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# Applying the international right to freedom of expression and its limitations to Yaoi

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# Chapter 1: Introduction

## 1.1 Background

Child pornography is a topic that continues to provoke debate in the international community, with current scholarly discussion focused on the representation of the child.[1] A relatively 'new area' of child pornography came to light where the images do not depict a 'real' child. These images are, for example, completely computer-generated images of children or pseudo-images (a 'real' child being morphed into an unidentifiable child). It has become a global issue since the images can be distributed through the Internet, avoiding geographical and legal jurisdictions, and has transformed into a "global multimillion-dollar industry."[2] This new area has caused much debate, as scholars did and still do not agree whether images containing no 'real' children conducting sexual acts can be considered child pornography.[3] Since this new area kept growing in popularity, the United Nations responded to the issue by addressing it in the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography[4] to the United Nations Convention on the Rights of the Child in 2000.[5] This protocol was created to stop child abuse and exploitation of children worldwide and explicitly

[1] Alisdair A Gillespie, *Child Pornography: Law and Policy* (Routledge-Cavendish 2011) 1.
[2] Bernadette H Schell and others, 'Cyber Child Pornography: A Review Paper of the Social and Legal Issues and Remedies and a Proposed Technological Solution' (2006) 12(1) Aggression and Violent Behavior 45, 46; Rita Shackel, 'Regulation of Child Pornography in the Electronic Age: The Role of International Law' (1999) 3(1) Macarthur Law Review 143, 144.
[3] Alexander Kalim, 'Addressing the Gap in International Instruments Governing Internet Child Pornography' (2013) 21(2) Journal of Communications Law and Policy 428; Francis S Monterosso, 'Protecting the Children: Challenges that Result in and Consequences Resulting from, Inconsistent Prosecution of Child Pornography Cases in a Technical World' (2010) 16(3) Richmond Journal of Law & Technology 1; William R Graham Jr, 'Uncovering and Eliminating Child Pornography Rings on the Internet: Issues regarding and Avenues Facilitating Law Enforcement's Access to Wonderland' (2000) 2000(2) Law Review of Michigan State University Detroit College of Law 457.
[4] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (opened for signature 16 March 2001, entered into force 18 January 2002) UNGA Res A/RES/54/263 (Optional Protocol).
[5] Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990) UNGA Res A/RES/44/25 (UNCRC).

identifies the issue of child pornography.[6] It included that "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes" could be identified as child pornography.[7] This provision meant that international legislation now recognized images with no 'real' children as child pornography.

However, even with these specific child pornography provisions, there still remains debate on whether certain particular representations of children could be categorized as child pornography, one being cartoons and drawings. One of the most prominent forms of drawings currently being discussed is the issue of Manga.[8] These comic books are extremely popular and an ancient form of art in Japan. Manga is entirely legal in Japan, which causes much debate between states.[9] Within Manga, some explicit subgenres specifically focus on aggressive sex, portraying rape, and involve underage characters, with one of the most-known genres using these underage characters being Lolicon. Much scholarly research has been done on these genres that focus on these explicit topics and contain underage girls. Most of these scholars agree that these genres should be prohibited because they qualify as child pornography under international law and should not be openly sold throughout the state. Japan has not prohibited this violent and sexualized content, which has caused considerable concern in some states since Japan has ratified the relating child pornography treaties, such as the UNCRC and the Optional Protocol. Therefore, there is "an increasing pressure on Japan to meet the international global

[6] 'Strengthening the Convention on the Rights of the Child: Optional Protocols' (Unicef) <https://www.unicef.org/child-rights-convention/strengthening-convention-optional protocols#:~:text=To%20help%20stem%20the%20abuse,from%20sale%2C%20prostitution%20and%20pornography> accessed on 7 May 2022.
[7] Optional Protocol, art 2 sub c.
[8] Gillespie (n 1) 20.
[9] Patrick W Galbraith, 'Lolicon: The Reality of 'Virtual Child Pornography' in Japan' (2011) 12(1) Image & Narrative 83, 83.

standards for regulating child pornography" and include cartoons and drawings into their legislation.[10]

Some genres are not generally known for explicitly focusing on these extreme sexual topics, such as Yaoi. This Manga genre is known to focus on the homosexual relationship between men and boys and stands out from other genres as it is made by women for women. There has been less research on Yaoi than on other Manga genres regarding child pornography. However, it could be possible that this genre would qualify as child pornography when diving deeper into the genre and, therefore, should also be restricted.

Japan adapted its child pornography legislation in the 2014 Amendment and prohibited the possession of child pornography. However, they intentionally let out cartoons and drawings as possible child pornography and, therefore, also Yaoi. The underlying reason to exclude "pictorial child pornography" from the definition of child pornography was the Japanese Constitution's guarantee of the right to freedom of expression, which the Supreme Court deemed "the foundation of democracy".[11] According to the Japanese government, criminalizing such material is 'thought censorship.'[12] However, under the Japanese Constitution, the freedom of expression can be restricted if it is in the interest of the public welfare.[13] The downside is that it lacks a definition in the Japanese Constitution, and the Supreme Court rarely uses it.[14] Currently, Manga is not treated as a material that compromises public welfare and is, therefore, protected by the freedom of expression according to Japan.

[10] Kirsten Cather, 'Must we Burn Eromanga?: Trying Obscenity in the Courtroom and in the Classroom', in Mark McLelland (ed), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture* (Routledge 2017) 78; Galbraith, 'Lolicon' (n 9) 83.
[11] Cory L Takeuchi, 'Regulating Lolicon: Toward Japanese Compliance with its International Legal Obligations to Ban Virtual Child Pornography' (2015) 44(1) Georgia Journal of International and Comparative Law 195, 211; Juulia Karjalainen, 'Japan's Limited Definition and Criminalization of Child Pornography and its International Legal Oblgations' (Thesis, Tallinn University of Technology 2021) 25.
[12]Galbraith, 'Lolicon' (n 9) 93; Martha H Good, 'Freedom of Expression in Comparative Perspective: Japan's Quiet Revolution', (1985) 7(3) Human Rights Quarterly 429, 431.
[13] Constitution of Japan 1946 (opened for signature 3 November 1946, entered into force 3 May 1947) Ministry of Justice. art 12 and 13.
[14] Karjalainen (n 11) 26.

