All views presented in this article are her own.

process can be defined through national legal instruments.⁶ A variety of procedures exist to assess asylum seekers' individual claims and examine their reasons for fleeing their country of origin. This has resulted in national RSD systems that lack uniformity and in countries having different systems and standards for judging who should be granted legal protection.⁷ This is problematic for the European Union ("EU") which strived to develop a Common European Asylum System ("CEAS") in 1999 to govern the EU's asylum procedures in a uniform manner.⁸ The goal was to harmonize procedures between Member States when applying their domestic RSD systems and establish a more comprehensive asylum legal framework in the EU.⁹ In theory, all EU Member States are bound by the CEAS and should examine asylum applications in a uniform manner so that no matter the Member State an applicant applies from, the outcome of their case will be similar.¹⁰ However, one of the recent criticisms of the RSD process and of the CEAS is tied to the variation in the recognition rates of asylum seekers.¹¹

According to The New Humanitarian, a news agency focused on humanitarian crises, "the EU's average approval rate for asylum applications in 2014 was 45 percent, but Sweden approved 77 percent of applications and Hungary just 9 percent. Greece only recognised 15 percent of applicants while Bulgaria recognised 94 percent."¹² Recognition rates also vary between Member States based on the asylee's country of origin. For example, in 2018, Syrians and Eritreans were issued more positive first-instance decisions than applicants from Bangladesh or Nigeria.¹³ Furthermore, over the last few years, mixed migration flows have not been evenly distributed across the EU. This is especially the case for Greece, a country that has had to bear a disproportionate share of the influx of refugees. Yet, Member States have a shared responsibility to welcome asylum seekers in a dignified manner, to ensure they are treated fairly, and to apply similar standards for the review of cases.

In an effort to improve the implementation of the CEAS, the European Asylum Support Office ("EASO") was established to enhance practical cooperation on asylum matters amongst Member States and ensure that countries fulfil their European and international obligations under the Refugee

Convention.¹⁴ As such, EASO was designed to streamline national asylum systems and consolidate the CEAS, monitor EU asylum instruments given changes in the migration landscape, and guarantee access to the asylum procedure.¹⁵

In 2011, a few months after the establishment of the Greek Asylum Service¹⁶ ("GAS"), EASO signed an Operating Plan with Greece. EASO asylum support teams were sent to help the government build a more robust and improved asylum and reception system.¹⁷ This decision came following the European Court of Human Rights ("ECtHR") case of *M.S.S. v. Belgium and Greece*, which highlighted the shortcomings of the Greek asylum system.¹⁸ The case concerned an Afghan asylum seeker who was arrested upon illegally entering the EU through Greece and asked to leave the country. Instead of applying for asylum in Greece, the petitioner continued to Belgium and tried to claim asylum there.¹⁹ The Court held that deplorable asylum reception conditions in Greece and its deficiencies in the asylum procedure coupled with the risk of the applicant's expulsion to Afghanistan without any serious examination of the merits of his claim amounted to the violation of several key articles of the European Convention on Human Rights.²⁰ The Court also decided against Belgium for having transferred the applicant back to Greece, where he was at risk of deportation.²¹ Following the *M.S.S.* ruling, "EASO's emergency support to Greece [became] one of the agency's main focuses" and it deployed several teams to help the government make adjustment to its asylum procedure.²² Furthermore, the *M.S.S.* judgment revealed that the CEAS could not be implemented properly without the compliance of EU asylum standards and international human rights law by Member States. This is where EASO would step in to provide Member States with tools and trainings and act as a monitoring body of the CEAS to ensure that EU asylum standards were uniformly applied throughout the EU. As such, EASO continued to provide operational support to Member States.

The large-scale arrival of migrants and asylum seekers in 2015 put a strain not only on many Member States' national asylum systems, but also on the CEAS as a whole. The volume and concentration of arrivals exposed in particular the weaknesses of the Dublin System, which determines the Member State responsible for examining an asylum

application based primarily on the asylum seeker's first point of irregular entry.²³ In an effort to curb migration flows and with the aim of assisting Member States faced with higher numbers of arrivals, the EU put in place the "hotspot approach" in June 2015.²⁴ These "hotspots," which are only hosted in Greece and Italy, were established to help these countries quickly register and process migrants, as well as provide support to relocation and returns.²⁵ The "hotspots" were intended as first reception facilities; as transit reception areas rather than prolonged accommodation facilities.²⁶ They were established with the aim of ameliorating coordination efforts between national officials and EU agencies at the EU's external borders.²⁷ In reality the "hotspots" functioned as detention centers aimed at enforcing the EU's containment policy at its borders and deterring asylum seekers from reaching it.²⁸

