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# PREVENTING PANDEMICS THROUGH THE RULE OF LAW STRENGTHENING COUNTRIES' LEGAL PREPAREDNESS FOR PUBLIC HEALTH EMERGENCIES

ISSUE BRIEF



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# EXECUTIVE SUMMARY

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Public health emergencies (PHEs) require a prompt and effective response at all levels: local, national, regional and global. Countries must be prepared well in advance, including legally, to ensure that systems for preventing, managing and responding to PHEs are in place and well-functioning, to support timely and effective action. In the context of PHEs, legal preparedness is the capability to map, develop, refine and use legal instruments that enable the implementation of capacities to prevent, detect and respond to infectious disease threats, and to do this across sectors.

The rule of law provides guidance and tools to strengthen States' legal preparedness as a critical capacity for PHEs. It offers governments a framework for taking action to design, implement and monitor laws and policies to better prevent, detect and respond to public health threats, in line with international norms and standards, such as the 2005 International Health Regulations (IHR). It also promotes the full development of core capacities and the effective implementation of IHR requirements at the national level, and enables countries' essential health functions. The rule of law fosters clear and transparent legal processes to identify roles and responsibilities in emergency prevention and response, and promotes accountability through monitoring, reporting and oversight mechanisms.

With its focus on promoting human rights, equality, justice and inclusion through the law, the rule of law also drives equitable, fair and sustainable public health measures that acknowledge and address the needs of all individuals during emergencies, especially the needs of those who are most vulnerable

and marginalized. It requires governments to consider existing and emerging inequalities when designing systems and mechanisms to prevent and manage PHEs, to mitigate the impact of outbreaks (especially on those who are most vulnerable), and to ensure just, equitable and inclusive measures for the recovery. Overall, the rule of law demands governments to respect, protect and fulfil civil and political rights, as well as economic, social and cultural rights in all actions taken to address PHEs.

Since the outbreak of the coronavirus (COVID-19) pandemic, the International Development Law Organization (IDLO) has built on its mandate to advance the rule of law to achieve sustainable development, and on its commitment to making laws and institutions work for people, by supporting countries to strengthen their national legal and policy frameworks on preparedness and response to PHEs. Together with global and national partners, IDLO has advocated for the role of the law in promoting better preparedness, both nationally and globally. Drawing on the experience of IDLO and partners, key building blocks of the rule of law have been identified to better prevent and respond to future pandemics and epidemics, and to ensure a response to PHEs that is based on the rule of law. These building blocks underpin a rule of law approach to PHE preparedness. They include effective legal frameworks for PHEs; functioning people-centred justice systems; legal protection for marginalized and vulnerable groups; multisectoral, whole-of-government and whole-of-society approaches to address PHEs; and sound national legal capacities.





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This analysis has led to a set of action-oriented recommendations for global health and development practitioners, and national and global policy-makers who are committed to strengthening national and global responses to public health crises. These stem from the application of a **rule of law approach to PHE preparedness** and aim to foster transparency and accountability in public health decision-making; eliminate arbitrariness in the application of emergency measures; enable improved access to justice; and provide a legitimate, effective and agile framework for the application of public health measures in critical times.

## Recommendations



**Safeguard access to justice during emergencies**, including transparent and accountable justice institutions; fair, effective and nondiscriminatory mechanisms to access justice and legal services (especially for women and girls, and vulnerable and marginalized groups); and investments to equip justice institutions to adequately address PHEs (e.g. in infrastructure, nondiscriminatory and accessible digitalization, and local capacities).



**Promote adherence to a human rights-based approach to address inequalities and tackle discrimination in the context of PHEs**, to ensure equality and nondiscrimination in the application of public health measures and other legal and policy measures to respond to the emergency and provide redress.



**Enhance national legal frameworks for PHE preparedness** to prevent and respond to PHEs by mapping and assessing legislation; and by identifying structural gaps, pathways to policy solutions and pathways to legal solutions.



**Adopt multisectoral and whole-of-government approaches to address PHEs**, to foster mutual understanding of respective roles and responsibilities in preventing crises and during a crisis; strengthen integrated responses in preparation for and during emergencies; and ensure effectiveness and sustainability.



**Champion participation and inclusiveness in PHE decision-making processes** by engaging all members of society, including marginalized groups, to contribute to, influence and take ownership of decision-making processes on legal, regulatory and policy PHE-related measures that are relevant to them and to the public interest.



**Strengthen national legal capacities for PHEs** to create an enabling environment for developing, sustaining and implementing solid legal instruments that provide effective prevention of, preparedness for and response to PHEs.

# INTRODUCTION

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The coronavirus (COVID-19) pandemic has demonstrated that, all over the world, countries are poorly equipped to effectively prevent and respond to serious public health threats. The inadequacy of national laws and policies was one of the main bottlenecks in countries' responses to the crisis.<sup>1</sup> Among the legal barriers that hinder countries' ability to effectively manage public health emergencies (PHEs) were outdated public health laws, poor implementation of international obligations and standards, insufficient coordination and surveillance mechanisms, and inadequate regulation on access to medical countermeasures and immunization systems. Sound legal frameworks under the rule of law provide a proper foundation for effective public health measures and are key enablers for such measures, which include effective prevention, detection and response to PHEs and other public health risks at local, national and regional levels.