However, this is based on the Japanese Constitution. The International Covenant on Civil and Political Rights, ratified by Japan, contains a provision that sets the right to freedom of expression under international law. Even though it is one of the foundational human rights, this provision can also be limited on various grounds, different from the 'public welfare' restriction that Japan has implemented. Since these restriction grounds differ from Japan's, it is unclear whether Japan complies with the right to freedom of expression under international law by not criminalizing Yaoi. It is essential to clear this up because if Yaoi would fall under one of these restriction grounds, it could be possible that Japan should or has a duty to prohibit Yaoi. Prohibiting Yaoi would also mean that Japan is one step closer to complying with the UNCRC and the Optional Protocol by restricting possible child pornography material.

### 1.2 Research Question

Given the above, the primary research question in this thesis is:

**How does the right to freedom of expression under international law and its limitations apply to Yaoi?**

The following sub-questions will answer this research question:

1. What is Yaoi and what are its focal points?
2. How do freedom of expression limitations based on the rights and reputation of others apply to Yaoi?
3. How do freedom of expression limitations based on national security, as well as public order, health, and morals apply to Yaoi?

## 1.3 Methodology

The primary type of research used in this thesis is doctrinal legal research. The thesis aims to deliver knowledge on whether the Yaoi genre is applicable to the limitations of the freedom of expression under international law to see whether Japan has a duty to prohibit the genre by interpreting each restriction ground.

Chapter 2 is based on descriptive research. The aim is to analyze the Yaoi genre to create a complete and thorough overview of Yaoi, focusing on seeking the true focal points of the genre. In order to illustrate this overview and find its focal points, secondary legal literature is referenced, such as academic books and law journal articles.

The primary type of research used in chapters 3 and 4 is doctrinal legal research. The aim is to construct an interpretation of each restriction ground in compliance with specific sources to apply to the Yaoi genre. In order to create these interpretations, these chapters will analyze different sources, such as documents of the Human Rights Committee. These documents contain specific statements of the Human Rights Committee that contribute to creating the interpretations of the restriction grounds. It will also make use of the Human Rights Committee's case law. The cases used to interpret the restriction grounds are all cases mentioned in General Comment 34. This way, the interpretations of the restriction ground are all (to a certain extent) in line with the interpretation of the Human Rights Committee since it used those specific cases in General Comment 34. This chapter will also make use of the interpretation methods mentioned in the Vienna Convention on the Law of Treaties and the interpretations stated in the Siracusa Principles. Together, these different (legal) sources will establish a beneficial interpretation of the restriction grounds.

## 1.4 Thesis Structure

Chapter 2 will dive into the definition of the Manga genre Yaoi, together with two of the genre's subgenres, Slash and Shotacon, to establish the genre's actual focal points, which will be necessary to answer the other sub-questions.

Chapter 3 provides an in-depth analysis of different interpretations of the first restriction category: to protect the rights and reputation of others and will apply the restriction to Yaoi.

Chapter 4 will provide an in-depth analysis of different interpretations of the second restriction ground: to protect national security or public order, public health, or public morals. The completed interpretations will then be applied to Yaoi.

Chapter 5 concludes with how the limitations of the right to freedom of expression apply to Yaoi and whether Japan should or is legally obligated under international law to prohibit Yaoi.

# Chapter 2: The Yaoi Genre

## 2.1 Introduction

Yaoi is a genre within Manga and fan Manga[15] and is openly sold throughout Japan. It originally began to achieve its general form as a 'main' genre around the 1960s and became popular around the 1970s, when there was a so-called 'explosion' in stories containing relationships between male characters.[16] Yaoi is categorized into subgenres, which is helpful for research purposes and to give an indication of what may be expected when reading a certain Yaoi story. These subgenres are subordinate to the main genre Yaoi. Yaoi Manga and fan Manga are known to focus on romantic homosexual relationships between men, called "beautiful boys" in the Yaoi genre.[17] Since Yaoi was initially created for the female audience, it is most popular among primarily young women, including children.[18] This genre stands out among other genres within Manga because the creators and readers are primarily female, which is uncommon in the Manga scenery.[19]

Yaoi often contains 'appear to be' underage characters who engage in sexual activities, which suggests the possibility that Yaoi does not fall under the right of freedom of expression and should be restricted under international law.[20] In order to thoroughly research this

[15] Manga is the Japanese interpretation of comic books and fan Manga are art and stories created by the Manga fan community which is often based on a specific Manga story and which are globally shared between the fan community.
[16] Akiko Mizoguchi, 'Male-Male Romance by and for Women in Japan: A History and the Subgenres of "Yaoi" Fictions' (2003) 25(1) U.S.-Japan Women's Journal 49, 52.
[17] Fermin T A Santos, 'Yaoi: Voices from the Margins' (2010) 31(1) Osaka University Knowledge Archive 215, 217 <https://ir.library.osaka-u.ac.jp/repo/ouka/all/7429/ahs31_215.pdf> accessed on 5 May 2022.
[18] Mark McLelland, 'The International Yaoi Boys' Love Fandom and the Regulation of Virtual Child Pornography: The Implications of current Legislation' (2007) 4(1) Sexuality Research & Social Policy 93, 97; Ágnes Zsila and others, 'Loving the Love of Boys: Motives for Consuming Yaoi Media' (2018) 13(6) PloS one 1, 1 < https://pdfs.semanticscholar.org/ba3f/082ae54fa697e17fc0d8078d9633d7b0861c.pdf> accessed on 7 May 2022.
[19] McLelland, 'The international Yaoi Boys' (n 18) 97.
[20] Aleardo Zanghellini, 'Underage Sex and Romance in Japanese Homoerotic Manga and Anime' (2009) 18(2) Social & Legal Studies 159, 161; Ilaria Parini, 'Censorship of Anime in Italian Distribution' (2012) 57(2) Meta: journal des traducteurs/Meta: Translators' Journal 325, 327.

possibility, an overview of the Yaoi genre will be necessary, which this chapter will provide. Section two of this chapter will go deeper into the definition of Yaoi and what the genre precisely entails. The third section will lay out two subgenres of Yaoi, *Slash,* and *Shotacon,* and the chapter closes with conclusions.

