COVID-19 and Limitations to the International Right to Freedom of Religion or Belief

Georgia Alida Du Plessis

Introduction

The largest pandemic outbreak in the twenty-first century to date is the coronavirus disease (COVID-19), causing, as of October 6, 2020, 1,051,475 deaths worldwide.¹ This has caused countries worldwide to institute drastic regulations that are affecting human rights, economics, health, and politics. The right to freedom of religion or belief (FORB) as contained in the International Covenant on Civil and Political Rights (ICCPR) has been challenged and...
affected by the unique and urgent circumstances created by the COVID-19 pandemic and the immediate threats posed to society.\(^2\)

The onset of a pandemic in modern times is not new. Several diseases and pandemics (such as the H2N2 [1957–1959]) have influenced the world since the signing of the Universal Declaration of Human Rights (1942).\(^3\) The World Health Organization (WHO) issued a document in 2009 providing guidelines on advance planning and preparedness to help mitigate the impact of a potential global pandemic.\(^4\) They were therefore fully aware of the risks and potential dangers of a future pandemic.\(^5\) Why, then, is the effect of the coronavirus pandemic so extraordinary today, and specifically for FORB? Global reactions to COVID-19 pose novel challenges to FORB, and the consequences are vast. According to United Nations (UN) Special Rapporteur Ahmed Shaheed, although restrictions to religious manifestations have been required during previous outbreaks of highly contagious

\(^2\) UN General Assembly, *International Covenant on Civil and Political Rights*, December 16, 1966, UN, Treaty Series, vol. 999, p. 171, accessed May 1, 2020, https://www.refworld.org/docid/3ae6b3aa0.html (hereinafter referred to as the ICCPR); The WHO has named the disease the “coronavirus disease” (COVID-19) and the virus “severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).” See WHO, “Naming The Coronavirus Disease (COVID-19) and The Virus That Causes It,” WHO, accessed May 1, 2020, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it; For the social implications of the virus, see Nicholas LePan, "History of Pandemics," Visual Capitalist, March 14, 2020, https://www.visualcapitalist.com/history-of-pandemics-deadliest/.

\(^3\) There were between 1 and 2 million deaths during the H2N2 virus. See Cécile Viboud et al., “Global Mortality Impact of the 1957-1959 Influenza Pandemic,” *J. Infect Dis* 213 (2016): 738–45. See also Philip Hunter, “Inevitable or avoidable? Despite the lessons of history, the world is not yet ready to face the next great plague,” *EMBO reports* 8, 6 (2007): 531–34.

\(^4\) The WHO is an international organization with a direct mandate in pandemics. See WHO, “WHO Constitution,” last modified April 7, 1948, Article 2, https://www.who.int/about/who-we-are/constitution. See also Armin von Bogdandy and Pedro A. Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis,” *MPI Research Paper Series* 2020-07 (2020): 4; With regards to the guidelines for advance planning and preparedness for a global pandemic, see WHO, “Pandemic Influenza Preparedness and Response: a WHO Guidance Document,” WHO (2009), https://apps.who.int/iris/bitstream/handle/10665/44123/9789241547680_eng.pdf?sequence=1; See also WHO, “Ethical considerations in developing a public health response to pandemic influenza,” WHO (2007), https://www.who.int/csr/resources/publications/WHO_CDS_EPR_GIP_2007_2c.pdf.

\(^5\) In order to be called a pandemic, an infectious agent must be able to spread rapidly, must be infectious and virulent and have a significantly high mortality rate (Hunter, "Inevitable or avoidable"). See also Lawrence Gostin, “Pandemic Influenza: Public Health Preparedness for the Next Global Health Emergency,” *J.L. Med. & Ethics* 32 (2004): 565.
infections, such as Ebola in West Africa, the global scale of the COVID-19 restrictions is unprecedented. For example, synagogues in Belgium have been closed for the first time since World War II. One of the most important events in the Christian calendar, Easter, was celebrated online by millions. Disagreements between religious and non-religious belief organizations have also occurred with the potential risk of affecting solidarity. 

Already vulnerable religious minority communities, such as the Bahá’ís in Iran, face even more discrimination and uncertainty under the pandemic. Islamic burial rites were violated by forced cremations of Muslims in Sri Lanka.

In light of government restrictions during the coronavirus pandemic, the right to FORB and its limitations as described in Article 18 of the ICCPR need to be analyzed. This necessity is especially augmented because of widespread non-compliance with International Health Regulations (IHR) by several countries and lack of international cooperation (due to ideological conflicts),

6. Ahmed Shaheed is the current UN Special Rapporteur on Freedom of Religion or Belief. See UNHR Office of the High Commissioner, “Special Rapporteur on Freedom of Religion or Belief,” accessed September 7, 2020, https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/FreedomReligionIndex.aspx; Regarding the unprecedented scale of the COVID-19 restrictions, see Ahmed Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief,” Just Security, June 18, 2020, https://www.justsecurity.org/70843/a-conversation-with-u-n-special-rapporteur-ahmed-shaheed-covid-19-and-freedom-of-belief/.

7. Kemal Rijken, “Antwerpse Joden nemen maatregelen om corona en ‘leven de Belgische regels na’,” Jonet.nl, April 6, 2020, https://jonet.nl/antwerpse-joden-nemen-maatregelen-om-corona-en-leven-de-regels-na/.

8. “Celebrating a Unique Easter with Pope Francis during Covid-19,” Vatican News, April 8, 2020, https://www.vaticannews.va/en/vatican-city/news/2020-04/celebrating-a-unique-easter-with-pope-francis-during-covid-19.html.

9. For example, the European Humanist Federation has stated that religious organizations are continuing to place the health and lives of others at risk by continuing religious services and that they should be prosecuted. See “Humanists Express Concerns about Practices of Religious Groups amid COVID-19 Crisis,” European Humanist Foundation, last modified April 7, 2020, https://humanistfederation.eu/humanists-express-concerns-about-practices-of-religious-groups-amid-covid-19-crisis/.

10. Michael Lipin, “Baha’i Leader: Iran Keeping up to 100 Baha’is in Prisons under Virus Threat,” VOA News, April 14, 2020, https://www.voanews.com/middle-east/voa-news-iran/bahai-leader-iran-keeping-100-bahais-prisons-under-virus-threat.

11. Shereena Qazi and Ashkar Thasleem, “Anguish as Sri Lanka forces Muslims to cremate COVID-19 victims,” Aljazeera, April 3, 2020, https://www.aljazeera.com/news/2020/04/anguish-sri-lanka-forces-muslims-cremate-covid-19-victims-200403053706048.html. See also Saroj Pathirana, “Coronavirus funerals: Sri Lanka’s Muslims decry forced cremation,” BBC News, July 5, 2020, https://www.bbc.com/news/world-asia-53295551.
undermining effective strategies, during the pandemic. This analysis is not an easy task since the relationship between FORB and public health is multidimensional, involving political, socio-economic, medical, scientific, and other considerations. For this reason, this article will focus on Article 18 of the ICCPR and the legal aspects concerning the limitation of FORB within the unique circumstances caused by COVID-19. The article proceeds by discussing the general international human rights framework regarding FORB. Two possible instances of limitation during COVID-19 are analyzed in depth. The possibility of derogation from some elements of FORB during public emergencies under the notions of freedom of assembly, freedom of association and religious minority rights is investigated. Thereafter, the limitation of FORB during COVID-19 and under Article 18, on two of the listed grounds—namely, “public health” and “the rights and freedoms of others”—and the resulting doctrine of proportionality, will be scrutinized. The aim is to indicate the process of establishing the proportionality of “social distancing” limitations to FORB under COVID-19. Finally, recommendations are given as to the responsibilities of States Parties toward FORB in the event of proportional limitations during COVID-19.

