THIRD PARTY INTERVENTION
IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 4982/07

Between

KAOS-GL

Applicant

and

TURKEY

Respondent

WRITTEN COMMENTS

by Article 19: Global Campaign for Free Expression;
the Miller Institute for Global Challenges and the Law (University of California Berkeley School of Law)
and Human Rights Watch

Barbora Bukovska
Senior Director for Law
ARTICLE 19
Free Word Center
60 Farringdon Road
London EC1R 3GA, UK
Email: barbora@article19.org

Alice Miller
Lecturer
Miller Institute for Global Challenges and the Law
University of California Berkeley School of Law
2850 Telegraph Ave., Suite 500
Berkeley, CA 94720-7230 USA
Tel: 510.642.7830 Fax: 510.643.4533
Email: amiller@law.berkeley.edu

Clive Baldwin, Senior Legal Advisor
Human Rights Watch
350 Fifth Ave. 34th Floor
New York, NY 10118 USA
Email: baldwic@hrw.org

2 November 2009

I. Introduction

1. These written comments are submitted by Article 19, the Miller Institute for Global Challenges and the Law (University of California Berkeley School of Law), and Human Rights Watch in accordance with the permission to intervene (with revised date of submission) granted by the President of the Court by letter of 12 October 2009 in accordance with Articles 36 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") and Rule 44 para. 2 of the Rules of the Court.

2. The present case, *KAOS GL v. Turkey*, raises critical questions regarding the obligations of states to protect rights of sexual expression of lesbian, gay, bisexual, and transgender people ("LGBT") under Article 10 of the Convention, in particular with regards to publications that portray the role of sexual imagery and representations in the life of LGBT people.

3. This submission draws on rights-based analyses of selected laws and jurisprudence from international, regional, and national systems, to consider limitations of sexual expression on "public morality" grounds. The sources include the laws, standards and jurisprudence of member nations of the Council of Europe, as well as of the European Union, the Inter-American system, and the United Nations treaty bodies, regarding expression and sexual speech and the boundaries to state suppression of speech based on the grounds of ""public morality"". The comments also note briefly the jurisprudence of the Netherlands, Spain, Sweden, and the United Kingdom, as well as Canada, regarding obscenity and evolving standards of state imposed limits to speech.

4. Firstly, this intervention addresses the evolving understanding of "public morality," and in particular that that concept must reflect the diversity of interests and populations comprising the public sphere and not just that of the majority. A secular democracy, espousing ideals of pluralism, including freedom of expression, cannot assert or promote a singular and incontrovertible vision of public morals, and censor materials that dissent from that perspective.

5. Second, "public morality," if it is to be properly be attributed to the "public", exists in historical time and is subject to social change; it is not a static entity iterated through appeals to the past, but evolves with the rest of society and culture. The idea that a state can justify repressive measures merely by pointing to a "public morality" without evidence, definition, and elaboration has been largely discredited. Council of Europe member states, countries around the world, and international and regional bodies have recognised—expressly or implicitly - that "public morality" arguments are acceptable only where some real and specific harm to society can be shown. In the face of this growing international trend, authorities may not criminalise and confiscate publications without demonstrating what harm it causes to what part of the "public," when, and where, and tailor any restrictions to any specific harm. Authorities cannot evade that responsibility by postulating a "public" and its hypothetical values as a pre-emptive and dangerously free-floating excuse.

6. In this light, modern regional and international standards do not accept absolute prohibitions on access to and use of any and all materials with a sexual content for all young individuals, indeed that adolescents may have a right of access to some material, Therefore vague and broad references to the "protection" of children to justify wide and absolute bans should not be sustained..