### 2.2 The definition of Yaoi

Yaoi is a Manga and fan Manga genre that does not contain representations of actual humans. Instead, the genre contains fictional, hand-drawn, or computer-generated characters. The genre is known for romance stories between men and is sometimes referred to as an 'explicit romance' genre.[21] Moreover, parody is also a main feature of Yaoi.[22] Melissa Frennea commented in her research on rape and child pornography in Yaoi that "despite its often difficult sexual themes, most Yaoi is actually humorous."[23] However, when diving deeper into the genre, the true focal points of the genre are not quite as simple as just humorous romance stories between homosexual men. Examining different research on Yaoi, it turns out that most Yaoi Manga and fan Manga contain rape, non-consensual sexual activities, BDSM, incest, orgies, and underage sex.[24] Moreover, these sexual themes and actions have become increasingly extreme in recent years.[25] However, these findings were regarding the main themes of Yaoi Manga and fan Manga. What about the main characters? As mentioned, the

[21] Anna Madill, 'Erotic Manga: Boys' Love, Shonen-ai, Yaoi and (MxM) Shotacon', in Clarissa Smith, Feona Attwood and Brian McNair (eds), *The Routledge Companion to Media, Sex, and Sexuality* (Routledge 2017) 135.
[22] Madill, 'Erotic Manga' (n 21) 135; Toshio Miyake, 'History as Sexualized Parody: Love and Sex Between Nations in Axis Powers Hetalia', in Rebecca Suter and Nissim Otmazgin (eds), *Rewriting History in Manga: Stories for the Nation* (Palgrave Macmillan 2016) 169.
[23] Melissa Frennea, 'The Prevalence of Rape and Child Pornography in Yaoi' (Proceedings of the National Conference on Undergraduate Research, New York, April 2011) <https://apps.cur.org/ncur2021/archive/Display_NCUR.aspx?id=51669> accessed on 6 May 2022; Madill, 'Erotic Manga' (n 21) 135.
[24] Bakhrul K Amal, Dina Ampera and Muhammad Natsir, 'The Analysis of Fantasy and Representation of Female on Gay and Male Homoerotic Relationships in the Yaoi Genre' (2021) 3(2) Asian Social Science and Humanities Research Journal 57, 60-63; Santos (n 17) 218.
[25] Mark McLelland, 'The World of Yaoi: The Internet, Censorship and the Global Boys Love Fandom' (2005) 23(1) The Autralian Feminist Law Journal 61, 68.

main characters of the stories are always male and in homosexual relationships. These relationships almost always contain, as Aleardo Zanghellini named it, "an attacker and receiver," who often significantly differ in age to show the relationship's "hierarchical structure."[26] The characters in Yaoi Manga and fan Manga are mostly preteens (age 9-12) and teens (age 13-19), which is problematic as they thus engage in sexual activities with each other or with older men.[27] However, in the past couple of years, some older characters have been portrayed, including some even in their mid-thirties, which is a positive change within the genre.[28] Unfortunately, this change progresses slowly, and only a few stories actually contain these older characters.[29]

The sexual themes and underage characters have become an essential feature of the genre, and therefore Yaoi is not 'just' romance stories between homosexual men.[30] In fact, Yaoi Manga and fan Manga stories actually focus on extremely explicit sexual romance stories between homosexual underage boys.

### 2.4 Subgenres of Yaoi

Since the beginning of Yaoi, the genre consisted of various subgenres, and as the genre grew, more and more subgenres popped up.[31] In this section, two subgenres of Yaoi will be explored. Exploring these subgenres will contribute to finding the true focal points of Yaoi because it creates a deeper understanding of the Yaoi genre instead of over-generalizing it. There are more than thirty subgenres, but only two subgenres will be explored in this section:

[26] Zanghellini (n 20) 169.
[27] McLelland, 'The World of Yaoi' (n 25) 68.
[28] Mizoguchi (n 16) 52.
[29] Mizoguchi (n 16) 56.
[30] Mizoguchi (n 16) 56; Noah Holloway, 'Hadeel Al-Alosi: The Criminalization of Fantasy Material: Law and Sexually Explicit Representations of Fictional Children' (2021) 50(1) Journal of Youth and Adolescence 202, 203.
[31] Sandy Enriquez and Andrew Lippert, 'Fandom and Sexuality in the Archives: Collecting Slash Fan Fiction and Yaoi/Boys' Love Manga' (2020) 31(2) Journal of the Fantastic in the Arts 182.