After September 2015, and after the expansion of the "hotspots" on the Aegean islands, EASO began assuming more salient responsibilities such as providing more technical support to GAS and jointly processing asylum cases.²⁹ In March 2016, the EU-Turkey Statement, also commonly known as the EU-Turkey Deal, was put into effect.³⁰ It was a pivotal agreement between the EU and Turkey that changed the landscape on the Greek "hotspots" and led to an expanded involvement of the EASO at the sea borders. This new reality triggered major changes such as the imposition of geographic restrictions on the islands to all new arrivals (whereby asylum seekers who arrived on the five Aegean islands designated as "hotspots" were banned from moving to the mainland) and the amendment of the Greek asylum legislation.³¹ Moreover, EASO became responsible for conducting admissibility interviews in the application of the "safe third country" concept, recommending asylum decisions, and conducting vulnerability assessments.³²

Now, six years on, the hardships of refugees on the Aegean islands persist and the standards of refugee protection continue to deteriorate.³³ However, while much has been written about the implications of the EU-Turkey Deal on the living conditions of the refugees stranded on the islands, there is relatively little discussion of the increased role played by EASO as a result of the deal. EASO's shortcomings in relation to its operation in Greece include its

extensive involvement in the asylum procedure and violations of fundamental standards for asylum interviews.³⁴ The migration crisis in Europe, which disproportionately affected frontline Member States like Greece and Italy, highlighted that the existing asylum infrastructure was ill-equipped and in need of reform.³⁵ Under the previous asylum system, asylum seekers were not treated uniformly across the EU and the proportion of positive asylum decisions in different countries varied greatly.³⁶ The Member State through which the asylum applicant first entered Europe is generally considered the State responsible for adjudicating that national's asylum claim.³⁷ However, asylum seekers claimed asylum in places other than the country of First Asylum and subsequently risked refusal, given the variability of reception conditions and asylum procedures across the EU.³⁸ Now that the regulation for the European Union Agency for Asylum ("EUAA") has been adopted,³⁹ it will be important to ensure that greater rights protections are included and the pitfalls of EASO do not reoccur. Section A discusses the criticisms of EASO's expanded role in the Greek hotspots, Section B provides an overview of the legal barriers faced by refugees in the Greek hotspots, and Section C offers several recommendations for alternative policies.

I. ANALYSIS

A. EASO'S FAILINGS REGARDING REFUGEES IN GREEK HOTSPOTS

Increased migration flows led to a shift in the EU's asylum policy. EASO's mandate was initially centered around operational support activities. As the number of arrivals on the Greek hotspots increased, the role of EASO and the scope of its activities began to expand. The following section describes the unfolding role of the agency, its failures, and its influence on the national RSD process in Greece.

i. EASO is overstepping its own mandate

When EASO teams were initially deployed to Greek hotspots, their roles were to assist GAS in setting up its procedures and providing expertise in the management of asylum applications.⁴⁰ As enumerated in its founding regulation, EASO's function was to strengthen practical cooperation on

asylum between EU Member States.⁴¹ The agency's duties, which are listed under Chapter 2 of the regulation, consist of providing information exchange opportunities of best practices in asylum processes between the Member States, maintaining accurate and up-to date information on countries of origin of persons applying for international protection, providing relocation support to Member States, developing training modules.⁴² Of particular interest is EASO's role vis-à-vis Member States subject to particular pressure, like Greece, which was characterized by the sudden arrivals in large numbers.⁴³ In these contexts, EASO could provide support by gathering information to assess needs, analyze data on sudden arrivals, and collect "information relating to the structures and staff available, especially for translation and interpretation, information on countries of origin and on assistance in the handling and management of asylum cases."⁴⁴ However, EASO's responsibilities began to significantly extend beyond its original role. The agency quickly began undertaking a broad scope of hands-on activities in Greece that went beyond its mandate.⁴⁵