The international legal framework, including the 2005 International Health Regulations (IHR), provides guidance to countries for tackling PHEs that may amount to global health threats and aims to prevent the international spread of diseases.<sup>2</sup> National legal frameworks are critical to providing effective responses to health threats as countries meet their international obligations. As part of such obligations set out in the IHR, States Parties are required to have in place effective legal instruments to prevent, detect and respond to public health risks and emergencies of national and international concern.<sup>3</sup>

The complementarity of the international and national legal systems is key in

ensuring effective preparedness for PHEs. Although global health governance reforms provide an opportunity to strengthen the global architecture for health emergency preparedness, the effectiveness of such governance depends on the level of commitment and capacity to implement the new system to strengthen preparedness at the country level. Legal preparedness in this context requires the capacity of all actors involved in the emergency response, depending on their role, to map, develop, implement, refine and use legal instruments that enable the implementation of capacities to prevent, detect and respond to infectious disease threats, and to do this across sectors.<sup>4</sup>

A rule of law-based response to PHEs is grounded in human rights and promotes sustainable development. The IHR principles state that the IHR must be implemented with full respect for the dignity, human rights and fundamental freedoms of persons.<sup>5</sup> Adherence to human rights norms and principles entails the need to limit the impact of PHE measures on fundamental rights; ensure protection of the most vulnerable members of society; promote inclusion and participation in public health decision-making; and guarantee access to justice, redress and accountability mechanisms during an emergency and its aftermath. Strengthening the capacity of all countries to prevent, detect and respond to public health risks is also a key target to achieve sustainable development across all the Sustainable Development Goals (SDGs). With its emphasis on the rule of law as an enabler of peace, justice and inclusion, SDG16 emphasizes the importance of the rule of law as a cross-cutting

enabler to promote health and well-being for all, including in preparation for and during PHEs.

The International Development Law Organization (IDLO) is the only global intergovernmental organization devoted exclusively to promoting the rule of law to advance peace and sustainable development. Since 2020, IDLO has worked with the World Health Organization (WHO) and other global and national partners to support countries to strengthen their legal preparedness to prevent and respond to PHEs, mainly in the context of the global response to the COVID-19 pandemic, and responding to the call to better prepare the world to prevent and respond to future health crises. IDLO has contributed to this global effort from its specific rule of law mandate, combining global advocacy and country-level technical support. In September 2020, IDLO published a policy brief on the rule of law and COVID-19, which indicated the pathway for IDLO's intervention.<sup>6</sup> Leveraging its programmatic expertise, in July 2020, in consultation with WHO, IDLO also designed and launched the

Pandemic Preparedness and Response Project (PPRP), a programmatic initiative that aims to assist countries in enhancing national legal frameworks for PHE preparedness; the PPRP was piloted in Uganda and Zambia.

This issue brief draws on the experience of IDLO and partners to advance legal preparedness as a critical competency to prevent and control public health crises. It analyses some of the building blocks of a rule of law-based response to PHEs and promotes a reflection on the role of the law – and of the rule of law – to better prevent, prepare for and respond to future pandemics and epidemics. Building on this analysis, the brief concludes with a set of recommendations to support global health and development practitioners as well as national and global policy-makers in their commitment to strengthening national and global responses to public health crises.



# IMPORTANCE OF THE RULE OF LAW IN PUBLIC HEALTH EMERGENCIES

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The rule of law requires that laws and policies are transparent, developed through participatory approaches, publicly disseminated, fairly enforced and, when required, independently adjudicated through courts and tribunals.<sup>7</sup> Core principles of the rule of law include the accountability of public and private actors, fair and transparent administration of justice, and protection of fundamental rights. The rule of law is an attribute of, and builds upon, good governance.

These principles also apply to public health systems, including public health laws, and prove especially important during times of emergency, as the COVID-19 pandemic has shown. PHEs, including pandemics and epidemics, often require governments to take quick actions and implement extraordinary measures. Justified by the protection of a public interest, these measures may affect individual rights and freedoms. For instance, during the early stages of the COVID-19 pandemic, governments around the world adopted measures such as lockdowns, digital surveillance, physical distancing, isolation and quarantine. Although the rule of law requires these measures to be grounded in the law, enacted through legal authorities, and have proper oversight, often this has not been the case.<sup>8</sup>

During PHEs, the rule of law supports governments in responding to crises by enhancing the legitimacy of the emergency measures taken, while safeguarding individuals and their rights through a system of checks and balances. It requires States to take transparent, equitable and fair measures to protect public health, while respecting and fulfilling human

rights norms and standards. It allows public health measures to be challenged in courts and presupposes a meaningful and inclusive review process to ensure that government actions are in line with the law, rather than being arbitrary or discriminatory. As such, the rule of law provides a safeguard against arbitrary implementation of restrictive measures to protect public health. This enhances public confidence and trust in public institutions, including public health and law enforcement authorities, and may contribute to greater public compliance with emergency measures.<sup>9</sup>

Under the 2030 Agenda for Sustainable Development, SDG16 (on peace, justice and strong institutions) emphasizes the importance of the rule of law as a cross-cutting enabler to reach the other goals, including SDG3 on achieving good health and well-being, and health-related targets. Working at the intersection between SDG16 and SDG3 provides a principle-based framework that guides government actions in addressing PHEs. In particular, target 3.d of SDG3 stresses the need to strengthen countries' capacity for early warning, risk reduction and management of national and global health risks.<sup>10</sup> In combination with SDG16 – which emphasizes sustainable development, equal access to justice for all, building stronger, effective, accountable and inclusive institutions at all levels, and promoting peaceful and inclusive societies – it urges governments to enhance their legal preparedness to address health threats through a fair, transparent and effective system of laws and institutions that adhere to rule of law principles.

The rule of law also requires compliance with international legal obligations. In the context of PHEs, for instance, domestic laws must comply with the legal obligations under the IHR. Among these obligations, the IHR requires States to develop specific capacities (referred to as core capacities); for example, to detect, assess, notify and report events, and to respond promptly and effectively to public health risks and PHE of national and international concern.<sup>11</sup> The rule of law entails that there should be a legal basis for implementing these core capacities. In addition to the obligations stipulated in the IHR, international human rights law sets additional standards to guide a response to PHEs that is based on the rule of law. Specifically, the right to health poses on States an obligation to prevent, treat and control epidemics.<sup>12</sup> This includes, for instance, making adequate provision for sufficient personal protective equipment (PPE) for health workers; supporting infection prevention and control within facilities; supporting the local health workforce to strengthen surge capacity to meet increased demand, while ensuring sufficient resources; and adequately resourcing laboratories and biosafety infrastructures.

Human rights standards under the rule of law framework also provide guidance for States in striking a balance between freedoms and entitlements. These include freedoms of movement and association, the right to information and procedural rights that guarantee legal certainty, clarity, due process and predictability. The Siracusa Principles (Box 1) provide guidance on balancing rights and ensuring that applications of PHE measures are necessary and proportionate.