*Slash* and *Shotacon*. These two subgenres are specifically chosen since they contain the most significant difference even though they are Yaoi subgenres. Other small subgenres, such as the famous *June* and *Shonen-ai* subgenres, only differ in small details, while the two chosen subgenres are so big that sometimes they are mistakenly seen as Manga genres on their own.[32]

### *2.4.1 Slash fiction*

Slash fiction is a subgenre of Yaoi and focuses on heterosexual male tv show characters and situating them into homosexual romantic relationships.[33] The first Slash fiction was created in the late 1970s and focused on a romantic relationship between the two main heterosexual characters from Star Trek, Captain Kirk and Spock.[34] This subgenre has grown much over recent years, and it mainly exists online.[35] Even though Slash fiction is a subgenre of Yaoi, it is often seen as a separate Manga genre because Slash fiction originally started as stories that focused on the relationship between adult men instead of preteen and teen boys. [36] However, the 'main' genre Yaoi has been influencing the subgenre in the last couple of years, which has resulted in the fact that Slash fiction focuses more and more on younger-looking boys.[37] This shift means that the most significant difference between the 'main' genre and subgenre is disappearing. There has been another development within Slash fiction. When Slash fiction was created, the stories were always about two heroes of a tv show or movie in a relationship.[38] In these original stories, there was no sexual violence (which is a big difference when looking

[32] Nicola Döring, 'Erotic Fan Fiction' (2021) Encyclopedia of Sexuality and Gender 1, 1.
[33] Virginia Keft-Kennedy, 'Fantasising Masculinity in Buffyverse Slash Fiction: Sexuality, Violence and the Vampire' (2008) 7(1) Nordic Journal of English Studies 49, 49.
[34] McLelland, 'The World of Yaoi' (n 25) 71.
[35] McLelland, 'The international Yaoi Boys' (n 18) 99.
[36] Döring (n 32) 1.
[37] McLelland, 'The international Yaoi Boys' (n 18) 99.
[38] Proud Arunrangsiwed, 'Equality, Friendship, and Violence in Slash or Yaoi Fan Art' (2015) 9(12) International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering 3747, 3749.

at general Yaoi stories) because the focus was not on sex but on "love and emotion".[39] However, this focus has shifted, and Slash fiction stories began to create relationships between the hero and the villain, which has caused many Slash fiction stories to contain much sexual violence.[40] Thus, with the primary genre Yaoi influencing the subgenre more and more, the most significant differences between Slash fiction and Yaoi are disappearing, and the 'main' genre and the subgenre are currently not so different from each other anymore.[41] This shift also suggests that the underage characters and the explicit sexual violence in Yaoi stories are not likely to disappear anytime soon.

### *2.4.2 Shotacon*

While most of the Yaoi genre focuses on teenage boys, stories in the Shotacon subgenre focus on the explicit sexual activities of preteen boys.[42] Shotacon is officially divided into male- and female-oriented material, of which only the male-oriented material is a subgenre under Yaoi. Shotacon is short for *Shotaro Complex*, roughly translated as "a strong attraction to young boys".[43] Shotacon is a small and controversial subgenre within Yaoi. Most of the fandom of Yaoi does not mind that stories include clearly preteen characters.[44] However, this only pertains to Shotacon stories, and most do not like it when these preteen characters appear in 'general' Yaoi stories.[45] An example of Shotacon is the series *Boku no Piko*, a story about a 12-year-old boy conducting many sexual activities with adults and other preteen and teen

[39] Arunrangsiwed, 'Equality, Friendschip and Violence' (n 38) 3753.
[40]Keft-Kennedy (n 33) 51; Joseph Brennan, 'Slash Manips: Remixing Popular Media with Gay Pornography' (2013) 16(4) M/C Journal <https://journal.mediaculture.org.au/index.php/mcjournal/article/view/677> accessed on 7 May 2022.
[41] Shweta Basu, 'Online Yaoi Fanfiction and Explorations of Female Desire through Sexually Exploited Male Bodies' (2020) 12(5) Rupkatha Journal on Interdisciplinary Studies in Humanities 1, 3.
[42] McLelland, 'The World of Yaoi' (n 25) 71.
[43] Ling Yang and Yanrui Xu, 'The Love that Dare not Speak its Name: The Fate of Chinese Danmei Communities in the 2014 Anti-porn Campaign', in Mark McLelland (ed), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture* (Routledge 2017) 179.
[44]Frennea (n 23); McLelland, 'The World of Yaoi' (n 25) 70.
[45] Madill, 'Erotic Manga' (n 21) 136.

boys.[46] In many jurisdictions (such as Australia), this subgenre is already marked as child pornography since every Shotacon story clearly contains preteen boys engaging in many sexual activities.[47] There is no indication that this subgenre is disappearing.

## 2.5 Conclusion

This chapter has attempted to introduce a nuanced understanding of the Yaoi genre. After examining the genre, it turns out that the true focal points of the genre are extremely explicit sexual romance stories between homosexual, clearly underage boys, instead of simply 'romance stories between homosexual men'. Moreover, although there is an increase in stories with older adult men, this focus has not shifted. Looking at the two subgenres that differ the most compared to the 'main' genre, Yaoi, this does not look much better. While Slash fiction was a 'safer' option, as the characters were adults engaging in violent sexual activities, this subgenre is changing, and more and more stories are containing underage boys. With Shotacon, the focus lies only on preteen boys engaging in sexual activities. With the current shifting within Slash fiction and the Shotacon genre that does not appear to be leaving the Yaoi scene, it seems not likely that the underage characters and violent sexual activities are disappearing within the Yaoi genre. Thus, with this more thorough overview, it can be concluded that Yaoi Manga and fan Manga stories currently are mainly focused on stories containing underage boys engaging in violent and explicit sexual activities with other underage characters and older men.

[46] Mizoguchi (n 16) 71.
[47] Anna Madill, 'Men on the market: Feminist Analysis of Age-stratified Male–Male Romance in Boys' Love Manga' (2016) 7(2) Studies in Comics 265, 268.

# Chapter 3: The Rights and Reputation of Others

## 3.1 Introduction

Freedom of expression has often been described as "the cornerstone of all rights" and is set in article 19 of the Universal Declaration of Human Rights.[48] However, Article 19 of the International Covenant on Civil and Political Rights[49] is the "actual veritable centerpiece" of the right because it focuses on the practical application of the right to freedom of expression.[50] Article 19 of the ICCPR is stated as follows:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include 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 his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputation of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[48] ECHR 'Handyside v. UK' (7 December 1976) App No 5493/72; Robert Cryer, Hakan Friman and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2019) 221.