12. WHO, “International Health Regulations,” 2005, https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf?sequence=1; Regarding the lack of international cooperation, see David Fidler, “To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence,” Chinese Journal of International Law 19, no. 2 (2020): 207–13.
13. Heather Payne and Norman Doe, “Public Health and the Limits of Religious Freedom,” Emory Int’l L. Rev. 19 (2005): 539, 554.
14. Although public health is one of the grounds of limitation under discussion, and a part of the proportionality test requires a scientific analysis of the effectiveness of public health measures, this is a legal article and will not endeavor to perform such a scientific analysis. However, this article will highlight the fact that the proportionality test requires an expert analysis of public health measures in order to determine its effectiveness.
15. When a state expresses its consent to be bound by a treaty (through stipulated international procedures), that state becomes a State Party of the treaty. See “Towards Universal Participation and Implementation,” United Nations, accessed October 6, 2020, https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf. For purposes of this article, a State Party refers to a state that has expressed consent to be bound by the ICCPR and other international instruments referred to.
The General Scope of the Right to Freedom of Religion or Belief

Article 18 of the ICCPR states that:

1. Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 18, paragraph 1 provides for a broad protection of religious and non-religious beliefs (thought, conscience and religion). Therefore, the limitations caused by COVID-19 are not only applicable to organized and well-established religions, but also to various types of ideological frameworks, such as humanism and atheism and even unknown beliefs (albeit with varying consequences for each).

Paragraph 2 of Article 18 states that FORB includes the forum internum (the right to have, change and adopt a religion or belief of choice) and the forum externum (the freedom to manifest a religion or belief in worship, observance, practice and teaching).

16. ICCPR, Article 18.
17. UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), July 30, 1993, CCPR/C/21/Rev.1/Add.4, paras 1 and 2, (hereinafter referred to as General Comment 22), accessed May 1, 2020, https://www.refworld.org/docid/453883fb22.html. See also Heiner Bielefeldt, “Misperceptions of Freedom of Religion or Belief,” Human Rights Quarterly 35 (2013): 33, 37.
18. The tenets of some belief systems are already in line with COVID-19 restrictions. Some adherents of Jainism already wear mouth coverings so as not to inhale microbes so that these organisms are not killed. See Ron Cherry and Hardev Sandhu, “Insects in the Religions of India,” American Entomologist (2013): 200–202. On the other hand, ultra-Orthodox Jewish communities are greatly affected by COVID-19 regulations as their community structures are extremely strong. Joyce Dalsheim, “Jewish History Explains Why Some Ultra-Orthodox Communities Defy Coronavirus Restrictions,” The Conversation, April 29, 2020, https://theconversation.com/jewish-history-explains-why-some-ultra-orthodox-communities-defy-coronavirus-restrictions-135292.
19. Heiner Bielefeldt, Freedom of Religion or Belief: Thematic Reports of the UN Special Rapporteur (Eugene, OR: Wipf and Stock, 2018), 3. See also, General...
The forum externum can be exercised individually or “collectively” as well as in private or in public. However, the forum externum is not absolute (whereas the forum internum is) and can be limited. Paragraph 3 states that the forum externum may be limited if (1) it is prescribed by law and (2) it is necessary to “protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Also applicable to FORB are Articles 21 and 22 of the ICCPR protecting the right of peaceful assembly and the right to freedom of association, respectively. Article 27, protecting the rights of religious minorities not to be denied the right to enjoy, practice and profess their own religion with others in their community, is also relevant.

The onset of the COVID-19 pandemic has reactivated questions relating especially to the “public health” and “fundamental rights and freedoms of others” grounds of limitations under Article 18. COVID-19 also probes the consideration of limitations to parts of FORB via derogation from the right to freedom of association (Article 22), the protection of religious minorities (Article 27) and the right to freedom of peaceful assembly (Article 21) when a public emergency is declared by a State Party. Depending on the reactions of the state to COVID-19, there are different consequences for religious and non-religious individuals and communities.

COVID-19 and the Restriction of the Right to Freedom or Religion or Belief

The Nature of the Restrictions in Question under COVID-19

The WHO has issued recommendations and guidelines to “faith-based organizations” in the context of COVID-19, specifically asking these organizations to avoid large group gatherings and to conduct “rituals and faith-related activities virtually” whenever

Comment 22, para. 4; For a discussion of the elements of FORB as part of international law as well as international customary law, see Bryan Edelman and James T. Richardson, “Imposed Limitations on Freedom of Religion in China and the Margin of Appreciation Doctrine: A Legal Analysis of the Crackdown on the Falun Gong and Other ‘Evil Cults’,” Journal of Church and State 47, no. 2 (2005): 246. Another source providing a broad overview of FORB in international law is Kevin Boyle, “Freedom of Religion in International Law,” in Religion, Human Rights and International Law, ed. Javaid Rehman and Susan C. Breau (Leiden: Martinus Nijhoff Publishers, 2007), 23–52.

20. Entire religious and non-religious faith communities and organizations are affected (not only individuals). General Comment 22 (para. 4) states that acts integral to the conduct of religious groups are included in FORB.

21. General Comment 22, para. 3.
possible. If gatherings are held, social (the WHO refers to “physical”) distancing should be administered. Religious rituals such as touching and kissing (also of sacred objects), Holy Communion (drinking from a common cup and the placing of the wafer on the tongue), fonts of holy water, foot washing, and weddings and funerals (without social distancing) should be prevented. In summary, “social distancing” should be applied.

In combating pandemics, there are a limited number of measures to minimize the loss of life and prevent the spread of the pandemic. These can be grouped into pharmaceutical and non-pharmaceutical public health interventions. Pharmaceutical interventions include vaccines and antiviral agents, while non-pharmaceutical interventions include heightened hygiene compliance, social distancing, isolation, and quarantine (also including travel restrictions). Usually pharmaceutical and non-pharmaceutical measures should be implemented in combination to reduce mortality and social and economic impact. Often, as in the case of COVID-19, access to pharmaceutical measures may not be available during the early outbreak of a pandemic and only non-pharmaceutical interventions, such as social distancing, are available. The terms “social distancing,” “quarantine,” and

22. The WHO prefers the phrase “physical distancing.” See WHO, “Coronavirus Press Conference”, last modified March 20, 2020, https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-20mar2020.pdf?sfvrsn=1eafbff_0). However, for purposes of this article, “social distancing” will be used, as this is the scientific name used in all research conducted pertaining to “public health”; The social distancing measures are also recommended by the WHO. See WHO, “Practical Considerations and Recommendations for Religious Leaders and Faith-Based Communities in the Context of COVID-19,” WHO, last modified April 7, 2020, file:///C:/Users/u0121375/Downloads/WHO-2019-nCoV-Religious_Leaders-2020.1-eng%20(1).pdf.
23. WHO, “Practical Considerations and Recommendations for Religious Leaders.”
24. Annette Braunack-Mayer et al., “Including the Public in Pandemic Planning,” *BMC Public Health* 10 (2010), http://www.biomedcentral.com/1471-2458/10/501. Non-pharmaceutical measures, such as “contact tracing,” also exist (combined with its own levels and aspects of controversy). See Biao Tang et al., “The Effectiveness of Quarantine and Isolation Determine the Trend of the COVID-19 Epidemic in the Final Phase of the Current Outbreak in China,” *International Journal of Infectious Diseases* 96 (2020): 636–47.
25. Hitoshi Oshitani, “Potential Benefits and Limitations of Various Strategies to Mitigate the Impact of an Influenza Pandemic,” *J Infect Chemother* 12 (2006): 167.
26. Rebecca Katz et al., “Local Decision Making for Implementing Social Distancing in Response to Outbreaks,” *Public Health Reports* 134 (2019): 150–54. Even if a vaccine is found, a pandemic would require mass vaccination in a short period of time. Also, there might not be adequate supplies and moral decisions will
“isolation” are used specifically in the field of “public health” and share common roots.\textsuperscript{27} The basic underlying idea is to protect society by removing and isolating threats to society.\textsuperscript{28} These are the conventional approaches that have been used for the control and containment of disease outbreaks for centuries.\textsuperscript{29} Government responses (social distancing, quarantine, and isolation) to COVID-19 are therefore not new.\textsuperscript{30}

Mostly relevant for religious and non-religious believers and faith communities (and also the focus of this article) is the notion of social distancing involving executive orders to limit human contact and movement in an attempt to delay and reduce the impact of a pandemic.\textsuperscript{31} However, social distancing measures have limited FORB either by the declaration of a public emergency or a direct limitation under Article 18(3) of the ICCPR.

\textit{Public Emergencies}

Under the ICCPR there is no suspension (rendering inoperative) of rights, but rather a proportional derogation during public emergencies.\textsuperscript{32} Article 4, paragraph 1 of the ICCPR states that in “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties ...