The core principles of a human rights-based approach (including equality and nondiscrimination) are also particularly important in this respect.<sup>13</sup> Grounding into such an approach, the rule of law provides a framework to tackle inequality throughout its

### Box 1. The *Siracusa Principles* on the limitation and derogation provisions in the International Covenant on Civil and Political Rights<sup>15</sup>

The *Siracusa Principles* detail requirements for laws that directly restrict individual freedoms during a PHE. Emergency laws that place limitations on individual freedoms must:

- respond to a pressing public or social need;
- pursue a legitimate aim;
- be proportionate to the legitimate aim; and
- be objectively considered and no more restrictive than required to achieve the purpose of the limitation.

social determinants, including during public health crises.<sup>14</sup> COVID-19 has emphasized the importance of addressing inequalities as part of an effective response to PHEs. Public health crises, and the measures adopted to address them, may create or further exacerbate social and economic inequalities by disproportionately affecting access to health services, aggravating the social determinants of health or creating barriers to accessing justice. During emergencies, the rule of law fosters equality in health by requiring governments to address the social and economic factors that determine the ability of individuals to respond to and recover from a health crisis, including access to safe and nutritious food, water, sanitation and housing, and equitable access to protective measures and medical countermeasures.

# RULE OF LAW BUILDING BLOCKS FOR PUBLIC HEALTH EMERGENCIES PREPAREDNESS

This section describes some of the building blocks that constitute rule of law-driven legal preparedness for PHEs; it also considers some of the key obstacles and opportunities for their realization. The building blocks contribute to creating a system that is based on the rule of law, to enable effective prevention, management and response to PHEs. Box 2 provides a working definition of the concept of legal preparedness as defined by the Legal Preparedness Action Package (LPAP) of the Global Health Security Agenda (GHSa).

## Box 2. Legal preparedness for PHEs

In the context of PHEs, legal preparedness is defined as the capability to map, develop, refine and utilize legal instruments across sectors that enable the implementation of capacities to prevent, detect and respond to infectious disease threats. It requires recognition of the crucial role that legal instruments play in supporting public health capacities that are essential to all phases of an emergency, from prevention to recovery. This working definition was developed through discussions by the GHSa LPAP.<sup>16</sup>

### GHSa LPAP

The GHSa LPAP was established in September 2021 under the leadership of Argentina, Georgetown University's O'Neill Institute for National and Global Health Law, and the United States in response to the legal barriers countries faced in their COVID-19 response and past emergencies. This unique global initiative brings together experts on law and global health security, governments, international organizations, civil society and academia to work collaboratively to:

- build a solid foundation and common understanding of the competencies necessary for strengthening public health emergency legal preparedness;
- develop technical tools to guide and support countries in strengthening their legal preparedness capacity; and
- raise greater awareness globally about the role that legal preparedness has in preparing for and responding to PHEs.

IDLO is an active member of GHSa and LPAP.



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## Effective legal frameworks

A sound national legal framework is a key building block of effective public health systems. It provides the foundation for effective and legitimate public health measures to prevent, detect and respond to PHEs.<sup>17</sup> WHO's Joint External Evaluation (JEE), which assesses countries' capacities under the IHR, identifies having legal instruments in place as a key indicator to assess a country's preparedness to address health emergencies.<sup>18</sup> JEE reports indicate that many countries face significant challenges under this indicator. In the aftermath of the COVID-19 pandemic, many countries have expressed their interest in and commitment to reviewing and assessing their national legal instruments to enhance their legal preparedness for PHEs. Hence, IDLO, WHO and other global health and development partners have developed tools and methodologies to assist countries in undertaking such an endeavour.<sup>19</sup>

An effective legal analysis combines a legal

mapping (based on a comprehensive desk review) with an assessment of legal authorities in place that provides a functional review of how the legal instruments are used in practice and their effectiveness.<sup>20</sup> Experience from the PPRP showed that a participatory and consultative approach to the legal analysis, with the involvement of all relevant stakeholders during the various steps of the process, ensures broader engagement, support and eventually buy-in to the assessment findings. It also provides a clearer picture of the effective application and functioning of legal authorities in relevant government offices. In addition, the process of collaboration among different stakeholders involved in the legal analysis provides opportunities for enhancing multisectoral coordination and integrated approaches, such as One Health.<sup>21</sup>

Mapping and assessing legal instruments<sup>22</sup> – including the identification of key areas of PHE prevention, detection, response and recovery – is a starting point for designing a country-tailored intervention that is aimed at

strengthening a country's legal capacity to prevent and respond to health emergencies. A review of the relevant legal instruments and policies is essential to identify gaps and highlight opportunities.

As an example, in the PPRP pilot countries in Sub-Saharan Africa (Uganda and Zambia), legal assessments conducted by IDLO showed that some of the laws dealing with PHE were outdated (e.g. some were almost a century old and had not been reformed since colonial times).<sup>23</sup> Laws that are legacies of colonial times may be in conflict with rule of law provisions and standards owing to the lack of adequate procedural safeguards at the time they were enacted and to human rights obligations that were subsequently undertaken by the government. Moreover, the inadequacy of old and outdated legislation may determine a lack of compliance and poor implementation by public health officials, creating de facto a legislative vacuum in the implementation. Gaps and challenges were also found in more recent legal instruments. The JEE reports undertaken in the WHO African Region and assessments conducted by other development organizations noted that gaps in legal frameworks and in their implementation are often major challenges for countries in effectively addressing PHEs.<sup>24</sup>

The assessments have identified technical areas in need of support, but have also found opportunities to use the law for health emergency system strengthening. Such opportunities include the need to mainstream and operationalize the One Health approach across government departments and policies; the operationalization of PHE operations centres and national public health institutes (NPHIs) through rules and regulations; the provision of sustainable financing for PHE management; data protection and privacy; and the definition in the law of the IHR national focal point, with a clear mandate, roles and

responsibilities as set out in the IHR. Legal instruments can be used to strengthen these processes and institutes; for example, by providing structured frameworks of cooperation and collaboration for a One Health approach across sectors (animal health, human health, food and environment) or by providing a legal foundation for ensuring sustainable financing for PHE management. Such legal instruments must already be operative before any PHE. During the crisis, special provisions may be needed to ensure continuity in the provision of services.