[49] International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) UNGA Res A/RES/2200A(XXI) (ICCPR).

[50] Tarlach McGonagle, 'The Development of Freedom of Expression and Information within the UN: Leaps and Boiunds or Fits and Starts?', in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press 2015) 19.

The right to freedom of expression is extremely important for individual development and democracy, but it is not an absolute right.[51] As can be seen in article 19, states carry 'special duties and responsibilities' to protect the right of free expression, which means that states can restrict the freedom of expression where they deem it necessary. For a restriction to be legitimate, it must be 'provided by law' and be 'necessary and proportionate'.[52] It must also be based on one of the exclusive grounds mentioned in article 19 sub 3, which are divided into two categories; (1) 'respect of the rights or reputation of others', and (2) for the protection of national security or public order, public health, or public morals.

This chapter will focus on the first category, 'respect for the rights and reputation of others'. The second section will map out the Vienna Convention[53], which will be used to interpret the restriction grounds. The third section will analyze different UN Human Rights Committee documents and the Vienna Convention to interpret the first category of restriction grounds. Section 4 will then use the findings of the previous section to apply the first restriction category to Yaoi to see if Yaoi could be restricted to protect the rights or reputation of others. Section 5 will conclude.

### 3.2 The Vienna Convention

This section will shortly dive into the Vienna Convention on the Law of Treaties. This convention contains three articles on the rules of interpretation, articles 31, 32, and 33. Since this thesis will use only article 31, it will shortly be mapped out. Article 31 sub 1 contains the general rule based on the textual approach.[54] It contains three principles; (1) the interpretation

[51] Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law' (2018) 20(1) International Journal of Speech-Language Pathology 12, 14.
[52] CCPR 'Robert W. Gauthier v. Canada' (5 May 1999) Communication No 633/1995, UN Doc CCPR/C/65/D/633/1995.
[53] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) UNTS vol 1155, 331 (Vienna Convention).
[54] Oliver Döll and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties* (2nd edn, Springer 2011) 580.

must be in good faith, (2) the terms used in the treaty must be interpreted to their ordinary meaning, and (3) this ordinary meaning must be determined in light of the object and purpose of the treaty.[55] Interpreting a treaty provision 'in good faith' means that the interpretation has to be reasonable. In other words, the interpretation found using the other principles can-not lead to an absurd or unreasonable result; otherwise, another interpretation must be sought.[56] By using the ordinary meaning of the terms of the treaty, an interpretation is given to a term by looking at what a person who has a reasonable knowledge of the subject would make of the terms used.[57] This is usually done by looking at the meaning given in dictionaries. The last interpretation is looking at the object and purpose of the treaty in question, which (for example) can be done by looking at the title of the treaty, the preamble, but also intuition and common sense are useful indicators.[58] These principles do not have a particular hierarchy or chronological order. All three principles are used to come to one interpretation of the treaty provision. Article 31 sub 2 states two extrinsic documents that can be used to define the context of the treaty. Article 31 sub 3 states other means for interpretation next to the context. These relate more to the "practice of the parties."[59] Lit a and b state certain materials to be used for the implementation, and lit c states that when interpreting a treaty, it should be done by keeping in mind all other treaty obligations that apply to the parties. This interpretation method is called systemic integration (or harmonization) because it is about keeping international law coherent.[60] This way, a state is complying with the treaty in question and at the same time complying with all its other treaty obligations. Article 31 sub 4 is an exception to sub one and

[55] Vienna Convention, art 31 sub 1.
[56] Döll and Schmalenbach (n 54) 687-588.
[57] Döll and Schmalenbach (n 54) 681.
[58] Döll and Schmalenbach (n 54) 686.
[59] Döll and Schmalenbach (n 54).
[60] Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) International & Comparative Law Quarterly 557.

applies when states have agreed on a special meaning of a term so that that meaning can be used with the interpretation of the treaty.

### 3.3 Defining 'the rights and reputation of others'

The first listed restriction in article 19 sub 3, 'respect of the rights or reputation of others', can be broadly interpreted. The ICCPR itself does not give specific details on when and how to implement the restriction. As the Human Rights Committee has emphasized, states have to use these restrictions with care because of the importance of the freedom of expression.[61] Therefore, this section will study different Human Rights Committee documents, case law, and scholarship to outline 'the rights and reputation of others.' Since the two terms, 'rights' and 'reputation,' are two different concepts, and this distinction may be relevant when put in the context of Yaoi, they will be studied separately.

#### *3.2.1 To protect the reputation of others*

The right to freedom of expression can be limited to protect the reputation of others. What do the terms 'reputation' and 'others' entail, and when can a state base restrictive measures on this ground? The first to be explored will be 'others' since the scope and context of 'others' is made clear in case law and Human Rights Committee documents. In *Ross v. Canada* in 1997, the Human Rights Committee set out the scope of 'others' as; "others (…) may relate to other persons or to a community as a whole."[62] In this specific case, Canada imposed restrictions on an author to protect the rights and reputation of persons of the Jewish Faith. The Human Rights Committee referred in this case to *Faurisson v. France*, where restrictions under 'rights or reputation of others' were permitted on statements against the

[61] CCPR 'General Comment 34: Article 19 Freedom of Opinion and Expression' (12 September 2011) Un Doc CCPR/C/GC/34 (General Comment 34).
[62] CCPR 'Malcolm Ross v. Canada' (1 May 1996) Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997.