\textsuperscript{27} David Claborn and Bernard McCarthy, “Incarceration and Isolation of the Innocent for Reasons of Public Health,” \textit{The Journal of the Institute of Justice & International Studies} 11 (2011): 77–78.

\textsuperscript{28} Claborn and McCarthy, “Incarceration and Isolation,” 76.

\textsuperscript{29} Oshitani, “Potential Benefits and Limitations.” See also Eugenia Tognotti, “Lessons from the History of Quarantine, from Plague to Influenza,” \textit{Emerging Infectious Diseases} 19 (2013): 254.

\textsuperscript{30} Isolation is the removal of symptomatic individuals from the general population. Quarantine is the removal of individuals who have had contact with an infected individual but are not displaying any symptoms. See Jose de Jesus Esquivel-Gómez and Juan Gonzalo Barajas-Ramírez, “Efficiency of Quarantine and Self-Protection Processes in Epidemic Spreading Control on Scale-Free Networks,” \textit{Chaos} 28 (2018). See also Oshitani, “Potential Benefits and Limitations”; Claborn and McCarthy, “Incarceration and Isolation,” 77–78; and WHO “Ethical considerations.”

\textsuperscript{31} Claborn and McCarthy, “Incarceration and Isolation,” 77–78. See also WHO, “Ethical Considerations,” and WHO Writing Group, “Nonpharmaceutical Interventions for Pandemic Influenza,” \textit{Emerging Infectious Diseases} 12, no. 1 (2006): 88–94.

\textsuperscript{32} Johan van der Vyver, “Limitations of Freedom of Religion or belief,” \textit{Emory International Law Review} 19 (2005): 512–14. See also Audrey Lebret, “COVID-19 Pandemic and Derogation to Human Rights,” \textit{Journal of Law and the Biosciences} 7 (2020): 1–15.
may take measures derogating from the obligations under the present Covenant.” However, paragraph 1 also states that these measures must be proportional. Some rights, such as FORB, cannot be derogated from, even in times of public emergency.

Conversely, the right to peaceful assembly (Article 21), freedom of association (Article 22), and the rights of religious minorities (Article 27) can be derogated from proportionally under declared public emergencies. If individuals cannot assemble peacefully or associate freely under a public emergency, how does it affect FORB where the essence of religious and non-religious manifestation (for many organizations) is to assemble and associate? Will those parts of FORB be affected by proportional derogation during a public emergency while the rest of the forum externum is not? What about religious minorities? Will they still be protected under Article 18, or will their rights be proportionally derogated from during a public emergency, since Article 27 is a right from which derogation is allowed? Bielefeldt et al. states that FORB should not be seen in isolation but “rather as forming an integral part of the entire system of human rights.” There is a particularly “close relationship between freedom of religion or belief and freedom of assembly and association.” The substantive issues should be examined under the right most relevant to the facts (lex specialis) and other rights viewed as subsidiary (the lex generalis). Yet, even if that is the case, derogations from Articles 21, 22, and 27 should be examined under the right most relevant to the facts (lex specialis) and other rights viewed as subsidiary (the lex generalis).

33. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (hereinafter referred to as the Siracusa Principles) state that such derogation is only allowed in cases of “exceptional and actual or imminent danger …” See UN Commission on Human Rights, The Siracusa Principles, September 28, 1984, E/CN.4/1985/4, para. 39, accessed May 3, 2020, https://www.refworld.org/docid/4672bc122.html.

34. This requirement of proportionality is described in Article 5 of the ICCPR: “1. Nothing in the present Covenant may be interpreted as implying … any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for ….”

35. Article 4, para. 2 of the ICCPR states: “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made ….” See also General Comment 22, para. 1 and paras 58 and 59 of the Siracusa Principles. It is interesting to note that FORB is not mentioned as a right from which no derogation is permitted in the European Convention on Human Rights. See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, November 4, 1950, ETS 5, https://www.refworld.org/docid/3ae6b3b04.html.

36. Heiner Bielefeldt, “Freedom of Religion or Belief—A Human Right under Pressure,” Oxford Journal of Law and Religion 1 (2012): 15–35.

37. OSCE Office for Democratic Institutions and Human Rights (ODIHR) “Guidelines on Freedom of Peaceful Assembly,” OSCE/ODIHR (2001), para. 14, accessed May 3, 2020, https://www.osce.org/odihr/73405?download=true.
22, and 27 will also affect FORB. Hence, under COVID-19, it is possible that parts of the *forum externum* of religious and non-religious beliefs may be affected during declared public emergencies by way of derogation from rights under Articles 21, 22, and 27. Hence, the meaning of “proportional derogation” becomes important.

Articles 4 and 5 of the ICCPR and paragraph 39 of the *Siracusa Principles* clearly state that proportional derogation can only occur in cases of exceptional and actual or imminent danger that threatens the life of the nation. “A threat to the life of the nation” is one that affects the whole population, and threatens the physical integrity of the population and the political independence or the territorial integrity of the state.\(^38\) If a public health emergency reaches this magnitude, it can be invoked as a ground for the derogation of human rights.\(^39\) Also, the derogations model, as opposed to Article 18 limitations, is more rigid in terms of its treatment of the seriousness of the danger and the scope and weight of limitations to rights.\(^40\) Some warn that discourse on global public health is too prone to portraying a health crisis as an emergency, thus bringing them on par with security threats. However, Article 4 of the ICCPR does include public health emergencies as long as it fulfills *all* criteria.\(^41\) In order to determine this, the grounds of derogation must be interpreted restrictively by States Parties and be of an “exceptional and temporary nature.”\(^42\) The derogation must also meet some proportionality requirements. It must be necessary and adequately respond to the “threat to life” of the nation, and may not go beyond this.\(^43\) The measures restricting the association and assembly of groups and religious minority rights must only be used for legitimate public health goals and not to squash dissent. Religious and non-religious believers and faith communities should also be clearly informed as to what the emergency measures are, when they will start and when they will end.\(^44\)

One of the “advantages” for FORB, if restrictions are declared in terms of public emergencies and not under Article 18, is that only

---

38. *Siracusa Principles*, para. 39.
39. Andraž Zidar, “WHO International Health Regulations and Human Rights,” *The International Journal of Human Rights* 19 (2015): 505, 508.
40. Zidar, “WHO International Health Regulations and Human Rights,” 507.
41. Zidar, “WHO International Health Regulations and Human Rights,” 508.
42. *Siracusa Principles*, para. 63. See also UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, August 31, 2001*, CCPR/C/21/Rev.1/Add.11, para. 2, accessed May 3, 2020, https://www.refworld.org/docid/453883fd1f.html.
43. According to *General Comment 29* (para. 4), the requirement of strict necessity relates to the duration, geographical coverage, and material scope of the derogation. See also *Siracusa Principles*, paras 64 and 65.
limited aspects of the right will be restricted (assembly and association). Another “advantage” is that a State Party declaring a state of emergency must clearly give a start and an end date to the derogation. The disadvantage of a public emergency derogation, as opposed to a limitation under Article 18, is that, although there are some limited proportionality requirements, a derogation does allow for a full suspension of a right and not merely a proportional limitation as in Article 18—although some checks and balances do apply. Derogation involves more far-reaching measures than limitations. Hence, the peaceful assembly and association parts (as well as religious minority rights) can be fully suspended. Furthermore, the public health derogation under a public emergency is more flexible and can change in accordance with the mutation of the public health risk. This makes it easier for the level of restrictions upon FORB to change and vary during the pandemic.