7. Finally, drawing upon jurisprudence from five countries, the intervenors submit that vague, open-ended, and blank 'obscenity' clauses used to place restrictions on expression, are out of step with contemporary laws of European and other countries regarding the rights-based regulation of sexual speech and are incompatible with global understandings of sexual expression as a basic right.[i]

II. Interest of ARTICLE 19, the Miller Institute for Global Challenges and the Law, and Human Rights Watch

8. ARTICLE 19 is an international human rights organization promoting and protecting freedom of expression worldwide. The Miller Institute/Berkeley Law is international and comparative legal think tank, with particular expertise on fundamental human rights protections for sexuality and health. Human Rights Watch is an international non-governmental organization that conducts research and advocacy on human rights. ARTICLE 19 and Human Rights Watch has previously submitted comments before the European Court in a number of cases.

III. Discussion

9. This submission argues that:

   a. Trends in pluralistic democracies and in the historical evolution of "public morality" indicate that a proper assessment of "public morality" should be based on the degree of harm caused to others.

   b. In consequence, restrictions or censorship on the grounds of "public morality" should only be used if they proportionately address the harm that has been shown to be caused.

a. Contemporary understandings of sexuality and sexual expression in light of the justification of interference with fundamental rights in the name of "protection of public morality"

i. legitimacy of censoring dissident voices

10. A secular democracy that espouses plurality should not adopt a single concept of "public morality". Freedom of expression benefits from and contributes to a democratic society. It ensures people's rights to be heard in public and political life. It is also a means to manifest and to explore diversity among cultures, religions, ideologies, and values.[ii] In that regard, freedom of expression entails an individual's right to receive and impart information and ideas, as well as the rights of dissidents and minority groups to express their views.

11. In a democratic society, because of the social and political role of information, the right of everyone to receive information and ideas has to be carefully protected. All other rights, and democratic ways of life, will be have limited effectiveness if individuals have no access to information. Any tendency of states to withhold information from people at large must therefore be strictly controlled.

12. Moreover, in a democracy this right protects not only individual participation but the expressions and capacities of groups—including unpopular groups, or groups that voice disagreement from majority opinion. Any restrictions to the freedom of expression should not be applied so as to promote prejudice and intolerance. The law must, without discrimination, protect the freedom to express minority views, including those potentially offensive to a majority. Protection does not ebb or retract its ambit where expression ceases to utter what is approved, or inoffensive, or indifferent. To be meaningful, it must safeguard those views that offend, shock, or disturb the state, or any sector of the population.[iii]

13. Recent reports of the UN Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression explore the critical place of sexual speech and the legally untrammelled discussion of sexuality in defending the freedom of diverse groups in democratic societies. For example, in a 2005 mission to Colombia, the Special Rapporteur wrote,

> In accordance with the nature and the spirit of his mandate, the Special Rapporteur considers that all citizens, regardless of, *inter alia*, their sexual orientation, have the right to express themselves, and to seek, receive and impart information.[iv]

14. The Special Rapporteur's comments take meaning from his overall descriptions of Colombia as a "multicultural country" suffering from four decades of internal conflict, where "the desire to exercise

freedom of opinion and expression is a fundamental factor in the search for a peaceful solution to the conflict and a prerequisite for democracy and good governance."[v] Censoring the speech of LGBT people, or other unpopular groups, cannot credibly draw justification from allusions to national values, because respect for diversity is in fact a social value integral to democracy.

15. The 2007 report of the UN Special Representative on Human Rights Defenders draws attention to defenders of lesbian, gay, bisexual and transgender and intersex (LGBTI) people's rights as at "particular risk," and cites Articles 2 and 12 of the declaration to remind states of their responsibility to protect human rights defenders.[vi] This Court, in 2007, in addressing the need to protect peaceful LGBTI groups, referred to the importance of pluralism in a democratic society in stressing the state's positive obligation to secure the effective enjoyment of freedoms of assembly and association.[vii]

ii. Evolution of obscenity laws

16. This submission argues that obscenity laws are moving away from 19th century ideas of the protection of "public morality" and toward a more limited purpose of addressing instances of specific harm. The broad justifications that supported the obscenity laws when they developed are insupportable in a modern legal regime of rights.