Jewish Faith to respect the Jewish communities.[63] Nevertheless, a community does not always have to be defined by religion. In the concluding observations on Israel, 'others' were Palestinians from Occupied Territories, or in the concluding observations on Slovakia, 'others' were human rights defenders.[64] The Human Rights Committee confirmed this interpretation of 'others' when they included their interpretation in General Comment 34.[65] A General Comment focuses on a specific theme or treaty provision and is usually used as the leading source of interpretive guidance for the treaty in question. It is a means by which a UN Human Rights Expert Committee refines its views on an issue that arises out of provisions of the treaty, and it presents those views in a formal statement.[66] In General Comment 34, the Human Rights Committee stated how article 19 should be interpreted in the scope and context of the rights of opinion and expression.[67] Thus, the term 'others' can relate to different subjects. It can relate to persons individually or as members of a particular community, whereby a community can be defined in different ways, such as by race, ethnicity, religion, and many other ways, such as human rights defenders.[68]

The second term, 'reputation,' will now be explored. The right to freedom of expression can be restricted when an individual or members of a community receive reputational harm from this expression.[69] 'Reputation', however, can be interpreted very broadly. The two most generally known situations under reputational harm are defamation and libel.[70] An expression

[63] CCPR 'Robert Faurisson v. France' (2 January 1993) Communication No 550/1993, UN Doc CCPR/C/58/D/550/1993.
[64] CCPR 'Concluding Observations of the Human Rights Committee: Israel' (21 August 2003) UN Doc CCPR/CO/78/ISR.
[65] General Comment 34, para 28.
[66] Michael O'Flaherty, 'International Covenant on Civil and Political Rights: Interpreting Freedom of Expression and Information Standards for the Present and the Future', in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press 2015) 55, 72-73.
[67] O'Flaherty (n 66) 72.
[68] Sarah Joseph and Melissa Castan, *International Covenant on Civil and Political Rights : Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) ch 18, 1331.
[69] Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 564.
[70] Joseph and Castan (n 68) 1340.

that violates a person's privacy can also fall under reputational harm. Article 17 ICCPR contains a positive duty on states to protect people against "intentional infringement on honor and reputation by untrue assertions."[71] The Human Rights Committee does not explicitly interpret 'reputation' in General Comment 34. However, it did dedicate a section on defamation to emphasize the limited scope of the restriction regarding the protection of reputation. The Human Rights Committee emphasized in that section that states must implement defamation laws with much care since they suppress freedom of expression, as well as consider "the decriminalization of defamation."[72] Concerning the specific form of expression, it only mentions that the form of expression must be subject to verification.[73] Since this statement does not clarify much, case law regarding this restriction might make it clearer. First is *Marques de Morais v. Angola* 2005. This case was about a journalist who wrote several public news articles in which he criticized the Angolan President on subjects such as corruption and 'destruction of the country.'[74] The Human Rights Committee also emphasized that the right to freedom of expression includes allowing a person to openly criticize their government without "fear of interference or punishment."[75] Moreover, it also noted that a public figure, such as a President, is "subject to criticism and opposition"; therefore, an arrest is not proportionate to protect the reputation of the President.[76] In *Adonis v. Philippines* 2008, a radio broadcaster was arrested for criminal libel because he accused a congressman of having an affair.[77] The Human Rights Committee concluded that the Filipino defamation law was too strict and that the Filipino government put an illegitimate restriction on the right to freedom of expression.[78] *Kozlov v.*

[71] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, Arlington 2005) 462.
[72] General Comment 34, para 47.
[73] General Comment 34, para 47.
[74] CCPR 'Rafael Marques de Morais v. Angola' (1 April 2005) Communication No 1128/2002, UN Doc CCPR/C/83/D/1128/2002.
[75] *Marques* (74).
[76] *Marques* (74).
[77] CCPR 'Alexander Adonis v. The Philippines' (26 April 2012) Communication No 1815/2008, UN Doc CCPR/C/103/D/1815/2008/Rev1.
[78] *Adonis* (77).

*Belarus* 2015 shows more aspects in which the Human Rights Committee shows interest. In this case, an author was fined for slander because of the content in his letter to the Minister of Finance, which the Human Rights Committee found a violation of his right to freedom of expression.[79] Looking at the communication, the Human Rights Committee based its findings on the specific form of expression (including its context), the way the form of expression was expressed (in this case, a letter), the public interest, the impact of the criticism, and the choice of wording.[80]

Furthermore, looking at the cases before the Human Rights Committee, they all have a common aspect, which is that the given expression is directed to public figures. The Human Rights Committee even specifically dedicated a paragraph in General Comment 34 to the situation of defamation and public figures.[81] It recognized that protecting the reputation of public figures is a legitimate government purpose, especially when the expression is not subject to verification.[82] However, it also stated that an expression considered to be insulting does not immediately justify the imposition of penalties since they are subject to criticism and political opposition, and a state can-not impose laws prohibiting such criticism.[83] The Human Rights Committee has become that the "defamation proponent," the public figure, has to prove that the person who expressed their statement "not only spoke in error but did so knowingly."[84] This means that the Human Rights Committee is creating a "transparent and accountable system of government" by limiting the scope of reputational harm in cases regarding public figures.[85]

[79] Taylor (69) 564.
[80] Taylor (69) 564.
[81] General Comment 34, para 38.
[82] Edward L Carter, '"Error but without Malice" in Defamation of Public Officials: The Value of Free Expression in International Human Rights Law (2016) 21(3) Communication Law and Policy 301, 321.
[83] General Comment 34, para 38.
[84] Carter (82) 322.
[85] Carter (82) 322.