National constitutions provide a starting point for the legal analysis because they may define the scope of domestic laws and the alignments required to ensure harmonization of the country's legal frameworks. They often provide for general emergency powers that authorize executive law-making and limitations to fundamental freedoms in times of emergency (such as were used as a basis for governments to adopt restrictive measures during the COVID-19 response). National constitutions also usually indicate the levels at which legislation is made and the competence of subnational authorities (where existing) to enact public health measures, including during emergencies, and how these authorities interact with those at the central level. Legal instruments may further establish coordination mechanisms to facilitate communications between central and district level authorities during an emergency. In fact, subnational legal frameworks are also particularly important to understand a country's legal preparedness for PHEs. Thus, mapping and assessment of these legal instruments at subnational level should also be included as part of a comprehensive and effective legal analysis.

To have a consistent approach throughout the process of legal analysis, there is need for harmonized methodology, guidance and tools.



The tools should ideally be flexible and consider different political contexts and legal systems. WHO has developed tools and guidance on specific areas.<sup>25</sup> Other organizations have also developed tools available for legal assessments for countries seeking to undertake the legal mapping and analysis.<sup>26</sup> Although such tools provide helpful guidance to countries in assessing the state of their legal instruments and their effectiveness towards detecting, preventing and responding to PHE, different approaches across instruments often means variation in the indicators and standards for assessment. Harmonization of these approaches would provide a consistent methodology and more opportunities for comparison of results. In addition to the development of tools and guidance, experience under the PPRP and with other initiatives has shown the importance of providing training and capacity-building on using these tools for the national experts who will work with governments to undertake the legal analysis, as discussed in the section on multisectoral approaches.<sup>27</sup>

Building on the PPRP experience, once the legal assessment has been conducted and the gaps and priorities identified, an agreed plan of action, based on extensive consultations with relevant stakeholders, can assist to identify the pathways for strengthening the system and enacting legal reforms, when needed.



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## People-centred justice systems

The rule of law requires effective systems of justice that advance equality, fairness and nondiscrimination, leaving no one behind. Even during an emergency, access to justice and legal assistance measures should comply with rule of law standards, to ensure legitimacy and acceptance. Hence, measures to provide access to justice and legal services during emergencies need to be carefully designed and validated during regular times through processes based on the rule of law that clearly identify authorities, mechanisms, modalities, roles and responsibilities, to ensure the effectiveness and legitimacy of these services during a crisis.

During emergencies, access to justice presents additional challenges, especially for marginalized and vulnerable groups. PHE may create barriers to accessing justice services (e.g. through court closures) and more difficulties accessing legal assistance owing to public health protection measures such as social distancing and lockdowns. During the COVID-19 pandemic, many countries made efforts to find alternative solutions to ensure continuity in the provision of basic legal services despite the restrictions, moving quickly to amend or put in place measures and guidelines for remote interviews and hearings, videoconferencing, infection prevention guidelines and improved electronic filing processes.<sup>28</sup>

Nevertheless, the capacity and resources to ensure remote access to justice systems differ among high-, low- and middle-income countries.<sup>29</sup> In Kenya, for example, even before COVID-19, IDLO had begun supporting the country's judiciary to leverage information and communications technology, and automate judiciary processes and systems.<sup>30</sup> The need for courts to explore alternative ways to provide justice services remotely during the pandemic led to the fast-tracked piloting of automated

judiciary processes such as electronic filing, payments and registries; online systems for case tracking, recording, and transcription; and virtual hearings by courts in Nairobi and select courts in the counties. Although this enabled continuity of justice service delivery in some courts, most of the courts outside Nairobi did not have the necessary technical infrastructure (e.g. access to computers and scanners, data servers and Internet connectivity) to access these technology-based services; this limited access to justice for the wider population.

The availability of effective legal services and legal empowerment to individuals and communities also play a key role in enabling individuals to seek remedy for public health measures taken during emergencies, for example, against potential adverse events from the use of medical countermeasures. Nevertheless, digital exclusion (which increased during the COVID-19 pandemic and persists during recovery), power supply and other logistic concerns may create further practical barriers to equitable access to justice for all during crisis, especially for the most marginalized and vulnerable populations. Even within countries, including high-income countries, the digital divide created a gap in access to services during the pandemic. For example, women and girls, older people, those living with disabilities, and people in rural areas or on a low income in urban areas suffered disproportionately from a lack of digital access during the pandemic.<sup>31</sup> An analysis of these issues is needed, given the potential problems of ad hoc responses (including insufficient time for preparation and test-running of measures) and the key role of courts in assessing and reviewing public health measures.

Box 3 provides examples from Kenya and Somalia of actions taken by IDLO to improve access to justice during the COVID-19 pandemic.

### Box 3. Supporting access to justice during COVID-19: cases from Kenya and Somalia

In **Kenya**, IDLO supported rule of law actions to improve access to free, quality legal aid services for communities whose vulnerabilities were exacerbated by the implementation of protracted COVID-19 containment measures such as lockdowns, restrictions on movement and curfews. Working with Kenya's National Legal Aid Service (NLAS), IDLO supported talk shows on access to legal aid services during the pandemic. These talk shows were on mainstream and community radio stations, broadcast in local languages and had wide audiences. The panellists on the talk shows discussed thematic issues tailored to the needs of the targeted audiences (e.g. women and children) such as custody and maintenance, guardianship, division of matrimonial property, land disputes, employment and labour relations, and witness protection. The talk shows also allowed the audiences to call and ask questions, and receive live feedback on the legal issues raised. Additionally, NLAS set up toll-free lines where these audiences could call 24 hours a day to seek free legal advice, both during and after the talk shows. The use of community radio platforms facilitated the provision of outreach to remote communities and of information on where they could access free legal aid services on issues such as domestic violence, household or land disputes, and sexual and gender-based violence (SGBV) arising from their heightened vulnerabilities during the pandemic.<sup>32</sup>