Another possible threat to FORB is that some of the most “grave and systematic human rights abuses occur during public emergencies.” A public emergency is unilaterally decided and declared by a State Party. Although States Parties must adhere to the requirements mentioned above and to measures of proportionality, the declaration and determination as to whether these grounds are met is decided independently by the State Party (although review measures exist). For example, under the margin of appreciation, the State Party is granted discretion to establish whether a “pressing social need” exists. The State Party is merely required to make an official proclamation, notify the other States Parties, and proclaim the procedures under national law. Article 4(3) of the ICCPR also states that the UN should be informed of the reason for suspending the right and the specific rights from which they have derogated, but this does not mean

44. Office of the United Nations High Commissioner for Human Rights (OHCHR), “UN Covid-19 Guidance,” OHCHR, last modified May 13, 2020, https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx.
45. See Article 4(3) of the ICCPR. See also the OHCHR, “Covid-19 Guidance” and Van der Vyver, “Limitations of Freedom of Religion or Belief,” 512–13.
46. Zidar, “WHO International Health Regulations and Human Rights,” 508.
47. Edelman and Richardson, “Imposed Limitations on Freedom,” 248.
48. During public health emergencies, there are many variables constantly shifting making it indeterminable and elusive. See Zidar, “WHO International Health Regulations and Human Rights,” 509.
49. Evan Criddle and Evan Fox-Decent, “Human Rights, Emergencies, and the Rule of Law,” Human Rights Quarterly 34 (2012): 39, 40.
50. General Comment 29.
51. Siracusa Principles, para. 62.
52. Edelman and Richardson, “Imposed Limitations on Freedom,” 249.
53. Siracusa Principles, paras 42–44.
that the UN is involved in the actual decision to declare a public emergency. In general, there has been widespread disregard for IHR, and David Fidler argues that international law has proved to be vulnerable and inadequate to support robust pandemic cooperation during public emergencies. In line with this, the UN Special Rapporteur on the rights to freedom of peaceful assembly and association has raised concerns during COVID-19 regarding:

- the lack of consultation of civil society organizations in the restrictions of assembly and association;
- the questionable processes through which some restricting laws have been passed;
- the broad and vague nature of some laws;
- the lack of dissemination of information;
- disproportionate penalties for non-compliance;
- the application of measures in discriminatory ways; and
- the lack of full consideration of the implications of some measures.

“Particularly worrying are cases in which governments have seized on the crisis to suspend constitutional guarantees, to pass sweeping emergency laws and to rule by decree . . .” or where governments threaten to do so. For example, New York City Mayor Bill de Blasio controversially threatened to permanently close Orthodox synagogues holding services in violation of governmental measures regarding the pandemic. Furthermore, derogation from religious minority rights under a public emergency can pose substantial threats to vulnerable societies and hence to FORB. Issues of “scapegoating” and the abuse of public emergencies to achieve alternative discriminating motives have arisen. For example, there are reports that Chinese authorities have forced Uighurs to work in factories to compensate for the decrease in output during the pandemic. The Sincheonji church in South Korea has

54. Fidler, “To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence.”
55. OHCHR, “States responses to COVID-19 threat should not halt freedoms of assembly and association,” last modified April 14, 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E. For example, Hungarian Prime Minister Viktor Orbán’s government submitted a draft law that would enable them to rule by decree for an unlimited period of time. See Eszter Zalan, “Hungary’s Orban Seeks Indefinite Power in Virus Bill,” EU Observer, March 23, 2020.
56. Daniel Leddy, “COVID-19: de Blasio, Others Threaten Religious Freedom (commentary),” SILive.com, April 7, 2020, https://www.silive.com/news/2020/04/covid-19-de-blasio-others-threaten-religious-freedom-commentary.html.
57. United States Commission on International Religious Freedom, “Factsheet: Coronavirus,” March 2020, https://www.uscirf.gov/sites/default/files/2020
also faced considerable criticism and even harassment from the government and society. In France, there were reports of the scapegoating of an evangelical church. Questionable news articles also targeted less vulnerable religious groups. In the United States, the New York Times ran an op-ed with the title “The Road to Coronavirus Hell Was Paved by Evangelicals.” The headline was later changed to “The Religious Right’s Hostility to Science Is Crippling Our Coronavirus Response.”

Whether countries have declared public emergencies or not, FORB may still be limited under Article 18 of the ICCPR. FORB also contains more than religious minority rights and the freedom to assemble and associate. The COVID-19 restrictions of social distancing have also affected more than these aspects of FORB. For several organizations, the spiritual consequences and impact on other aspects of the forum externum (and the forum internum) have been vast.

Limitations under Article 18

Even if the freedom of assembly and association can be derogated from in times of public emergencies (but not FORB), many states have not declared public emergencies. In those cases, the limitation of FORB can be justified by way of Article 18(3) of the ICCPR.

Specifically relevant for pandemics such as COVID-19 is that Article 18 explicitly provides for “public health” and “the rights and freedoms of others” as grounds for limitation (not specifically mentioned as a ground for derogation during public emergencies). The International Covenant on Economic, Social and Cultural

%20Factsheet%20Covid-19%20and%20FoRB.pdf. See also Radio Free Asia, “Xinjiang Authorities Sending Uyghurs to Work in China’s Factories, Despite Coronavirus Risks,” Radio Free Asia, February 27, 2020, https://www.rfa.org/english/news/uyghur/work-02272020160853.html.

58. United States Commission on International Religious Freedom, “Factsheet: Coronavirus.” See also Massimo Introvigne et al., “Shincheonji and Coronavirus in South Korea: Sorting Fact from Fiction,” CESNUR and Human Rights Without Frontiers, accessed May 3, 2020, https://www.cesnur.org/2020/shincheonji-and-covid.htm.

59. Willy Fautrè, “France: Covid-19: Scapegoating an Evangelical Church in Mulhouse,” Human Rights Without Frontiers, May 19, 2020, https://hrwf.eu/france-covid-19-scapegoating-an-evangelical-church-in-mulhouse/.

60. Katherine Stewart, “The Religious Right’s Hostility to Science Is Crippling Our Coronavirus Response,” New York Times, March 27, 2020, https://www.nytimes.com/2020/03/27/opinion/coronavirus-trump-evangelicals.html; Paul Marshall, “Should Churches Like John MacArthur’s Resist COVID-19 Restrictions?,” Religion Unplugged, September 2, 2020, https://religionunplugged.com/news/2020/9/1/should-churches-resist-covid-19-restrictions.

61. See page 21.
Rights also mandates States Parties to protect the public from epidemic diseases.\(^{62}\) Although the state cannot deny or “take away” FORB even during a public emergency, the forum externum part of the right may be limited proportionally and only if necessary under strictly defined and specific circumstances, such as “public health” and “the rights and freedoms of others.” Paragraph 8 of General Comment 22 states that all the necessary requirements must be present, i.e., prescribed by law and necessary to achieve one of the following purposes: public safety, order, health, morals, and the rights and freedoms of others. The list containing the grounds for limitation is a closed list, and restrictions are not allowed on grounds not specified in Article 18.\(^{63}\) Limitations in Article 18 are to be strictly interpreted and “applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.”\(^{64}\) Regulations limiting FORB must be clear and transparent as to their scope, and must also be time-limited.\(^{65}\) Under Article 18, there is no specific official proclamation announcing the limitation necessary. However, General Comment 22 does say that Article 18 limitations must be proportional and include a proportional timeframe directed towards a specific purpose. The presumption is always in favor of FORB for all, and the onus is on the state to justify limitations.\(^{66}\)

Since COVID-19 has been identified as a threat to “public health” and the “rights and freedoms of others,” states have been able to justify limitations on various external manifestations of FORB during the COVID-19 pandemic. It, therefore, becomes important to establish the theoretical basis of justification of these limitations and their scope.

---

62. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, December 16, 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 12 (2) (c), accessed May 3, 2020, https://www.refworld.org/docid/3ae6b36c0.html.

63. General Comment 22, para. 8.

64. General Comment 22, para. 8.

65. OCHCR, “COVID-19: States Should Not Abuse Emergency Measures to Suppress Human Rights,” OCHCR, last modified March 16, 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E.