In Greece, the establishment of the "hotspots" was governed by Law 4375/2016 which envisioned an expanded role for EASO in the inadmissibility interviews without specifying specific responsibilities.⁴⁶ In addition, this law, which was amended in June 2016, granted EASO officials with the authority to conduct merit interviews of applicants in the context of the exceptional procedure applied at the border.⁴⁷ EASO staff became responsible for conducting admissibility interviews, drafting opinions, and providing GAS with recommendations.⁴⁸ The EASO staff would set the tone for the interview, explain the procedure to the applicant, and exercise control over the interpreter.⁴⁹ After the interview, EASO staff prepared the relevant Opinion (also known as "Concluding Remarks") and recommended a decision to GAS.⁵⁰ EASO's concluding remarks in asylum interviews specified whether the "safe third country" concept could be applied in a particular case, thereby providing the ground on which the asylum seeker's application could be rejected as inadmissible.⁵¹ EASO's heightened role in processing asylum claims created fundamental rights challenges.

While in Lesbos as a Program on Human Rights and the Global Economy Fellow working for the Hebrew

Immigrant Aid Society (HIAS), the author witnessed firsthand how much GAS relied on EASO's record without posing any direct questions to the applicant. In fact, GAS often relied heavily on EASO's recommendations due to workload pressures. Under those circumstances, GAS inevitably relied on EASO to conduct the interview itself and its final recommendation on admissibility. Asylum seekers need to be treated equally regardless of who is conducting their interview. Refugee advocates and civil society groups reported several drawbacks on EASO's approach in assessing vulnerability and conducting admissibility interviews.⁵² Advocates claim that conducting several processes by EASO in English limits the ability of Greek lawyers to advocate for their clients' rights. For example, EASO's advisory opinions on admissibility and the interviews it conducts are in English and are not translated into Greek. Therefore, EASO officers exercised de facto power on decisions in relation to applications for international protection by conducting admissibility interviews and making recommendations, which was outside of their original mandate. Subsequently, the European Center for Constitutional and Human Rights filed a complaint against EASO within the European Ombudsman.⁵³ The complainants argued that EASO was acting outside of the scope of its mandate by deciding the merits of admissibility interviews and that EASO violated Article 41 of the Charter of Fundamental Rights and its own guidelines by acting in this way.⁵⁴ Although the Ombudsman could not effectively rule on these issues, it did express concerns⁵⁵ over the extent of EASO staff's involvement in assessing asylum applications in the "hotspots."

ii. EASO is failing to meet fundamental standards of fairness⁵⁶

The admissibility interviews conducted by EASO caseworkers failed to respect core standards of fairness.⁵⁷ EASO's influence and failures manifested in the lack of a thorough investigation of vulnerability.⁵⁸ During the author's time as a fellow from September to November 2017, EASO officers often stuck to a rigid questionnaire without giving the applicant sufficient opportunity to elaborate on their personal history of harm or persecution. Based on a series of EASO-conducted interviews that the author analyzed, there was an overwhelming number of

closed questions or inappropriately suggestive questions, and a failure to ask follow-up questions concerning the vulnerability of the applicant. As such, these interviews did not warrant a fair assessment of individual cases and lacked a critical approach as to whether Turkey qualified as a safe third country for the person concerned. It took an inquiry from the European Ombudsman for EASO to respond to these complaints, but they accepted the suggestions resulting from the inquiry.⁵⁹ Moreover, EASO officers failed to give applicants the opportunity to clarify inconsistencies between their statements and information from other sources. Yet these inconsistencies were systematically highlighted in EASO's concluding remarks to refute the applicant's account. In the most severe cases, the concluding remarks did not include crucial information on vulnerability expressly raised by the applicant. In sum, the interviews consistently failed to consider the individual experiences and vulnerabilities of the applicants.⁶⁰ This is particularly critical, given that these vulnerabilities could significantly impact the assessment of Turkey as a safe third country and corresponding exemptions from inadmissibility per Article 38 of the recast Asylum Procedures Directive.⁶¹ At the time, the law⁶² allowed persons recognized as "vulnerable" to be transferred to mainland Greece instead of having to stay in the "hotspots."

Moreover, in order to meet the needs in the "hotspots," EASO began employing additional staff to address major case-processing delays.⁶³ However, many of the newly recruited employees lacked the proper training and background needed to take on these roles. Without the proper legal knowledge, experience, and cultural competence, the already imperfect process suffered further. Additionally, EASO staff are not subject to UNHCR's quality assurance system since EASO has its own system.⁶⁴ Many of the lawyers with whom the author worked stated that EASO caseworkers often failed to maintain an unprejudiced, attentive, culturally sensitive and empathetic attitude, as required by EASO's Practical Guide for Personal Interviews.⁶⁵ This made applicants feel uncomfortable and unwilling to communicate. It also resulted in increasing loss of trust and anxiety, which were not conducive to an environment that encouraged the applicant to share a detailed and coherent account of their claim. The length of the interview itself, often

over several days, only exacerbated the harsh interview environment. These examples all show that the procedures followed by EASO in the "hotspots" was insufficient to meet the situational demands.