In **Somalia**, IDLO has supported alternative dispute resolution centres, which are aimed at resolving disputes through means other than litigation or a full-scale formal court process. These centres often resolve disputes through mediation or arbitration; also, they apply customary or sharia law in alignment with the rule of law and international human rights standards. During the height of the pandemic, these centres remained open and continued to provide justice services, despite the closure of the district courts and limitations on movement. IDLO supplied personal protective equipment, installed handwashing stations, and implemented social distancing and other safety measures to ensure that the centres could continue running. In addition, the centres provided hotline support and community awareness sessions through radio programmes for better outreach to those potentially seeking justice, especially women at risk of domestic violence and internally displaced persons. These efforts ensured that the centres remained open to manage the increase in gender-based violence cases, particularly domestic violence.<sup>33</sup>





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## Legal protection for vulnerable groups

Marginalized and vulnerable populations are at the centre of a rule of law and human rights-based response to PHEs. PHEs and measures taken to manage them have often exacerbated impacts and taken a substantial toll on people who are marginalized and vulnerable. Thus, addressing PHEs includes legal and policy measures that consider and tackle existing and emerging inequalities, and inequities across the social determinants of health. Some of the layers of inequalities that may be exacerbated during PHEs, as exemplified during the COVID-19 pandemic, are gender inequalities, disability discrimination, digital exclusion, inequalities in access to education, food insecurity among marginalized and vulnerable populations, and rural versus urban divides. During PHEs, migrant, refugee and stateless

populations, as well as people in penitentiary institutions, are also often disproportionately affected in terms of access to health services, including access to vaccines and other medical measures; also, they often experience increased xenophobia. Hence, there is a need for systematic national approaches to identify the needs of vulnerable and marginalized populations, and address those needs through PHE measures and law reforms, in line with the rule of law and international human rights standards.

Gender inequalities are particularly exacerbated during PHE owing to social, cultural and biological factors. For instance, compared with men, women are more likely to be primary caregivers, are at higher risk of poverty and are disproportionately affected by gender-based violence.<sup>34</sup> Violence against

women increased steeply during periods of quarantine in countries across the world, with women having limited access to supportive interventions during the height of the pandemic in 2020–2021.<sup>35</sup> At the same time, gender inequality may pose an obstacle to an effective and inclusive PHE response that ensures equitable access to the whole population.

A human rights-based approach to PHE legal preparedness requires legal instruments that address gender inequalities and promotes gender equity during emergencies, including by providing access to medical, psychosocial and legal services for survivors of gender-based violence. The importance of ensuring gender equality during emergencies (e.g. through effective gender-sensitive and gender-responsive PHE legal instruments) is also reflected in the IHR JEE tool, which includes gender equity and equality during health emergencies as an indicator to assess countries' capacity under the technical area of legal instruments. As part of the legal assessment, the tool considers whether countries have conducted a systematic assessment of gender gaps and whether an action plan to address priority gender gaps has been developed, funded, implemented and incorporated in national annual plans.<sup>36</sup> Countries need support to undertake such an assessment and ensure gender-responsive PHE legal frameworks.

Box 4 provides examples of actions taken by IDLO in Myanmar to support SGBV survivors to access to support services during the COVID-19 pandemic.

#### Box 4. Supporting SGBV survivors during COVID-19 in Myanmar

In Myanmar, during the COVID-19 pandemic, IDLO provided support to raise awareness among communities on SGBV and available support services. Thus, IDLO explored innovative ways for reaching out to communities, including by distributing over 25 000 pamphlets about COVID-19 and SGBV, with graphics and information on how to access services; broadcasting podcasts and videos to tell the stories of advocates and justice service providers working to address SGBV and bring attention to the legal and cultural barriers faced by survivors of SGBV in the country; and livestreaming virtual events on SGBV, including information on where to seek help and access to justice.

Access to safe and nutritious food is another determinant of health that may both arise from and determine structural and social inequality, especially in times of emergencies. As observed during the COVID-19 pandemic, restrictive measures to protect public health during emergencies may create barriers to equal access to safe and nutritious food, especially for the most marginalized and vulnerable social groups. Rule of law-based legal preparedness requires States to set up an appropriate legal system to promote equal access to safe and nutritious food for all in times of crisis, aligning with the right to adequate food as set out, for example, in Article 11 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>37</sup> In times of emergency, when scarcity of resources resulting from crises may put marginalized and vulnerable





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groups at serious risk of food insecurity, legal frameworks are key in protecting and ensuring equal enjoyment of the right to adequate food for the most vulnerable populations. Since 2020, IDLO, in partnership with the Food and Agriculture Organization of the United Nations (FAO), has implemented a project to strengthen food security and nutrition for vulnerable groups, including women and girls, as part of the COVID-19 response and recovery.<sup>38</sup> The project involved a global legal assessment of laws and regulations adopted during the pandemic in about 40 countries and their potential effects on access to adequate food.

Building on this programmatic experience IDLO has identified good practices and areas where legal instruments can be used to protect the realization of the right to adequate food during PHEs. Long-term solutions

include alignment of domestic laws with international commitments and the expansion of constitutional rights to include the right to food. In the shorter term, legal frameworks can be amended to enact social protection strategies to improve adequate food access during crises (e.g. through school feeding programmes and special social assistance schemes). Social protection strategies in relation to food access must target the most marginalized and vulnerable groups, including women and girls, older people, those living with disabilities, refugees, internally displaced persons and the poor. More broadly, laws that address the structural inequalities and drivers that lead to food insecurity provide a structural framework to ensure equal access to food during emergencies.<sup>39</sup>



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## Multisectoral approaches

Under the rule of law, a multisectoral, whole-of-government and whole-of-society approach is key to ensuring ownership and buy-in on an integrated response to PHEs, and enhancing trust in the local institutions. PHEs typically involve multiple issues and cross-cutting areas; hence, an effective response will involve different sectors and require action from multiple perspectives.

On the governmental side, all levels of government are essential in ensuring the successful assessment, design and implementation of legal instruments. Their participation in setting priorities, designing the scope of the intervention and contributing to the validation of the assessment is key to creating shared responsibility and mutual commitment to strengthen and advance integrated approaches to PHEs. In addition to the public health-mandated institutions, the other ministries, departments and agencies that use public health laws and regulations in

practice (especially during emergencies) should be involved from the outset, including ministries of justice, agriculture and finance; agencies in charge of emergency or disaster management; biosafety and biosecurity institutions; and data protection authorities, among others.