17. A brief review of the status of the defence of "public morality" illustrates usefully how thinking about the justification and purpose of obscenity laws has evolved. It appears many obscenity laws date from the 19th century. However, the shift in sexual morality and increasingly permissive attitude of the public toward issues related to sex and marriage in the late 20th and early 21st century, have had an impact on obscenity laws in western European countries and in Australia, Canada and the United States. Similar developments occurred in countries in Eastern Europe following the collapse of communism in 1989. For example, in the Czech Republic and Poland in the 1990s, sizable industries in sexual imagery developed, and they have faced little legal intervention or censorship from the government. Generally, the new legal environment in Europe favours greater sexual permissiveness and the right to individual privacy.

17.1. The evolution of the purpose of obscenity laws has been recognized also at the international level. For example, the 1984 Siracusa Principles[viii], note in their short section on "public morality" that "[s]ince public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community."[ix] It is important to add that the principles also state that "[t]he margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant."[x]

17.2. The necessarily evolutionary character of concepts such as "obscenity" has been acknowledged also by this Court, for example in *Muller v. Switzerland*:

> It is not possible to find in the legal and social orders of the Contracting states a uniform conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterized, as it is by a far reaching evolution of opinions on the subject. [xi]

17.3. Recent cases in national courts also demonstrate the evolution of the principles set out in Siracusa. In 2005 a High Court in Fiji interpreted the Fijian Constitution in explicit recognition of the Siracusa limitations principles, and concluded that some rights [privacy] are "so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity."[xii] In 2009, a High Court in India (Delhi) also referenced the evolution of the UN Human Rights Committee practice regarding public morality (which is guided by Siracusa) when they struck down a criminal provision on same sex conduct. [xiii] Notably, this Court also proceeded to address directly the deeper claims of morality (also citing a South African judgment) in contemporary democracies, emphasising

that the morality claimed by compelling state interest must be found in the *political morality* of the Constitution, not merely popular morality. [xiv]

b. Protection of Minors

18. There is almost universal agreement that obscenity provisions designed to protect children from harm pursue a legitimate objective. Children, unlike adults, are not fully responsible moral agents and lack the capacity to make choices with regard to sexual matters. While there is inevitably an arbitrary element to such distinctions - an individual is no more capable of making certain decisions on his or her sixteenth birthday than the day before and everyone matures at a different rate - for legal certainty, some cut-off is necessary. Logically, this should be the age of consent for sexual relations although some jurisdictions have argued for a higher limit.

19. Prohibitions designed to protect children from involvement in sexual activities may serve a number of specific legitimate objectives. Such prohibitions may seek to prevent the production of sexually explicit material involving the actual abuse of children, or to prevent the distribution of material which incites adults to commit sexual offences against children.

20. In addition, it is widely accepted that decisions about what children may see or watch should be subject to some form of parental control. To render that control effective, a number of what are commonly termed 'time, manner, place' restrictions may be legitimate. One such mechanism is mandatory classification of films and videos, so that users have an idea of what sort of content they contain. Indeed, this requirement is legitimate not only to assist adults in protecting children but also to enable adults to screen out material they themselves do not wish to view. Restrictions on the manner of display of sexually explicit material and on the sale of such material to minors may also be legitimate. In addition, many countries restrict the broadcasting of material that may be harmful to children, for example by subjecting broadcasters to codes of conduct imposed by independent regulatory bodies or by prohibiting the broadcast of such material at certain times.

21. However, while there appears to be little disagreement about the legitimacy of these objectives, there is a great deal of debate about whether specific measures purportedly carried out to achieve these objectives are rationally connected to these objectives and whether they are the most appropriate measures to achieve them.