66. Bielefeldt, “Misperceptions of Freedom of Religion or Belief.” See also Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices (New York: United Nations Publication, 1960), 54.
Article 18 grounds for limitation are very broad and vaguely constructed, leaving it to States Parties to interpret the contents. Even in international instruments, such as the Siracusa Principles and General Comment 22, the content of these concepts remains vague. Similarly, the WHO defined the notion of “health” very broadly as “the state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” The prevention of epidemics is contained within this broad definition. Based on the broad definition of “public health,” religions and beliefs also have a role to play in the achievement of physical, mental and social well-being in general and during times of pandemic. Therefore, public health and most belief systems share the same goal: the general well-being of the individual. Laws generally see religious observances as contributing to the mental health of individuals (and creating the optimal environment where health can flourish). This is also the assumption in rules, permitting, for example, religious accommodations in prisons and spiritual needs of hospital patients. Practices and doctrines emanating from religious and non-religious belief systems may therefore be vital in achieving “health” as advocated by the WHO. This is also acknowledged directly by the WHO when it states that “faith-based organizations ... can play a major role in saving lives and reducing illness related to COVID-19.” However, in cases of pandemics, where religious or non-religious manifestations pose a danger to public health, the potential contribution may become a general threat to public health and the question of limitation arises. This is the paradox and dilemma for religious and non-religious organizations. Also, it is a principle in medicine to hold that human life should be preserved wherever possible, gaining priority over other considerations such as financial cost and religious conviction. For that reason also, social distancing

67. Gehan Gunatilleke, “Criteria and Constraints: the Human Rights Committee’s Test on Limiting the Freedom of Religion or Belief,” Religion and Human Rights 15 (2020): 20, 22.
68. WHO, “WHO Constitution.”
69. Payne and Doe, “Public Health and the Limits of Religious Freedom,” 541.
70. Ahmed Shaheed states that religious actors also play a vital role in the provision of healthcare. See Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief.”
71. Payne and Doe, “Public Health and the Limits of Religious Freedom,” 553.
72. The WHO further states that “faith-based organizations” are “a primary source of support, comfort, guidance, and direct health care and social service ...” (WHO “Practical considerations and recommendations”).
73. Payne and Doe, “Public Health and the Limits of Religious Freedom,” 553.
74. Although the principle of autonomy may sometimes override (as in the case of euthanasia), the presumption remains, in an emergency, that action must be
measures have been implemented with the knowledge that it can cause dire economic consequences and the limitation of rights such as FORB.

This leads to the second ground of limitation relevant to COVID-19 and pandemics in general, the “fundamental rights and freedoms of others.” Which right should be limited where the protection of one right—such as the right to life and right to health of an entire population—will limit another right such as FORB?75 The *Siracusa Principles* state that in the event of a conflict between rights, weight should be given to rights not subject to limitations.76 Accordingly, since FORB is subject to limitations, it will be trumped by a right that is not. Johan van der Vyver disagrees with this construction and states that when a right or freedom cannot be limited, it is because of the nature of the right “and its possible bearing on contingencies that warrant the limitations of others, and is not necessarily based on the special significance or preeminence to the right or freedom concerned.”77 This author agrees that whether public health rights can limit FORB should not depend on whether those rights are more important or not. This author agrees also with Heiner Bielefeldt that, when there is a conflict between rights, the substance of all conflicting human rights must be preserved to the maximum degree possible.78 This rules out two assumptions: (1) that one right can generally overrule another and (2) that a middle ground or compromise should be found.79 With regards to the first assumption, setting a concrete priority is unavoidable (such as during COVID-19). However, the “winner takes it all” approach cannot work in human rights understanding. Hence, when one right overrules another, one party gets one hundred percent and another party gets nothing. A conflict cannot be solved by “postulating an abstract hierarchy” between rights. All human rights belong together and are universal, indivisible, interrelated and interdependent.80 With regards to reaching a compromise (the second assumption), the solution

taken to save a life. See Payne and Doe, “Public Health and the Limits of Religious Freedom,” 553.
75. The “rights and freedoms of others” are not limited to rights in the ICCPR. See *Siracusa Principles*, para. 35.
76. *Siracusa Principles*, para. 36.
77. Van der Vyver, “Limitations of Freedom of Religion or Belief,” 507.
78. Ahmed Shaheed agrees by stating that every effort must be made to ensure that all rights are protected as all human rights are indivisible, inter-related and interdependent and without hierarchy. See Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief.”
79. Heiner Bielefeldt, “Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom,” *Religion and Human Rights* 15 (2020): 3, 13.
80. Heiner Bielefeldt, “Limiting Permissible Limitations,” 13.
will lie somewhere in the middle ground between competing rights. In the middle ground compromise, there is a fifty-fifty win (or loss). However, both approaches assume the structure of a “zero-sum-conflict.” The ideal approach would be to view the issue from the perspective that—however far possible—both rights (for example the right to health and life and FORB) could be preserved at one hundred percent.81

In order to do so, one has to determine whether a conflict really exists.82 During COVID-19, there are clear restrictions on religious and non-religious believers and communities. However, does that really mean that religious and non-religious believers and communities (and their FORB) are, in principle, in conflict with COVID-19 restrictions and their aims? As described above, religion has a positive and important role to play in the achievement of health. The social distancing restrictions are, in most cases, not targeted at instituting a conflict with religious or non-religious faith organizations (and should not be), but are rather aimed at achieving a common goal of public health protection. In effect, there are limitations to FORB, but it is not necessarily in direct conflict with the aims and purposes of various religious and non-religious faith organizations. Yet, the potential exists that the COVID-19 pandemic can be utilized to wield excessive state power with the aim to unjustifiably limit and even harm human rights and FORB. However, in these cases, there would usually be an ulterior motive that extends beyond the purpose of achieving the notion of protecting public health.

Yet, it cannot be denied that COVID-19 restrictions extensively limit FORB and potentially do conflict with many faith organizations. Also, the pandemic clearly presents the potential and a golden opportunity for some States Parties to negate the protection of all human rights in good faith. In cases where rights and interests clash, justice needs to be done “to the maximum degree possible” to each right concerned. The ideal solution is to preserve one hundred percent of each right. If that is not possible, States Parties should try to remain as close as possible to such a solution. In order to achieve this, any limitation requires a specific justification as described in the proportionality analysis inherent in Article 18.83

81. Heiner Bielefeldt, “Limiting Permissible Limitations,” 14.
82. Heiner Bielefeldt, “Limiting Permissible Limitations,” 14–15.
83. Bielefeldt, “Limiting Permissible Limitations,” 15.
Proportionality during COVID-19

As already mentioned, within the context of COVID-19, the purpose of social distancing as a public health limitation will be to either prevent or delay the spread and impact of a pandemic disease. However, measures of social distancing raise political, ethical, and socioeconomic issues. Historically, they have been perceived as intrusive and met with distrust. Also, in the past, lower classes as well as ethnic and marginalized minority groups have been stigmatized and faced discrimination through social distancing. For example, in the nineteenth century, “social distance” was used as a polite euphemism by the British to refer to class and by U.S. citizens to refer to race. Similar events have occurred during COVID-19. In the Middle East and North Africa, social distancing measures banning assemblies were implemented to limit popular protests. Under the umbrella of “social distancing,” a few states (Kazakhstan, Uzbekistan, and Russia) raided the homes of individuals belonging to non-registered religious or belief communities. Social distancing, due to its inherent limitation of the freedom rights of individuals, requires vigilance to avoid causing prejudice. This vigilance is also required in the proportionality analysis, whilst the complex nature of the political, ethical, and socioeconomic issues raised must constantly be kept in mind.

84. WHO Writing Group, “Nonpharmaceutical Interventions for Pandemic Influenza.”
85. Tognotti, “Lessons from the History of Quarantine.”
86. Gostin and Berkman, “Pandemic Influenza,” 171–75.
87. Tognotti, “Lessons from the History of Quarantine.”
88. Lily Scherlis, “Distantiated Communities: A Social History of Social Distancing,” Cabinet, April 30, 2020, http://cabinetmagazine.org/kiosk/scherlis_lily_30_april_2020.php. See also Amy Fairchild et al., “Vexing, Veiled, and Inequitable: Social Distancing and the ‘Rights’ Divide in the Age of COVID-19,” The American Journal of Bioethics 20 (2020): 55–61.
89. Michele Collazzo and Alexandra Tyan, “Emergency Powers, COVID-19 and the New Challenge for Human Rights,” IAI Commentaries 20 (2020), https://www.iai.it/en/pubblicazioni/emergency-powers-covid-19-and-new-challenge-human-rights.
90. OSCE, “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic – Part II: Impacts on Democratic Institutions and Human Rights,” OSCE, July 17, 2020, 118, https://www.osce.org/odihr/human-rights-states-of-emergency-covid19.
91. Tognotti, “Lessons from the History of Quarantine.”
92. Although this article focuses on the legal aspects concerning the proportionality, it is important to mention that the influence of social distancing on political, social and economic (and other) factors is to be taken into account when doing the proportionality analysis.
The most general understanding of proportionality is that “one should not use a sledgehammer to crack a nut when a nutcracker will suffice.”93 In order for a limitation to be proportionate: (1) it must be prescribed by law; (2) it has to be appropriate (there must be a relationship between the means employed [social distancing] and the end sought [delaying the spread and minimizing the effects of the pandemic towards protecting the health and lives of citizens]); (3) it must be necessary to achieve the intended purpose (not merely suitable); (4) the limitations must be proportionate (the burden placed upon FORB must not be excessive relative to the objective of delaying and minimizing the effects of the pandemic); and (5) there should not be a less restrictive way in which the same purpose can be achieved.94

These seemingly simple requirements are complicated. In the past, not even the Human Rights Committee has applied the proportionality test consistently.95 Furthermore, it is especially difficult to do a proportionality analysis in conditions of scientific uncertainty and crisis.96 The WHO does not give advice as to whether extensive restrictive social distancing measures are justifiable or not, as these measures are tailored in accordance with the different legal contexts within which they apply.97 However, although a single universal answer might not be possible, it is important to establish the basic responsibilities that States Parties have in attempting to achieve, as far as possible, the one hundred percent protection of all rights involved, including FORB.