Good practices of collaboration have emerged from country-level experience during the COVID-19 pandemic, where some countries developed multidepartment structures to manage PHEs. NPHIs, in addition to ministries of health, often play a central role, working in conjunction with other relevant ministries, including competent authorities overseeing key areas relevant for IHR implementation. Adequate legal instruments are key in laying the ground for the creation, institutionalization or operationalization of these structures for collaboration, and in regulating the engagement of the private sector. IDLO experiences in Uganda and Zambia indicate the value of taking such an approach from the outset of the intervention. In these countries, under the

PPRP, a participatory, multisectoral roadmap was developed in conjunction with country stakeholders, who were engaged throughout the process of legal analysis and technical assistance.

Country ownership and leadership are also key to ensuring the sustainability of interventions. Although countries may require support from international organizations and development partners to strengthen legal preparedness and undertake national reforms, it is essential that the countries take the lead in advancing these measures, with governments driving the process at all stages of the intervention. Lessons from the PPRP and other related work have shown the importance of championing legal preparedness with decision-makers to mobilize political will. Engagement of political leadership – with the direct involvement of high-level executive offices and a functioning administrative structure – is key to moving the work forward.

Besides government departments, other bodies that should also be part of the legal review and reform process are civil society organizations (CSOs) – such as human rights groups, medical and law societies, and patient groups – academia, international development agencies (e.g. WHO) and regional intergovernmental health organizations. The participation of such groups in PHE legal reforms and decision-making is both a key building block for a rule of law and human rights-based response to PHEs, and an effective approach to ensure the sustainability and legitimacy of PHE measures. Participation is a key principle of the human rights-based approach. Experience from the PPRP and other work in this area indicates that the involvement and engagement of civil society in the decision-making process ensures democratic support for and validation of measures taken during an emergency. A participatory approach also helps to galvanize the support necessary for reforms, when

needed. This approach involves integrated planning for addressing PHEs across all sectors of society (e.g. public and private sector organizations, essential services, CSOs and academia) within and outside the health sector. CSOs and academia are particularly important for ensuring social mobilization and community engagement around the policy process (Box 5).

### Box 5. Supporting social mobilization and advocacy for health

Effective participation of CSOs and communities in national emergency prevention and response processes requires them to be aware of their role and of existing legal frameworks and standards, and empowers them to meaningfully engage in policy discussions. Since the establishment of its Health Law Program in 2009, IDLO has developed extensive experience in health-related legal empowerment and social mobilization, including:

- providing technical assistance and capacity-building for national CSOs engaged in the provision of legal services for people living with HIV and other marginalized and vulnerable populations;<sup>40</sup>
- providing technical support for health-related legal and policy initiatives in over 20 countries; and
- facilitating the creation of regional civil society law, and health and rights networks in the Middle East and North Africa, and in Latin America and the Caribbean.



CSOs can promote the application of human rights standards in proposed legal reforms to the populations they serve, advocate for key policy changes and bring critical issues to the awareness of the general public.

Participation also requires the engagement of marginalized and vulnerable populations wherever possible, to ensure that PHE measures are inclusive and cognizant of the needs and challenges of these groups. CSOs bring unique advocacy skills; however, it is important to ensure that the voices of those who are disproportionately impacted by PHEs are also directly part of the public discussion. This will help to shape responsive public policy and legal instruments, enhance legitimacy for these measures, increase levels of compliance and support, and ensure that these measures comply with human rights norms.

Academia also has a key role. Academic institutions can provide analysis of the different strategies in use, options for replication and contextualization in national contexts, and suggestions for other potentially helpful strategies that may be used. Further, these institutions are crucial for developing future generations of legal and public health officers versed in legal preparedness, who in turn will shape public health laws and policy necessary for preparing and responding to PHEs. Public health law is not a key course offered by the universities of many low- and middle-income countries; courses on legal preparedness are even less available. With the attention that COVID-19 brought to the importance of legal preparedness for PHEs, it is critical that academia becomes a source of information and analysis informing policy and legal reforms (Box 6).

### Box 6. Building bridges between legal and public health academia

Law is being increasingly recognized and used as tool for improving the health of populations at global, national and subnational levels. However, law and public health is not a mainstream subject in higher legal education, and schools of public health often focus narrowly on the role of public health legislation in regulating areas such as medical and health care services. Similarly, it is rare to find collaboration between schools of law and schools of public health in research and teaching on issues of law and health. To bridge this gap, IDLO works in East Africa and South Asia to promote interdisciplinary study, research and teaching in universities at the intersection between law and public health. In addition to establishing multidisciplinary academic groups bringing together legal and public health scholars, IDLO supports the integration of legal approaches to address public health challenges in public health curricula, and the development of multidisciplinary courses on law and public health.<sup>41</sup>



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## Sound national capacities

During the WHO 152nd Executive Board in January 2023, Ethiopia, on behalf of 47 African States, recognized that several countries in the region are struggling with effective implementation of the IHR and international health guidelines and frameworks, and noted that less than 10% of African countries have adequate capacities to prepare, detect and respond to PHEs. Recommendations from the international review committees have called on WHO and partner organizations to strengthen support for countries in enhancing their capacities to ensure effective implementation of the IHR.<sup>42</sup> The same call came from World Health Assembly Member States, which requested stronger and more systematic support to strengthen the IHR core capacities at the country level.<sup>43</sup>

Support for legal preparedness capacities has remained an underresourced area in efforts

to strengthen countries' responses to PHEs. Addressing and strengthening countries' legal preparedness for PHEs requires a significant investment in building and enhancing the capacities of local actors to effectively use legal instruments in preparation for and in the context of a PHE; it also requires support for enabling environments for the adoption and implementation of effective legal instruments, in compliance with IHR requirements. Experience from the implementation of the PPRP indicates that capacity-building in this area is critical for the various stakeholder groups involved in the development, use and implementation of legal instruments during emergencies, and should go beyond support for ad hoc technical assistance, aiming to build long-term and sustained capacity at the country level, across sectors (Box 7).