B. ADDITIONAL LEGAL BARRIERS FACED BY REFUGEES IN GREEK HOTSPOTS

Asylum seekers also faced other barriers when trying to access asylum procedures. Without proper information and support, there was a high risk that people's legitimate requests for asylum were rejected, and that they were sent back to life-threatening circumstances without an ability to be heard. Many concerns have been raised regarding gaps in the provision of information on legal issues and asylum procedures.⁶⁶ Throughout all procedures affecting asylum seekers, there was in general inadequate and insufficient information provided to them regarding their rights and situation. Materials used to disseminate information to applicants often did not include all relevant languages⁶⁷ and there was a constant lack of interpreters in the hotspots.⁶⁸ Additionally, there were significant gaps in legal assistance to asylum seekers.⁶⁹ The current wait times for asylum procedures remain long,⁷⁰ leaving people in a prolonged state of limbo regarding their claims as they wait in appalling and overcrowded living conditions.⁷¹

As stated above, an asylum seeker that was deemed to be "vulnerable" could be transferred to mainland Greece instead of having to wait in the "hotspots" for their claims to be processed. To be considered vulnerable, an asylum seeker would have to fall under one or more of the following categories:

[M]inors; persons who have a disability or suffer from an incurable or serious illness; the elderly; pregnant women or those having recently given birth; single parents with minor children; victims of torture, rape, or other serious forms of psychological, physical, or sexual violence or exploitation; persons with a posttraumatic disorder—in particular, survivors and relatives, specifically parents and siblings, of

victims of shipwrecks; and victims of human trafficking.⁷²

Reforms made to the International Protection Act (“IPA”), which went into effect in January 2020, severely restricted asylum seekers’ rights. The IPA limited asylum seekers’ access to protection and it removed people with posttraumatic stress disorder⁷³ and survivors of shipwreck from the list of vulnerable groups.⁷⁴ This law was in conflict with an EU directive intended to ensure fair asylum processing for all vulnerable populations.⁷⁵ Before its passage, the EU’s Asylum Procedures Directive prevented GAS and EASO from accelerating the processing of asylum seekers who were deemed “vulnerable.”⁷⁶ Despite practical difficulties in accessing legal aid and social assistance, this policy was intended to ensure that vulnerable individuals could have the ability to seek these services prior to lodging their asylum claims. Under the international protection law, the vulnerability of an asylum seeker is no longer considered when processing an individual’s asylum claim.

These barriers were further exacerbated during the COVID-19 pandemic.⁷⁷ Under the pretext of public health, Greece suspended the RSD registration process for a period of time during the pandemic.⁷⁸ The Greek authorities barred asylum seekers who were arriving illegally through the Mediterranean Sea from lodging their claims,⁷⁹ detained nearly 2,000 people in unacceptable conditions,⁸⁰ and used illegal operations to push back people attempting to enter Greece.⁸¹ Hearings for negative asylum decisions proceeded despite the inability of applicants to meet with their lawyers and obtain asylum files. Lawyers also reported being discouraged by EASO caseworkers from participating in their clients’ interviews due to social distancing requirements. Many months into the pandemic, Greece continued adopting a more restrictive approach to protection.⁸² As the new EUAA is established, closer attention should be directed towards ensuring that the RSD process in the “hotspots” is fair and adequate.

C. ALTERNATIVE APPROACHES: LOOKING AHEAD

i. The EUAA

A new independent body, the EUAA was put in place to standardize the asylum procedure across the EU Member States.⁸³ Its role will be to assist Member States in the registration of asylum seekers, examination of their applications, and refugee resettlement.