The first requirement states that any restriction to FORB must be “prescribed by law.” During public emergencies, many states have expedited procedures of lawmaking so that laws can swiftly be proposed and adopted in order to respond to pressing needs, such as the COVID-19 pandemic. While such procedures allow for certain aspects of the regular legislative process to be passed over, “the principles of transparency, inclusiveness and accountability” should still guide the overall process to ensure that laws are legitimate and accessible “as well as compliant with human rights and the rule of law.”98 This means that (1) the

93. Jeremy Gunn, “Deconstructing Proportionality in Limitations Analysis,” Emory International Law Review 19 (2005): 466–67.
94. Gunn, “Deconstructing Proportionality,” 467–68.
95. At times, they have used a flexible approach and at other times, a more rigorous approach. See Gunatilleke, “Criteria and Constraints,” 22.
96. Gostin and Berkman, “Pandemic Influenza,” 147–50.
97. Von Bogdandy and Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis,” 20.
98. OSCE, “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic – Part II: Impacts on Democratic Institutions and Human Rights,” 71.
restrictive legislation or regulation must be accessible to citizens and (2) it must be written in a way that citizens can foresee the exact scope and meaning of the provision.\textsuperscript{99} Social distancing restrictions should be described as precisely and clearly as possible.\textsuperscript{100} Governments should also clearly state who has the power to order and enforce social distancing strategies.\textsuperscript{101} Not only should they be clearly described and consistently applied, they should also be given a start date and an end date.\textsuperscript{102} The laws and limitations should also be properly promulgated. As mentioned above, the broad and vague grounds for limitations (reinforced by the broad definition of the WHO) leave it to States Parties to interpret the content of these concepts, thereby providing for the opportunity to implement vague laws of restriction.\textsuperscript{103} For example, with the “war on terrorism,” several countries have defined the restriction contained in “public safety” too broadly, and this has disproportionately violated the right to freedom of religion or belief.\textsuperscript{104} During the COVID-19 pandemic, Belgium, France, Portugal, and the United Kingdom instituted vague and overly broad restrictive measures where potentially arbitrary powers were conferred on the executive. This also led to inconsistent applications of restrictive measures.\textsuperscript{105}

A second aspect of the proportionality test is that social distancing restricting FORB must be necessary to achieve the purpose of preventing loss of lives and limiting the spread of the disease. According to the Siracusa Principles, “public health” is a legitimate ground for limitation if it is necessary for a state to take certain measures in dealing with a serious threat to the health of the population or individual members of the population.\textsuperscript{106} The restrictions used must be specifically designed to prevent the identified threat or achieve the identified purpose. “In other words, there must be a reasonable relationship between the public health intervention and the achievement of a legitimate public health objective.”\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{99} Edelman and Richardson, “Imposed Limitations on Freedom,” 248.
\item \textsuperscript{100} Gunn, “Deconstructing Proportionality,” 490–91.
\item \textsuperscript{101} Gostin and Berkman, “Pandemic Influenza,” 171–75.
\item \textsuperscript{102} Gostin and Berkman, “Pandemic Influenza,” 171–75.
\item \textsuperscript{103} Gunatilleke, “Criteria and Constraints,” 22.
\item \textsuperscript{104} United Nations General Assembly, “Interim Report of the Special Rapporteur on Freedom of Religion or Belief,” A/73/362, last modified September 5, 2018, file://i:/Articles/NUWE/FWO%20Research%20Project%202020/A_73_362_E.pdf: para. 41.
\item \textsuperscript{105} OSCE, “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic – Part I: States’ Obligations in a Time of Emergency,” July 16, 2020, 33–34, https://www.osce.org/files/f/documents/a/9/462723.pdf.
\item \textsuperscript{106} Siracusa Principles, para. 25.
\end{itemize}
With regard to necessity, there are two important aspects. First, a regulation may seem neutral, but does not adequately address the harm and thereby unnecessarily limits FORB in general (therefore it is not necessary). Second, a regulation might address the harm (it seems necessary), but does so in a way that is discriminating against the FORB of specific religious groups and communities. In the first instance, governments can institute seemingly neutral and necessary regulations but define the notions of “public health” and “rights and freedoms of others” too broadly (either intentionally or not), and use it to overextend its power and violate rights such as FORB. In the second instance, it might be that such COVID-19 restrictions do address a real harm, but at the same time they disproportionately and unfairly affect the FORB of certain individuals or communities. The second instance has been a problem during COVID-19 since, although in most countries social distancing measures have been applied equally and nation-wide (not focusing on certain communities of people), the effects thereof have been disproportionate towards certain vulnerable groups. That is because the patterns of disease and death have reflected social inequalities while social distancing operates “in a context characterized by profound inequalities.” In both cases, it is important to establish whether the regulations and restrictions are really necessary to achieve the purpose of securing public health and diminishing the loss of lives (even if it resultantly does), and whether they are in the “genuine interests of democracy and […] not merely political expediency in disguise.” It should also be established whether the regulations and restrictions have disproportionate effects, even if equal in their application.

During COVID-19, the necessity requirement has been a general concern regarding the abuse of powers within the United Nations. These fears are not unfounded. In Iran, the government has released 85,000 prisoners to prevent the spread of COVID-19, but has reportedly placed prisoners who are part of the Sufi religious minority in wards that are overcrowded, thereby increasing their risk of infection. In South Korea, some authorities are scapegoating a small religious sect because some of its members were

107. Gostin and Berkman, “Pandemic Influenza,” 147–50.
108. Gunn, “Deconstructing Proportionality,” 496.
109. Amy Fairchild et al., “Vexing, Veiled, and Inequitable: Social Distancing and the “Rights” Divide in the Age of COVID-19.”
110. Gunn, “Deconstructing Proportionality,” 488. See also General Comment 22, para. 8 and Siracusa Principles, para. 12.
infected. The UN has expressed a general fear that governments will not remain true to their commitment under the 2030 agenda “to leave no one behind.” The Special Rapporteur on the Right to Development states: “I am deeply concerned that decision makers will step away from their promises to reduce inequalities ... during the current fight against the coronavirus pandemic, by adopting policies which may reinforce and exacerbate vulnerabilities ...” Specifically for purposes of COVID-19, UN experts have warned that government responses must be motivated by genuine health concerns and not alternative motives. There is also great concern for minority groups including religious minority groups. It is feared that countries will use the pandemic and emergency powers as an excuse to implement totalitarian policies and abuse security measures to suppress dissent.