22. Article 226 of the Turkish Penal Code, as well as the Law on the Protection of Children from Harmful Publications, creates a regime by which materials can be arbitrarily construed as 'pornography' ostensibly for the protection of children. The law therefore appears to make possible a blanket criminalisation of any dissemination of sexual speech to any and all minors. However, to reflect international standards, any such provision on restricting access to 'pornography' should also reflect the need to take into account adolescents' rights in the context of sexual speech called for by the United Nations Convention on the Rights of the Child ("CRC") and recognized by the European Union ("EU")**.**

23. Article 13 of the CRC protects the right of freedom of expression and information for all children. [xv] This right includes the freedom to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice." In this regard, states must also ensure children's access to mass media, including material from a diversity of national and international sources. This must be read together with the guarantee in Article 3: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." It must also be read with the Convention's repeated affirmations that the child's "evolving capacity" to exercise rights on his or her own behalf must be taken into consideration in decision-making, as well as the guarantee in Article 12 whereby "the views of the child" should be "given due weight in accordance with the age and maturity of the child" in all matters concerning his or her welfare.

24. These provisions direct states to the complex tasks of ensuring that children—especially adolescents, who have an evolved capacity for choice and will necessarily confront many situations in which they must make responsible decisions that will affect their life and health—can make decisions armed with information appropriate to their life situations, rather than in a vacuum of knowledge and capacity that would only make them further vulnerable to abuse and exploitation. A blanket prohibition of disseminating any information about sexuality to adolescent children does not address these dilemmas or approximate that balance. It reflects neither evolving capacities nor differences in age and maturity. It imposes only silence where education is needed.

25. In 2003, in an authoritative interpretive comment, the UN Committee on the Rights of the Child noted that, in regard to adolescent sexuality, States parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality, without discrimination in regard to gender or sexual orientation.[xvi]

26. The European Court of Justice has recognized the importance of the CRC in restrictions on freedom of expression that involves children. It has allowed some restrictions on select information from reaching children on the grounds of "public morality", but it requires that such restrictions must be properly justified. In *Dynamic Medien Vertriebs GmbH v. Avides Media AG,* the ECJ upheld Germany's discretion to apply stricter regulations on mail-order media than other, exporting countries on grounds of protecting children. However, it clarified that the discretion of countries to impose such restrictions must be in conformity with Community law and be consistent with the principles guiding the rights of the child found in the CRC. In this context, giving regard to Article 17 of the CRC, the Court stated that restrictions based on "public morality" may be justified only if they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it**.**

27. The jurisprudence shows that although some criminalisation of materials with sexual representation and imagery to which young people may have access can be justified, complete bans are not. National courts, as will be seen below justify similar restrictions when the aim of the publications is to cause harm. However, materials that can increase the understanding of an LGBT adolescent of him or herself and of his or her sexuality should be legitimate in contemporary societies.

28. In this case, assuming Turkey's valid interest in protecting children from exploitation, Turkey would have to show how criminalisation and a complete ban of KAOS GL's publication serves that goal. Particularly in case where it is extremely unlikely that the magazine would end up in the hands of children—given the small number of magazines published, the targeted audience, and the cover directive not to sell to minors—presented would be necessary to show any evidence of negative consequences that might result if it did so in order to justify a ban. An adolescent's inadvertent access to such materials could have the potential to increase their understanding of themselves (if he or she is gay or lesbian) or of diverse communities within Turkey (if he or she is not), as well as to improve his or her ability to think critically about issues surrounding pornography.

IV. Comparative Law

29. Other regional and national systems have dealt with this and similar questions regarding freedom of expression. Such a comparison demonstrates that, in various states and contexts around the world, "public morality" has not been understood to require censoring such discussions.

A. Regional Jurisprudence

a. The European Court of Justice

30. The European Union (EU) and in particularly the European Court of Justice follow a similar test of necessity for evaluating interference with fundamental rights as this Court.[xvii] Although public morals, along with public health, *inter alia*, is one of the grounds upon which nations can assert restrictive

barriers to entry of materials, subject to proportionality review,[xviii] it is notable that the EU as an entity has not focused on "obscenity" or material with a sexual content generally as a concern for common regulation. The EU has focused its permissible restrictions upon obscenity where actual harm is understood to have occurred through the abuse of a minor in the production of the material. Strong regulations have been promulgated regarding materials deemed 'child pornography,' as opposed to blanket regulations presuming that the harm lies in injury inflicted upon a hypothetical, abstract viewer.[xix]

b. The Inter American human rights system

31. The Inter-American human rights system analyzes freedom of thought and expression with a dual lens, addressing both freedom of expression and the concomitant rights of others to receive information. It has not yet addressed a case challenging restrictions on sexual speech, but it has recently noted the importance of protecting the rights of persons facing violations of their fundamental rights because of their sexual orientation and gender identity.[xx]