## Box 7. GHSA LPAP capacity building sub-working group

Since 2022, IDLO has co-led the capacity building sub-working group under the framework of the LPAP. The subworking group aims to strengthen the legal preparedness capacities of national, regional and international stakeholders involved in the prevention and response of PHEs by:

- supporting the development and dissemination of training resources;
- supporting capacity building initiatives; and
- promoting the establishment of a global network of experts on legal preparedness.

To meet that aim, the subworking group conducts a mapping and assessment of existing capacity-building initiatives and resources, to make them available to countries that request them. Also, the group encourages exchange and collaboration between PHE legal experts and governments to facilitate the provision of technical assistance and promote sustainability.

The subworking group further facilitates collaboration and coordination among global health and development partners and other organizations that provide training and capacity-building to countries, to promote consistency and coherence across initiatives.

There is a need to build the capacity of national legal and public health officers to undertake legal mapping and review domestic legal frameworks on PHE preparedness in line with international law, including human rights standards. Supporting the development of such capacity requires effective tools such as curricula, toolkits and guides. Although such tools have been developed by WHO and other global health and development organizations,<sup>44</sup> there is a need to harmonize existing materials and strengthen support for country-level capacity development initiatives. Additional country-tailored training and specific capacity development initiatives are needed to support countries in mapping, reviewing, assessing, operationalizing and reforming (when needed) relevant legal frameworks.

It is also necessary to strengthen the capacity of CSOs and academia to understand the relationships between PHE and the law; understand legal preparedness as a fundamental capacity in PHE management; conduct rule of law checks; engage in policy and legislative advocacy for reforms; and demand accountability of government institutions to fulfil their obligations to prevent, manage and respond to PHEs, in line with human rights obligations.

# RECOMMENDATIONS

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COVID-19 has raised attention at the global and national level of the need to strengthen the world's preparedness for PHEs, including through enhanced national legal preparedness. There is now the opportunity to build on this momentum to link global and national agendas by reviewing global health governance frameworks and strengthening capacities at the country level. The rule of law can provide valuable guidance.

This section draws from the analysis of the building blocks that may advance a rule of law-driven legal preparedness for PHEs and consideration of the various tools identified in the issue brief that can be useful in practice. It proposes a nonexhaustive list of recommended actions that States and global health and development actors can use in strengthening their responses to PHEs under the framework of the rule of law.

The recommended actions stem from the application of the rule of law approach to PHE preparedness. The rule of law provides a strong foundation for public health measures in times of emergency. It fosters transparency in emergency decision-making processes and requires accountability of public health decision-makers; it also eliminates arbitrariness in the use of power in the application of emergency measures and enables improved access to justice, ensuring that national emergency response systems are inclusive and nondiscriminatory. The rule of law may also provide a legitimate, effective and agile framework for the application of public health measures in critical times, as permitted by law.

The following actions are recommended:



**Safeguard access to justice during emergencies.** The capacity of legal systems to provide justice during emergencies is a key building block of rule of law-based legal preparedness for PHEs. Access to justice may be severely curtailed in times of emergencies. Functioning, people-centred justice systems need to be carefully designed and validated through rule of law principles and standards during regular times to ensure their effectiveness and legitimacy during a crisis. An investment in justice systems is needed to ensure that justice institutions and mechanisms can adequately address PHEs (e.g. investing in the necessary infrastructures, nondiscriminatory and accessible digitalization and local capacities). Alternative systems of justice that are in line with rule of law and human rights standards – including customary informal justice and alternative dispute resolution mechanisms – may provide additional avenues to alleviate the bottleneck of justice in times of crisis.



**Promote adherence to a human rights-based approach to address inequalities and tackle discrimination in the context of PHEs.**

A human rights-based approach to the application of public health crisis management requires governments and policy-makers to ensure equality and nondiscrimination in the application of public health measures and other legal and policy measures to respond to the emergency. It also entails the recognition that civil and political rights stand together with economic, social and cultural rights as part of the same framework. The human rights-based approach promotes an understanding that the root causes of inequality and discrimination may be exacerbated during emergencies. It offers a framework to address discrimination and promote access to justice for the most marginalized and vulnerable populations, including vulnerable women and girls, people living with disabilities and populations with limited access to digital technology. Global health and development actors should align with the principles and standards of a human rights-based approach when providing guidance to States in enhancing PHE legal preparedness.



**Enhance national legal frameworks for PHE preparedness.** Strong and effective legal instruments are an essential building block of national legal preparedness to prevent and respond to PHEs. Legal mapping and assessments are stepping stones for strengthening national public health institutions to advance public health goals, including during PHEs. National legal assessments undertaken in various low- and middle-income countries have helped in identifying structural gaps and pathways to policy and legal solutions to prevent and respond to PHEs. Global health and development actors should support countries in conducting PHE legal analysis through participatory and multisectoral approaches, ensuring country ownership throughout the assessment process and building the capacities of local actors to oversee and implement recommendations for strengthening legal frameworks.



**Adopt multisectoral and whole-of-government approaches to address PHEs.** PHE preparedness and response involves all government sectors and requires effective intersectoral collaboration. Integrated action that engages the different sectors involved in the emergency response fosters mutual understanding of the respective roles and responsibilities during a crisis. Multisectoral processes facilitate better coordination, collaboration and communication across sectors, to strengthen integrated responses in preparation for and during emergencies, and generally ensure effectiveness and sustainability.



**Champion participation and inclusiveness in PHE decision-making processes.**

Participation is a key principle of the human rights-based approach and is itself a right that entitles all members of society, including marginalized groups, to contribute, influence and take ownership over decision-making processes that are relevant to them and to the public interest. Participation promotes sustainability, transparency and accountability. It requires the engagement of groups such as civil society, communities and academia, while at the same time strengthening these groups' capacities to meaningfully engage in decision-making processes on issues related to PHE. Global health and development actors that support countries in enhancing their PHE legal preparedness should ensure appropriate participation of society in PHE legal assessment and decision-making processes.