This still leaves the question open of what 'reputation' precisely entails. Therefore, article 31 sub a of the Vienna Convention will be used in order to create an interpretation of the term 'reputation.' First, it will be checked what the general meaning of the term 'reputation' is by using dictionaries. Generally, 'reputation' is defined as 'the beliefs or opinions that people, in general, have about someone or something.'[86] Using this interpretation of 'reputation' is not absurd or unreasonable, meaning it passes the requirement of the reasonableness test and thus the principle of Good Faith. Moreover, this interpretation is in line with the object and purpose of the ICCPR and article 19. Looking at the preamble, the purpose of the ICCPR is to ensure the dignity of each individual and to ensure that states encompass civil and political rights. Defining 'reputation' as 'the beliefs or opinions that people, in general, have about someone or something' implies that imposing restrictive measures on this ground is to protect the opinions that people have about someone or something of others. Since this interpretation protects the dignity of individuals, the interpretation is in line with the object and purpose of the ICCPR and, therefore, complies with all three principles of article 31 sub a of the Vienna Convention.

In almost all observations, the Human Rights Committee expresses concern about the use of defamation laws.[87] States have used the 'reputation restriction' too broadly, and the Human Rights Committee has stated several times that these defamation laws exceed the limits of article 19 sub 3.[88] The term 'reputation' can be interpreted broadly; thus, the Vienna Convention was used to create an interpretation of the restriction ground, being 'to protect the

[86] 'Reputation' (Cambridge Dictionary) "The opinion that people in general have about someone or something, or how much respect or admiration someone or something receives, based on past behavior or character" <https://dictionary.cambridge.org/dictionary/english/reputation> accessed on June 10 2022; 'Reputation' (Lexico) "The beliefs or opinions that are generally held about someone or something" <https://www.lexico.com/definition/reputation> accessed on 10 June 2022; 'Reputation' (Merriam-Webster) "Overall quality or character as seen or judged by people in general" <https://www.merriam-webster.com/dictionary/reputation> accessed on 10 June 2022.
[87] Taylor (69) 566.
[88] CCPR 'Concluding Observations of the Human Rights Committee: Croatia' (30 April 2001) UN Doc CCPR/CO/71/HRV para 17; CCPR 'Concluding Observations of the Human Rights Committee: Azerbaijan' (12 November 2001) UN Doc CCPR/CO/73/AZE para 22.

opinions that people have about someone or something of others.' This means imposing measures through this restriction ground is to protect the opinions that people have about someone or something of others. Moreover, limiting freedom of expression to protect the reputation of others should only be used in extreme situations and with the utmost care. These extreme situations are mostly cases involving a public figure and a falsely spoken expression that was done knowingly. Furthermore, even though the Human Rights Committee has not specified the requirements of the form of expression, most cases revolve around the same sort of 'forms' of expression, which are mainly in the direction of an oral statement (for example, face-to-face or a radio broadcast) or a written statement (such as news articles and personal letters).

#### *3.2.2. To protect the rights of others*

The right to freedom of expression can also be limited to protect the rights of others. When exercising the right of freedom of expression, it may conflict with another right and make it necessary to restrict freedom of expression to protect the other right. Since the term 'others' is already defined in the previous subsection, this subsection will only dive into the term 'rights'. Which rights can be protected by legally restricting the freedom of expression? The Human Rights Committee explicitly referred to 'rights' in General Comment 34. It noted that it "includes human rights as recognized in the Covenant and more generally in international human rights law".[89] This statement indicated that these rights, which may cause the restriction of freedom of expression, have to be of the same equality, so not a "lesser right".[90] The Human Rights Committee gave an example regarding this statement: "it may be legitimate to restrict the freedom of expression to protect the right to vote under article 25".[91] Looking at case law,

[89] General Comment 34, para 28.
[90] Joseph and Castan (n 68) 1332.
[91] General Comment 34, para 28.

the rights to be protected differ from case to case. In *Ballantyne et al. v. Canada* in 1989, the Canadian government restricted freedom of expression in order to protect the right of the francophone minority to use their language.[92] In *Jong-Cheol v. Republic of Korea* in 2005, the Human Rights Committee concluded that restricting freedom of expression to protect the rights of Presidential candidates fell within the terms of article 19 sub 3 ICCPR.[93] In *Svetik v. Belarus* in 2004, the freedom of expression was restricted to protect the right to vote.[94] These cases show the diverse rights that can be protected to justify a restriction on freedom of expression. The protected rights indeed need to be of the same equality as the right to expression of freedom.

The term 'rights' can also be interpreted using the Vienna Convention. This section will use article 31 sub 1 of the Vienna Convention but will also use article 31 sub 3 lit c of the Vienna Convention. First, an interpretation will be made by the three principles of article 31 sub 1 of the Vienna Convention, good faith, object and purpose of the ICCPR, and article 19 and the ordinary meaning of the term. Examining different dictionaries, the term 'rights' is generally known as "a legal entitlement to which one has a just claim."[95] This interpretation of 'rights' does not seem absurd or unreasonable, meaning it is in accordance with the good faith principle. When using this interpretation in the restriction, it creates the following: To protect the legal entitlement to which one has a just claim of others. Since this means that it wants to enforce and protects the rights of individuals, it also implies the rights of the ICCPR and article 19. Therefore, it can be said that this interpretation complies with the object and purpose of the ICCPR and article 19. With this last implication, it can be concluded that the interpretation of

[92] CCPR 'John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada' (5 April 1993) Communication No 359/1989, UN Doc CCPR/C/47/D/359/1989.
[93] CCPR 'Kim Jong-Cheol v. Republic of Korea' (31 January 2000) Communication No 968/2001, UN Doc CCPR/C/84/D/968/2001.
[94] CCPR 'Leonid Svetik v. Belarus' (5 November 1999) Communication No. 927/2000, UN Doc CCPR/C/81/D/927/2000.
[95] 'Right' (Lexico) "A moral or legal entitlement to have or do something" <https://www.lexico.com/definition/right> accessed on 11 June 2022; 'Right' (Merriam-Webster) "something to which one has a just claim" <https://www.merriam-webster.com/dictionary/right> accessed on 10 June 2022.

the restriction ground as 'to protect the legal entitlement to which has a just claim of others' complies with all three principles of article 31 sub 1 of the Vienna Convention and, therefore, will be used further.