32. The Inter-American standard for scrutinizing government limits on speech is quite robust: its parameters were set in the 1985 Consultative Opinion OC 5/85, in which the Court stated, *inter alia*, "Article 13 (freedom of expression) includes freedom to seek, receive, and impart information and ideas of all kinds...." [...]Article 13 consequently has a [...] dual aspect "….[i]n its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings [...]."

33. The Inter-American system has also developed jurisprudence regarding the deployment of standards of morality and protection of the values of others. The Inter-American system has considered highly provocative cases of speech, including one of blasphemy arising in part from the treatment of Jesus in the film entitled "The Last Temptation of Christ." Chile banned the film, arguing that its representation was offensive to the majority who viewed Christ as God and their saviour, and because of the detrimental effect that viewing the film could have on children. The Inter-American Court determined that Chile's ban of the film was a violation of Article 13 of the American Convention.[xxi] Notably, the Inter-American Court reiterated its statements from Consultative Opinion 5/85 on the dual nature of the right to freedom of thought and expression, and the importance for society of the right to receive the opinions and thoughts of others. The Court explained that "freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one's point of view to others, but it also implies everyone's right to know opinions."[xxii]

B. National Law

a. The Netherlands

34. The Netherlands Penal Code criminalises "he who knows or has serious reasons to suspect that an image or object is offensive to decency and (1) displays publicly or offers this image or object in or at public places; and (2) sends this image or object to another person, otherwise than at this person's request" (art. 240). The Supreme Court of the Netherlands underlined in the case *Hoge Raad* that consensual distribution of obscene or offensive images or objects cannot be prosecuted under article 240.[xxiii] The court refused to find an offence against decency, because the recipients of the material knew or could reasonably suspect its obscene or offensive content; they had either requested or consented to receiving material of such nature, it was not posted or displayed in a public place, and it was not forced upon anyone.

b. Spain

35. The Spanish Penal Code establishes that it is illegal to perform exhibitionist obscene acts before minors and disabled persons (Art 185), and illegal to sell, distribute and show pornographic material to minors (Art 186). There is, however, no blanket ban on the distribution of pornographic material to the general public. Instead, these provisions state that harm occurs when material is exposed to specific

vulnerable groups, who may not be able to consent or dissent to the exposure. The provisions do not establish the protection of public morals as an end in itself for the state to pursue.

c. Sweden

36. The Swedish Penal Code offers a limited scope to restrict material deemed pornographic. Chapter 16 – On Crimes against Public Order 16.11 – Unlawful exhibition of pornographic pictures—states that "A person who, on or at a public place, exhibits pornographic pictures by means of displays or other similar procedure in a manner which is *apt to* result in public annoyance, shall be sentenced for unlawful exhibition of pornographic pictures to a fine or imprisonment for at most six months." This also applies to a person who sends through the mail to or otherwise furnishes another with unsolicited pornographic pictures (Law 1970:225).

37. The Swedish film censorship law, dating from 1911, is the oldest such law in the world. It permits censorship, *inter alia,* "if the film or video can seem corrupting/depraving" (*förråande*) or if it has "images of sexual violence or coercion or images of children in pornographic contexts" (Art. 4). The censorship agency has once intervened in films to be shown publicly since 1995. In 2009 a government-appointed expert suggested that film censorship for adults be abolished, and the film censorship board disbanded. The issue is currently under debate in the Swedish parliament, but public opinion and political trends suggest strongly that the law will be abolished in accordance with the proposal.[xxiv]