**Strengthen national legal capacities for PHEs.** Effective legal instruments are only meaningful if national stakeholders can use them effectively. Capacity-building for all relevant stakeholders is therefore needed to create an enabling environment to strengthen legal preparedness for PHEs. Strengthening the legal literacy of government officials and their understanding of the role of the law in PHEs is a first step. Public health officers should be able to clearly understand their roles and responsibilities, law enforcement officers should be trained on enforcing public health measures in compliance with international standards, and legal advisers should be trained to support ministers of health in applying legal norms. Moreover, the capacity of civil society should be enhanced to understand the importance of and advocate for effective legal frameworks to advance public health outcomes. Hence, capacity-building should target different sectors, including government officials, parliamentarians, regulators, CSOs, researchers and academia. International development and global health partners should work together to harmonize tools and provide consistent guidance on States' legal responses to PHEs.



# ENDNOTES

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- 2 The IHR are a legally binding international instrument that defines countries' rights and obligations in preventing, detecting and responding to PHEs. They also require States to strengthen core capacities to ensure effective surveillance and response at different levels. *International Health Regulations (2005)* (Geneva: World Health Organization, 2008), <https://www.who.int/publications/item/9789241580410>.
- 3 The IHR Joint External Evaluation (JEE) tool sets in place the existence of adequate legal instruments that support and enable the implementation of IHR obligations and rights as a target to measure countries' capacity under the Legal Instruments technical area. Legal instruments are defined as "[m]easures enacted and implemented by national or intermediate levels of government that are legally binding and enforceable"; they include "constitutions, laws, arrêtés, decrees, regulations, administrative requirements, or other government instruments, proven to be adequate to support IHR implementation across relevant sectors". This brief aligns to this definition. *Joint External Evaluation Tool: International Health Regulations – Third Edition* (Geneva: World Health Organization, 2022), <https://www.who.int/publications/item/9789240051980>.
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- 6 *Rule of Law and COVID-19* (Rome: International Development Law Organization, 2020), [https://www.idlo.int/sites/default/files/pdfs/publications/idlo-rule\\_of\\_law\\_and\\_covid19-policy\\_brief-final.pdf](https://www.idlo.int/sites/default/files/pdfs/publications/idlo-rule_of_law_and_covid19-policy_brief-final.pdf). See also *The Vital Role of Law in the COVID-19 Response: Key Lessons from Advancing the Right to Health* (Rome: International Development Law Organization, 2020).
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  - 21 One Health is defined by the One Health High Level Expert Panel as "an integrated, unifying approach that aims to sustainably balance and optimize the health of people, animals and ecosystems. It recognizes the health of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) are closely linked and inter-dependent. The approach mobilizes multiple sectors, disciplines and communities at varying levels of society to work together to foster well-being and tackle threats to health and ecosystems, while addressing the collective need for clean water, energy and air, safe and nutritious food, taking action on climate change, and contributing to sustainable development". Wiku B. Adisasmito et al. "One Health: A New Definition for a Sustainable and Healthy Future," *PLoS Pathogens* 18, no. 6 (June 2022), <https://doi.org/10.1371/journal.ppat.1010537>.
  - 22 See endnote 3 for a definition of legal instruments as introduced under the third edition of the JEE tool.
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  - 26 For example, *Providing a Legal Framework for a National Public Health Institute* (Addis Ababa: Africa Centres for Disease Control, 2019), <https://africacdc.org/download/providing-a-legal-framework-for-a-national-public-health-institute-nphi/>; *Public Health Emergency Operations Center (PHEOC) Legal Framework Guide: A Guide for the Development of a Legal Framework to Authorize the Establishment and Operationalization of a PHEOC* (Geneva: World Health Organization, 2021), [https://www.afro.who.int/sites/default/files/2021-03/AFRO\\_PHEOC-Legal-Framework-Guide.pdf](https://www.afro.who.int/sites/default/files/2021-03/AFRO_PHEOC-Legal-Framework-Guide.pdf); and *12 Characteristics of an Effective Public Health Emergency Law* (New York: Vital Strategies, 2020), [https://preventepidemics.org/wp-content/uploads/2020/08/CCC\\_276\\_LEG\\_-\\_Characteristics-of-an-Effective-Public-Health-Emergency-Law-.pdf](https://preventepidemics.org/wp-content/uploads/2020/08/CCC_276_LEG_-_Characteristics-of-an-Effective-Public-Health-Emergency-Law-.pdf). In the context of the GHSA LPAP, a legal preparedness legal framework is currently being developed to assist countries with completing this type of functional review.
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- 39 *Rule of Law for Food Systems Transformation* (Rome: International Development Law Organization, 2023), [https://www.idlo.int/sites/default/files/2023/other/documents/food\\_systems\\_-\\_2\\_page\\_handout.pdf](https://www.idlo.int/sites/default/files/2023/other/documents/food_systems_-_2_page_handout.pdf).
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- 41 See, for example, the *Toolkit on Regulatory Approaches to Noncommunicable Diseases: Healthy Diets and Physical Activity* (Rome: International Development Law Organization, 2022), <https://www.idlo.int/publications/toolkit-regulatory-approaches-noncommunicable-diseases-healthy-diets-and-physical>. Global initiatives, including the GHSA LPAP, are also promoting academic engagement to bridge this gap in the area of PHE, “Global Health Security Agenda (GHSA) Legal Preparedness Action Package,” *Global Health Security Agenda*, 2023, <https://globalhealthsecurityagenda.org/legal-preparedness/>.
- 42 See, for example, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response* (Geneva: World Health Organization, 2021), <https://www.who.int/publications/m/item/a74-9-who-s-work-in-health-emergencies>.
- 43 “EB152 Constituency Statement: Strengthening WHO Preparedness for and Response to Health Emergencies (Agenda Item 12.1),” World Health Professions Alliance, January 31, 2023, <https://whpa.org/eb152-constituency-statement-strengthening-who-preparedness-and-response-health-emergencies-agenda>.
- 44 Including tools developed by, for example, the International Federation of Red Cross and Red Crescent Societies, the United States Centres for Disease Control and Prevention (CDC), the Africa CDC and Resolve to Save Lives.







Creating a Culture  
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