The new agency replaced EASO in January 2022, but getting to a uniform asylum system across Europe has been slow. The EUAA will have a budget of 172 million euros, will add 500 permanent employees to its existing staff and will have another 500 staff to be called in from a “reserve pool” of officials from Member States.⁸⁴ The agency has appointed a Fundamental Rights Officer who will guarantee that the rights of asylum applicants are safeguarded.⁸⁵ It will also allow non-governmental organizations to weigh in on important issues through a “Consultative Forum.”⁸⁶ In addition, a grievance and redress mechanism has been developed to address complaints that may arise.⁸⁷ However, it is yet to be seen how these changes will be implemented in practice.

ii. An alternative to the “hotspots” approach? A rights-based approach to identification and registration of asylum seekers

The identification and registration procedures in the “hotspots” should be conducted in a rights-sensitive manner by including physical and legal protections. Asylum seekers with negative RSD decisions must be treated humanely and in accordance with basic human rights. The “hotspot” model should be viewed as a temporary and more sustainable solutions for the reception, protection, and integration of refugees must be implemented. New arrivals should not be forced to stay in the “hotspots” for an extended length of time and if there are increases in the number of arrivals, contingency plans must be in place. There should also be a systematic approach to the early identification of vulnerabilities, including non-visible ones such as mental illnesses, and appropriate follow up on referrals must be ensured. Furthermore, a clear legal framework delineating the roles and responsibilities of the EU agencies and Member

States in the identification and registration process in the “hotspots” must be in place to help ensure access to asylum is safe and timely. Additionally, access to legal information upon arrival and free legal assistance at the appeal stage must be made available to all asylum seekers. Placing migrants and asylum seekers in detention should be seen as a last resort to be used only in strictly limited circumstances. Therefore, asylum access should be expanded using a rights-based approach in conducting identification and registration procedures.

iii. Access to fair and unambiguous asylum procedures

While many of these restrictive policies were introduced by the Greek government and the hotspots approach remains primarily a national identification and registration method, these procedures should be viewed in light of an EU-wide effort to curb migration flows into European countries. People seeking protection in Greece and in the EU more broadly must have access to a fair, effective and transparent asylum procedure. More robust procedures should be in place to permit the rapid and appropriate identification of persons in vulnerable situations and the full range of human rights protection needs. Given the ever-changing, opaque and inconsistently applied policies and practices, asylum seekers need to have meaningful access to information and legal assistance, provided in a language they understand. Applicants should be equipped with sufficient information on the asylum procedure in a sufficient period of time. Greece must fulfill its obligations under EU and national law regarding the provision of information and legal assistance to asylum seekers by allocating additional funding and hiring more lawyers, staff, and interpreters. The EU, in turn, has a responsibility to ensure that all Member States, including Greece, uphold national, EU, and international laws to protect the human rights of those seeking asylum.

iv. Improving the quality of RSD decision-makers

The rise in refugee arrivals on the Greek islands led to an urgency in hiring additional EASO case managers, many of whom were underqualified for their positions.⁸⁸ More than six years into the so-

called “migration crisis,” the situation in the “hotspots” can no longer be deemed a crisis and a long term strategy should be considered. A more strategic approach to hiring and training of EUAA staff should be implemented to take into account the shortcomings of EASO staff. Standards for qualifying for these roles should be reviewed by external agencies such as UNHCR. This approach ensures an objective evaluation of the new staff to ensure that they are fit to conduct asylum interviews. Given the importance of the individual’s statement in the asylum process, the quality of the interviewer as well as the competence of the staff are crucial to the outcome of the process. Frequent training of staff on cultural competency, trauma-informed interviewing techniques, and empathy responsiveness should be conducted. Finally, given the impact of the expansion of EASO’s role on the “hotspots,” the EUAA’s mandate should be clearly defined and monitored carefully.

II. CONCLUSION

The examination of the current legal framework regulating the functioning of the “hotspot” approach and the analysis of the actual role of EASO in relation to RSDs of asylum seekers merits greater attention and appropriate reform. EASO’s operation in the Greek hotspots has gone beyond the mandate envisaged in the regulation on which it was founded. As seen above, EASO’s involvement in the processing of applications for international protection in the Greek “hotspots” has resulted in strong discretionary and decision-making powers. Further core quality asylum interview standards have been frequently disregarded by EASO staff, raising serious concerns in relation to its capacity to process applications for international protection fairly. Now that the EUAA has been adopted, an alternative to the “hotspots” approach should be considered to guarantee that the rights of asylum seekers are upheld. Providing information about legal rights and access to counsel are paramount in ensuring that access to asylum is fair and unambiguous. Lastly, the quality of staff hired should be improved by adopting a more strategic approach to hiring and training. States must therefore implement consistent and fair institutional processes to conduct refugee status determination and consider alternatives to the “hotspots” approach.

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