d. United Kingdom

38. The United Kingdom rarely employs its Obscene Publications Act (OPA) 1959. There have been no prosecutions under the act since 1991, until a recent case that has since been dropped.[xxv] Since the passing of the Human Rights Act in 1998, implementing the European Convention of Human Rights, the OPA has not been applied in court. Legal commentators have noted that the OPA is outdated legislation, employing words such as 'indecent', 'obscene', and 'depraved and corrupt' that have a strong subjective element. [xxvi]

e. Canada

39. The Canadian Supreme Court, in a series of three cases in recent years, has taken steps that limit or discard the general notion of "community standards" and general morals and embracing more focused tests for harm. In *Regina v. Butler*, the court established that the "community standard" of tolerance should be determined by reference to the risk of harm entailed by the conduct.[xxvii] Eight years later, in 2000, the Court affirmed that obscenity must involve harm: the Court declared that "not all sexually explicit erotica depicting adults engaged in conduct which is considered to be degrading or dehumanizing is obscene. The material must also create a substantial risk of harm which exceeds the community's tolerance."[xxviii]

40. By 2005, the Canadian Supreme Court abandoned the rationale of "community" morals completely and focused entirely on principles of harm in *R v. Labaye,* holding that "indecent criminal conduct will be established where the Crown proves beyond a reasonable doubt the following two requirements: 1) by its nature, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws [and] 2) the harm or risk of harm is of a degree that is incompatible with the proper functioning of society."[xxix]

CONCLUSION

41. Because "public morality" is a constantly evolving term, a state's bare assertion that repressive measures are necessary to protect a singular and undefined "public morality" has largely been discredited. States in Europe have been given a margin of appreciation regarding their assertion to limit freedom of expression based on "public morality", however, this margin is not unlimited and must be justified by recourse to proportionate measures. In the cases of restricting publications, states must

present evidence of specific individual harm resulting from the publication, even as regards to minors. Without such evidence, the courts have ruled that censorship is without legal justification.

42. The Court has made clear that the European Convention does not permit the prohibition same sex sexual conduct per se. Therefore it should follow that restricting speech and expression about such conduct, in itself, cannot be considered necessary to protect public morals.[xxx] Tolerance of sexual expression and imageries is all the more important in contexts where violence and discrimination based on sexual orientation and gender identity continue and where building a strong LGBTI community capable of participating in public life is necessary to counter that abuse.

43. The Intervenors finally submit that the very invocation of "public morality" as a justification should be treated with great caution without definition and elaboration, especially when it appears to be used for repression of a disfavoured minority through alleged "community" values.

---

[i] In the three successive decisions, *Dudgeon v United Kingdom* (1981), *Norris v Ireland* (1988) and *Modinos v Cyprus* (1993) this Court has held that laws criminalising consensual homosexual conduct violated Article 8 of the Convention. In *Dudgeon,* the Court held that laws penalising homosexual conduct could not be held "necessary in a democratic society" and that "[a]lthough members of the public who regard homosexuality as immoral may be shocked, offended, or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved. " *Dudgeon v United Kingdom* (Application No. 7525/76), Judgment of October 22, 1981, available at www.echr.coe.int, para. 60 (accessed on October 30, 2009). See also *Nicholas Toonen v Australia,* 50th Sess., Communication No. 488/1992, CCPR/c/50/D/488/1992, April 14, 1994, para. 8.7.

[ii] See Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/11/4, April 30, 2009, para. 42, available at http://www2.ohchr.org/english/issues/opinion/annual.htm (accessed on October 30, 2009).

[iii] "Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45," E/CN.4/1995/32, December 14, 1994, referencing jurisprudence of the European Court of Human Rights (accessed on October 30, 2009).

[iv] Report of the Special Rapporteur on the right to freedom of opinion and expression, Mission to Colombia, E/CN.4/2005/64/Add.3, November 26, 2004, available at http://www2.ohchr.org/english/issues/opinion/visits.htm (accessed on October 30, 2009).

[v] Ibid.