Closely connected to the requirement of necessity is the question as to whether the restrictions will be effective (or reasonably likely to be effective) in achieving the desired purpose. Has the restriction on religious and non-religious faith communities coming together (and other social distancing measures) contributed to slowing down the pandemic, hence protecting public health, or can it reasonably be expected to do so? Here, scientific evidence, if available, will be a decisive factor, especially medical-epidemiological research. Although a scientific public health analysis of the evidence of the effectiveness of social distancing falls outside of the scope of this article, it is important to mention that a proportionality analysis will require a scientific evaluation of existing evidence, and that states have a duty to consider these evaluations, for example, in determining the timing with which these social distancing measures are implemented. To be most effective, authorities must intervene at the earliest stages (even

111. Gayle Manchin and James Carr, “COVID-19 Symposium: Don’t Let Religious Freedom Become a Casualty of Coronavirus,” OpinioJuris, April 6, 2020, https://opiniojuris.org/2020/04/06/covid-19-symposium-dont-let-religious-freedom-become-a-casualty-of-coronavirus/.
112. OHCHR, “Leave no one behind” – Don’t forget your commitments in your response to the COVID-19 crises,” OHCHR, last modified April 9, 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25786&LangID=E.
113. OHCHR, “Leave No One Behind.”
114. OHCHR, “States Should Not Abuse Emergency Measures.”
115. OHCHR, “Leave No One Behind.”
116. OHCHR, “States Should Not Abuse Emergency Measures.”
117. Gunn, “Deconstructing Proportionality,” 491.
118. Von Bogdandy and Villarreal, “International Law on Pandemic Response,” 20.
before the threat level is clear). If interventions are well timed, untold economic and human harm may be prevented. However, if interventions overreach, are too early or too late, it may have dire consequences for the economy (if too early and overreaching) and human lives (if too late). Therefore, there is a responsibility on governments to act with due diligence in assessing the best timing, based on the scientific knowledge available to them (and due to the novelty of the virus, this has posed some problems). In the event of a State Party neglecting to do so, this may result in more extensive social distancing measures in order to slow the spread of the pandemic and, in effect, result in even more restrictions to FORB. Such negligence by a State Party may therefore exacerbate and contribute to causing restrictive limitations to FORB and other human rights.

Even if a limitation is necessary and effective, it has to be proportional. Social distancing may be both necessary to achieve the purpose of preventing loss of human lives and effective in limiting the spread of the disease. However, it may still be unethical if the human burden imposed is wholly disproportionate to the expected benefit. For example, can the global economic loss be justified? Will the same economic loss occur if millions die? Can potential loss of livelihood and people dying from starvation be justified? Can the extensive loss of individual freedom be justified? What about the homeless person who has to stay in an overcrowded shelter in order to social distance? Can the potential negative effect of social distancing on the community morale be justified, or the exacerbation of social inequalities it might cause? In France and Germany, the initial blanket bans on meetings in places of worship, without individual accommodations, were later considered excessive and disproportionate to the aim of achieving public health. Therefore, the benefits and potential problems attached to social distancing methods must be

119. Esquivel-Gómez and Barajas-Ramírez, “Efficiency of Quarantine and Self-Protection,” 28. See also Fang et al., “Transmission Dynamics of the COVID-19 Outbreak,” 645.
120. Gostin and Berkman, “Pandemic Influenza,” 571.
121. Gostin and Berkman, “Pandemic Influenza,” 147–50.
122. Harunor Rashid et al., “Evidence Compendium and Advice on Social Distancing and Other Related Measures for Response to an Influenza Pandemic,” Paediatric Respiratory Reviews 16 (2015): 121.
123. Gunn, “Deconstructing Proportionality,” 492–93.
124. Amy Fairchild et al., “Vexing, Veiled, and Inequitable: Social Distancing and the “Rights” Divide in the Age of COVID-19.”
125. WHO, “Guidance Document on Pandemic Preparedness.” See also Amy Fairchild et al., “Vexing, Veiled, and Inequitable: Social Distancing and the “Rights” Divide in the Age of COVID-19.”
understood by government so that appropriate and proportional interventions are taken.\textsuperscript{127}

Not considering all the other aspects and rights affected by social distancing measures, are the means employed disproportionately restricting FORB?\textsuperscript{128} This means that authorities have to establish exactly what aspects of religious freedom are involved, how important the manifestation is to an individual or community, and how serious the infringement is. For example, U.S. Governor Larry Hogan did not deem places of worship as essential and all churches were closed, raising the question as to who is to decide whether the practice of one’s religion is essential.\textsuperscript{129} This could be very intrusive, as it requires an external entity to establish the importance or triviality of parts of a belief system.\textsuperscript{130} In fact, this in itself goes against the established right that religious and non-religious faith organizations have to manage their own internal affairs and autonomy.\textsuperscript{131} Authorities should tread with caution and sensitivity and realize that what may seem trivial to them is not necessarily trivial to the individual adherent or community of a religious or non-religious belief. The OSCE even recommends that competent authorities monitoring places of worship for compliance are trained in religious literacy and FORB, in order to deal with places of worship with “due sensitivity.”\textsuperscript{132} Furthermore, the social distancing restrictions might seem to affect only the collective aspects of FORB. However, individual aspects of FORB have also been affected for many. As indicated by the European Court of Human Rights, weakening the collective aspects of FORB also weakens the individual’s rights.\textsuperscript{133} For example, in the Catholic Church, participating in Holy Mass and Holy Communion is not merely a minor collective or individual

\textsuperscript{126} OSCE, “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic,” 118.

\textsuperscript{127} Gostin and Berkman, “Pandemic Influenza,” 571.

\textsuperscript{128} Gunn, “Deconstructing Proportionality,” 495.

\textsuperscript{129} State of Maryland, Order of the Governor of the State of Maryland, No. 20-03-30-01, March 30, 2020, https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf. See also Leddy, “COVID-19: de Blasio, Others Threaten Religious Freedom (commentary).”

\textsuperscript{130} Gunn, “Deconstructing Proportionality,” 492–93.

\textsuperscript{131} The European Court of Human Rights included the right of religious communities to autonomy in their internal affairs as part of FORB. The Court also stated that if the community aspects of FORB are not protected, the individual’s right to FORB will also become vulnerable. See Hasan and Chaush v. Bulgaria, App. No. 30985/96, Eur. Ct. H.R. (2000).

\textsuperscript{132} OSCE, “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic,” 119.

\textsuperscript{133} OSCE, “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic,” 119.
spiritual event but is a sacrament practiced by individuals happening in a collective setting. Although in most cases Catholic services were willingly suspended and Spiritual Communion practiced, the absence of a collective setting influences the individual’s ability to exercise some of the doctrinal aspects of Catholicism. Another example of the lack of consideration of the seriousness of a belief or doctrine is the forcible cremation of two Muslims (who passed away due to COVID-19) in Sri Lanka, against the wishes and religious beliefs of their families. Authorities should keep in mind that adaptations in religious burials and weddings, not meeting together, or giving up pilgrimages or festivals are not merely giving up “spiritual add-ons” or a technical minor aspect of a belief. Also, authorities should be sensitive to the possibility that social distancing measures might not only affect the _forum externum_, but can easily affect the _forum internum_, which cannot be restricted. As stated by the Special Rapporteur on the Right to Freedom of Religion or Belief, it is not always possible to separate internal beliefs with manifestations of religion or belief, especially when one acts in accordance with an internal belief system. For example, in cases of programs countering violent extremism, governments have indirectly placed limitations on the _forum internum_ by way of placing limitations on the _forum externum_. Governments should make

134. Ahmed Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief”; The Catechism of the Catholic Church confirms this by stating that “Holy Communion, because by this sacrament we unite ourselves to Christ, who makes us sharers in his Body and Blood to form a single body. We also call it: the holy things (ta hagia; sancta)—the first meaning of the phrase “communion of saints” in the Apostles’ Creed—the bread of angels, bread from heaven, medicine of immortality, viaticum.” See Catechism of the Catholic Church, https://www.vatican.va/archive/ENG0015/__P3Y.HTM , 1331.

135. Catholic services were replaced by Spiritual Communion. See Daniel Burke, “The Great Shutdown 2020: What Churches, Mosques and Temples are Doing to Fight the Spread of the Coronavirus,” CNN, March 14, 2020, https://edition.cnn.com/2020/03/14/world/churches-mosques-temples-coronavirus-spread/index.html. See also James Coriden, Thomas Green and Donald Heintschel, eds., _The Code of Canon Law: A Text and Commentary_ (New York: Paulist Press, 1985), 1248.2 and Catechism of the Catholic Church, 2181; Regarding the absence of a collective setting, see Jason Goroncy, “Holy Communion and COVID-19,” _ABC Religion and Ethics_, April 7, 2020, https://www.abc.net.au/religion/jason-goroncy-holy-communion-and-covid-19/12129848.