[vi] "Report submitted by the Special Representative of the Secretary-General on human rights defenders," A/HRC/4/37, January 24, 2007, para. 17 (accessed on October 30, 2009).

[vii] *Baczkowski and others v. Poland,* Application no. 1543/06, May 3, 2007, para. 64. In finding against Polish authorities' efforts to ban LGBTI people's peaceful public demonstrations.

[viii] United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights," Annex, UN Doc E/CN.4/1984/4 (1984).

[ix] Ibid, Principle 27.

[x] Article 19, *Camden Principles on Expression and Equality*, April 2009, available at, http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf (accessed on October 30, 2009). These principles similarly emphasize the close relationship between equality and freedom of expression, as equal abilities to speak (especially by otherwise marginalized groups) are a key element of a pluralistic and functional democracy. Available at, http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf

[xi] See *Muller vs. Switzerland* (1988), 13 EHRR 212, para 35.

[xii] High Court of Fiji at Suva Appellate Jurisdiction, *Nadan v The State,* FJHC 1; Haa0085 & 0086.2005, August 26, 2005, available at http://www.paclii.org/fj/cases/FJHC/2005/1.html (accessed on Cotober 30, 2009).

[xiii] High Court of Dehli, *Naz Foundation v Government of Dehli*, WP(C) No. 7455/2001, July 2, 2009, available at http://www.scribd.com/doc/17059723/Delhi-Highcourt-Judgement-on-Homosexuality-and-IPC-377 (accessed on October 30, 2009).

[xiv] Ibid., paras. 79-81[also citing *National Coalition of Gays and Lesbians of South Africa v Ministry of Justice* case no. 3988/98. 1999, (1) South Africa 6 (Constitutional Court).

[xv] Convention on the Rights of the Child. (1989). G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by Turkey April 4, 1995.

[xv] Ibid.

[xvi] Ibid., Also See United Nations Committee on the Rights of the Child (2003), *General comment no. 3: HIV/AIDS and the rights of the child*; United Nations Committee on the Rights of the Child (2003), paras. 12 and 16, *General comment no. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*; Convention on the Rights of the Child.

[xvii] *Zardi v. Consorzio agrario provinciale de Ferrara,* Case C-8/89, 1990 ECR I-2515, 2532, para. 10; Case C-244/06, Opinion of Mr. Advocate General Mengozzi delivered on September 13, 2007, para. 68, available at http://eur-lex.europa.eu (accessed on October 31, 2009). "According to settled case-law, an impediment to intra-Community trade contrary to Article 28 EC may be justified only by the public-interest grounds listed in Article 30 EC – which include public morality, public policy, public security and the protection of health and life of humans – or, if the legislation creating such an impediment is applicable without distinction, by one of the overriding public-interest requirements within the meaning of the case-law flowing from the abovementioned Cassis de Dijon judgment relating, inter alia, to consumer protection. In either case, the national provision must be appropriate for securing attainment of the objective which it pursues and must not go beyond what is necessary for attaining it." Se also, Takis Tridimas, *The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration,* 31 IRISH JURIST 83, 84, 1996. , as cited in Thomas Frank, *On Proportionality of Countermeasures in International Law,* 102 AMJ INT L 2008, 715, 753.

[xviii] The only cases in the EU regarding restrictions do not relate to print material but address (and accept) national level regulation of image storage media (DVDs, videos). Case C 244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG,* February 14, 2008, paras. 40 and 42, stating that under Article 17 of the CRC the "important function performed by the mass media and are required to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. Article 17(e) provides that those States are to encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being." The Court noted that "[a]lthough the protection of the child is a legitimate interest which, in principle, justifies a restriction on a fundamental freedom guaranteed by the EC Treaty, such as the free movement of goods (see, by analogy, Case C 112/00 Schmidberger [2003] ECR I 5659, paragraph 74), the fact remains that such restrictions may be justified only if they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary in order to attain it (see, to that effect, Case C 36/02 Omega [2004] ECR I-9609, para. 36, and Case C 438/05 International Transport Workers' Federation and Finnish Seamen's Union [2007] ECR I-0000, para. 75)." The case noted that the national margin of discretion was not unfettered, and must be harmonized with European community values.

[xix] See, Council of the European Union, *Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography,* December 22, 2003.

[xx] OAS, General Assembly, "Human Rights, Sexual Orientation, and Gender Identity," Res. 2504 (XXXIX-O/09), June 4, 2009. See also, "Human Rights, Sexual Orientation, and Gender Identity," GA/Res. 2435 (XXXVIII-0/08), available at www.oas.org/juridico/English/regeneas.htlm (accessed on October 31, 2009).

[xxi] Inter-American Court of Human Rights., Case of "The Last Temptation of Christ" *Olmedo-Bustos et al. v. Chile*. Merits, Reparations, and Costs. Judgment of February 5, 2001. Series C No. 73

[xxii] Inter-American Court of Human Rights, Consultative Opinion 5/85, "Compulsory Membership Association Prescribed by Law for the Practice of Journalism," November 13, 1985, paras. 64 and 65, available at http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf (accessed on October 30, 2009).

[xxiii] October 30, 1984, nr. 77785U.

[xxiv] The overwhelming majority of public and private bodies to which the proposed measure was referred for consideration supported the measure, which also has government support.

[xxv] The case – of a man charged with depicting a fictional torture and murder of the members of a girls pop group on a fantasy pornography site – was dropped in 2008 when the prosecution offered no evidence that the story had been easily accessible by the public. See http://news.bbc.co.uk/2/hi/uk_news/england/tyne/8124059.stm and http://www.guardian.co.uk/world/2009/jul/04/girls-scream-aloud-obscenity-laws

[xxvi] See various comments in Afua Hirsch, *The Guardian,* "How to police popslash", July 4, 2009, available at http://www.guardian.co.uk/world/2009/jul/04/girls-scream-aloud-obscenity-laws. However, the UK has recently enacted a new law in its Criminal Justice and Immigration Act 2008, para 63, that criminalises possession of 'extreme' pornographic images. This legislation raises several concerns; criminalising possession even when no criminal activities in the production have been involved, and is much criticised by scholars and others, see inter alia http://www.backlash-uk.org.uk/murray905.html. It is also notable that this law, which legal scholars consider at risk because of its breadth and vagueness, aims only at a sub-set of material with a sexual content that is stripped of expression protection because of the legislative claims that such imagery leads to harm (violence against women). See, for a review of judicial experience with such harm-based statutes in the United States, David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression,* 143 UNIV OF PENN L REV. 111. 1994.

[xxvii] *R. v. Butler*, 1 S.C.R. 452 (1992).

[xxviii] *Little Sisters Book and Art Emporium v. Canada* (Minister of Justice), [2000] 2 S.C.R. 1120, 2000 SCC 69

[xxix] *R. v. Labaye*, 3 S.C.R. 728, (2005).

[xxx] These principles were best applied in regard to restrictions on fundamental rights relating to sexuality in a 1994 Human Rights Committee decision, stating that the laws criminalising sexual activity between men were "not essential to the protection of that society's moral standards." *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992. This case makes it clear that earlier, more cautious deference to state margins of appreciation on sexuality have given way to more robust review as both the capacity of the treaty body has matured and the understanding of the role of sexuality has altered. Examinations of the travaux of the ICCPR reveal this skepticism: …. The Special Rapporteur also notes that during the travaux préparatoires concerning article 19 of the Covenant, more than 30 proposals for restrictions and limitations were tabled. …Thus, the issues of pornography and blasphemy were subject to debate. The fact that the final wording of article 19 (3) does not include a reference to these matters does, of course, not imply that interference on the part of the State for the purpose of protecting these interests is prohibited without exception. The limited scope for permissible interference that we find in article 19 (3) - limited especially as compared to regional human rights instruments - suggests to the Special Rapporteur that any interference, and especially restriction or limitation, should be interpreted narrowly in case of doubt.