136. Ahmed Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief.”

137. UNGA, “Interim report,” para. 42.

138. UNGA, “Interim report,” para. 43. The Special Rapporteur on Freedom of Religion or Belief noted that to “police” the internal belief system of an individual may amount to indirect coercion and violate the _forum internum_.

1331.
sure that this does not happen, as it would not be proportional and would constitute an unjustifiable violation of international human rights and the absolute *forum internum*.

Finally, are there less restrictive means to achieve the aim of securing public health? In order to answer such a question, enormous evidentiary analyses in public health sciences are necessary, falling beyond the legal scope of this article. It is a difficult task requiring the consideration of public health evidence to assess all alternatives in order to establish a least intrusive method.\textsuperscript{139} However, in order to establish whether less restrictive means are available where FORB is limited, a case-by-case analysis, considering all the relevant circumstances, is necessary.\textsuperscript{140} There is an obligation on the state to accommodate as far as possible the wishes of individuals to exercise their FORB, being sensitive to the religious and belief requirements of those involved.\textsuperscript{141} The forced cremation of two Muslims in Sri Lanka against the religious beliefs of their families is an example of a government that lacked sensitivity to the religious requirements of Islam and its importance to the family, thereby neglecting to evaluate the circumstances of the case.\textsuperscript{142} This is even truer in light of the fact that there are less restrictive measures than cremation available under the public health guidelines issued by the WHO.\textsuperscript{143} The organization of social distancing can be less or more restrictive and, based on the attempt that should be made to preserve one hundred percent of all human rights involved, States Parties should always try to alleviate the restrictive measures and organize in a less restrictive manner (accommodating, as far as possible, the individual needs of religious or belief adherents).

In order for social distancing measures to be a proportional and justifiable limitation of FORB on the grounds of “public health” and “the rights and freedoms of others,” a number of strict requirements and responsibilities are placed on governments when implementing these restrictions.

\textsuperscript{139} Gunn, “Deconstructing Proportionality,” 495.
\textsuperscript{140} Ahmed Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief.”
\textsuperscript{141} Ahmed Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief.”
\textsuperscript{142} Ahmed Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief.”
\textsuperscript{143} WHO, “Infection Prevention and Control for the safe management of a dead body in the context of COVID-19,” March 24, 2020, https://apps.who.int/iris/bitstream/handle/10665/331538/WHO-COVID-19-IPC_DBMgmt-2020.1-eng.pdf?sequence=1&isAllowed=y.
The Responsibilities of States toward FORB

The non-adherence to proportionality requirements in the use of social distancing during COVID-19 has the potential to unjustifiably limit FORB. 144 A proportional response during COVID-19 places several responsibilities upon governments towards FORB. It is even more important to reiterate these responsibilities since there has been a lack of cooperation and compliance amongst states during the COVID-19 pandemic. 145 From the analysis of the requirements of a proportional limitation of FORB, the following duties placed on the state can be concluded:

(1) Authorities should engage religious and non-religious faith communities and individuals in the pandemic planning and the restrictions imposed. Ideally, this should have occurred even before the pandemic. 146 Religious and non-religious believers and faith communities should participate in crucial decisions affecting them. 147

(2) Laws and the restrictions they contain should be passed through adequate processes of lawmaking. The restrictions should be clearly defined, their consequences adequately considered and then communicated to all religious and non-religious believers and faith communities. Those who have the power to impose these measures should also be made clear. 148

(3) Supportive measures aimed at ways in which restrictions to FORB can be minimized should be provided to religious and non-religious faith communities and individuals. The least restrictive measures should be used, taking into account and accommodating the religious and faith needs of individuals on a case-by-case basis.

(4) There should be regular, transparent, and comprehensive communication to religious and non-religious faith communities. 149 Clear and honest communication about the risks and benefits of social distancing measures to FORB is necessary. 150 Governments need to be transparent about what is known and

144. OHCHR “States Responses to COVID-19”.
145. David Fidler, “To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence.”
146. Braunack-Mayer et al., “Including the Public in Pandemic Planning”. See also Ahmed Shaheed, “A Conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief.”
147. Gostin, “Pandemic Influenza,” 571.
148. Gostin and Berkman, “Pandemic Influenza,” 171–75.
149. Tognotti, “Lessons from the History of Quarantine.”
150. Tognotti, “Lessons from the History of Quarantine.”
unknown, and when new evidence is found that warrants the reconsideration of restrictive measures.\textsuperscript{151}

(5) Special attention should be paid to the protection of vulnerable religious and non-religious faith communities, as well as the provision of social justice and procedural fairness.\textsuperscript{152} The OSCE recommends that, in cases where religious or belief communities resist the social distancing measures, states should avoid sensationalizing or misrepresenting such developments and not attribute blame to communities as a whole.\textsuperscript{153} This is especially important to prevent the scapegoating of vulnerable groups.

(6) Governments should not use this as an opportunity to achieve alternative motives other than protecting public health" and minimizing the spread and effects of the pandemic.

(7) The penalties imposed for non-compliance to social distancing measures should not be overburdensome to religious or non-religious believers and faith communities.

(8) Restrictions should not be implemented before they are needed. Neither should they be extended beyond a disease crisis, or enacted if they are not effective or necessary in fulfilling the purpose of public health.\textsuperscript{154}

(9) Authorities should implement restrictions timeously based on the available scientific evidence as to the nature, spreading, cause and transfer of the virus. Authorities should not be negligent in their response to public health, thereby causing extensive social distancing measures to be adopted in order to salvage the situation and extensively limiting FORB.

(10) The authorities should at all times attempt to promote one hundred percent of all rights involved, and not establish a hierarchy of rights. Governments should remain sensitive to the importance of the extent of the freedoms lost for members of various beliefs. Authorities should attempt to see the severity of these losses and limitations, not only from a detached perspective, but also from the perspective and experience of the religious or non-religious faith community or individual. In other words, considering limitations on FORB as a restriction of a clinical and technical aspect, and not as a limitation of part of the adherents’ identity, conscience, and human dignity (and sometimes livelihood, socio-economic support and information channels), will not suffice.

\textsuperscript{151} Gostin, “Pandemic Influenza,” 571.
\textsuperscript{152} Gostin, “Pandemic Influenza,” 571.
\textsuperscript{153} OSCE, “OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic,” 119.
\textsuperscript{154} Gostin and Berkman, “Pandemic Influenza,” 171–75.
(11) Authorities should ensure that social distancing measures are not encroaching upon the *forum internum* of religious or non-religious believers or faith communities. This should not take place directly (clear restriction of the right to have, hold, and adopt a belief) nor indirectly (through restricting the *forum externum*, thereby affecting the *forum internum*).

(12) All the above recommendations also apply to the creation and communication of an exit strategy (from the pandemic) and the restoration of the baseline FORB as soon as possible.

In general, governments must interpret grounds of limitations strictly, in good faith and in line with human dignity, freedom, and equality. Together, this means all government responses to COVID-19 should be closely monitored for proportionality, necessity, and retraction of measures once the crisis is under control—not only during declared public emergencies.

**Conclusion**

This article has investigated the general scope of limitations applicable to FORB in international human rights law during COVID-19. The COVID-19 pandemic has brought about major and unprecedented challenges to international human rights, and especially FORB. The potential threat to FORB can be seen in the possibility of disproportionate responses and regulations by authorities in their use of public emergency regulations and Article 18 to justify limitations to FORB during the pandemic—a concern also uttered by the UN Special Rapporteur on the rights to freedom of peaceful assembly and association. During a public emergency, the limitation of FORB occurs indirectly via the declaration of a public emergency limiting the freedom of peaceful assembly, association, and the rights of religious minorities under the ICCPR. The limitation of FORB may also occur directly under Article 18(3). In both instances, extensive responsibilities are placed upon authorities to act in good faith, proportionally, and to continuously attempt to preserve one hundred percent of all human rights (even in emergency situations). Against this proportionality analysis, recommendations on how authorities should act in order to minimize restrictions to FORB during the COVID-19 pandemic are provided. It is argued that *bona fide* limitations to international human rights and FORB can be justifiable under the pandemic, but that States Parties may not overextend their powers, thereby unjustifiably and disproportionately limiting FORB.