Now, there will be an interpretation made by using article 31 sub 3 lit c of the Vienna Convention, which is that the restriction ground has to be taken into account with any relevant rules of international law applicable in the relations between the parties.[96] Japan has been criticized for not criminalizing and banning Manga (including Yaoi), as many states see comic books as child pornography under international law.[97] Since Japan has ratified the UNCRC and the Optional Protocol, it means that their definition of child pornography binds Japan under these treaties. Therefore the freedom of expression provision plus its limitations should be interpreted in light of that definition of child pornography. Doing so creates an interpretation of article 19 that allows Japan to comply with the right to freedom of expression and, at the exact same moment, the rights of the child. Therefore, the following section will interpret the definition found with the child pornography definition of the UNCRC and Optional Protocol in mind.

With the information presented in this subsection, it can be concluded that imposing measures based on this restriction ground is to protect the legal entitlement to which has a just claim of others and that this right has to be of the same equality (such as human rights in the ICCPR or human rights in general). Moreover, when applying this interpretation to Yaoi, it has to be done using the UNCRC and Optional Protocol in mind.

[96] Vienna Convention, art 31 sub 3 lit c.
[97] Mark McLelland, 'Introduction: Negotiating "Cool Japan" in Research and Teaching', in Mark McLelland (ed), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture* (Routledge 2017) 25; Galbraith, 'Lolicon' (n 9) 83.

## 3.4 Applying 'the rights and reputation of others' to Yaoi

This section will explore whether Yaoi and, thereby, the right to freedom of expression could be restricted to protect the rights or reputation of others. Since the protection of 'reputation' and 'rights' apply in different contexts, both restrictions will be explored in the context of Yaoi, which will be done in two separate sections. As mentioned, Yaoi will be analyzed to the interpretations presented in section 2, but with the child pornography provisions of the UNCRC and Optional Protocol in mind.

### *3.4.1 Applying 'others' to Yaoi*

Both restrictions have to protect 'others'. As has been concluded in section two, 'others' can be individual persons, members of a community, or a community as a whole. 'Others' also must be interpreted with the UNCRC and Optional Protocol in mind. The purpose of both treaties is to protect the rights of the child.[98] To be more precise, a child is meant: "a human being below the age of eighteen".[99] Therefore, the restriction regarding reputation will be: 'to protect the reputation of the child, and the restriction regarding rights will be: 'to protect the rights of the child'. These interpretations are coherent with the interpretation of the Human Rights Committee and with the UNCRC and the Optional Protocol. Now that this term has been established, the restriction will be applied to Yaoi.

### *3.4.2 Applying the 'protection of reputation' restriction to Yaoi*

The restriction regarding reputation will first be applied to Yaoi. It will first be established whether Yaoi causes reputational harm to the child. Therefore, it is crucial to know the consequences of Yaoi concerning the child to see if Yaoi causes reputational harm.

[98] UNCRC; Optional Protocol.
[99] UNCRC, art 1.

Research does not show that the Yaoi community explicitly threatens or harms children.[100] However, this research concerned the underlying motivations of participating in the Yaoi community and not precisely the positive and negative effects of Yaoi on people in general.[101] Further research concludes that Yaoi has created positive support for female readers regarding coping with past trauma, helping with a negative self-image, gender-related problems, and with anxiety about having homosexual thoughts.[102] However, McLelland emphasized in his research on the Yaoi fandom that more research is needed into the specific positive and negative effects of Yaoi on younger men and women since there is a severe lack regarding this specific topic.[103] Therefore, it is difficult to see whether Yaoi causes reputational harm to children. To protect the opinions that people have about someone or something of others. Nevertheless, current research does not show that Yaoi causes defamation, libel, or privacy harm to children. This would suggest that Yaoi does not cause reputational harm when looking at current research. Moreover, since the Human Rights Committee has emphasized that the restriction is used too quickly and too much, and seeing the positive support Yaoi has created, it does not seem likely that Yaoi could be restricted to protect the opinions that people have about someone or something of others.

### *3.4.3 Applying the ' protection of rights' restriction to Yaoi*

This last subsection will look at whether Yaoi can be restricted to protect the rights (the legal entitlement to which has a just claim) of children. Moreover, this has to be done with the UNCRC and Optional Protocol in mind. Many states criticize Japan for not restricting Manga

[100]Fujimoto Yukari and others, 'Transgender: Female Hermaphrodites and Male Androgynes' (2004) 27(1) U.S.-Japan Women's Journal 76; Kazumi Nagaike, *Fantasies of Cross-Dressing: Japanese Women Write Male-Male Erotica* (Brill 2012); Mizoguchi (n 16) 75.
[101] McLelland, 'The international Yaoi Boys' (n 18) 101.
[102] McLelland, 'The international Yaoi Boys' (n 18) 101; Patrick W Galbraith, 'Fujoshi: Fantasy Play and Transgressive Intimacy among "Rotten Girls" in Contemporary Japan' (2011) 37(1) Signs: Journal of Women in Culture and Society 219.
[103] McLelland, 'The international Yaoi Boys' (n 18) 101.

genres because they consider it child pornography.[104] Article 34 of the UNCRC notes that state parties shall take measures to prevent child pornography.[105] The Optional Protocol to the UNCRC contains the specified definition of child pornography, and since Japan has ratified these treaties, this provision will be applied to Yaoi. Child pornography in the Optional Protocol is stated as follows:

"Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."[106]

The Committee on the Rights of the Child has established guidelines for this provision, which will be used when applying this provision to Yaoi. First, the Committee on the Rights of the Child noted that "any representation, by whatever means" means that "it reflects the broad range of material available in a variety of media, both online and offline".[107] Moreover, they stated that child pornography provisions should cover all forms of material.[108] These statements suggest that Yaoi applies to this first part of the provision since Yaoi is a genre of comic books, fan art, and fan-written stories online and offline. All forms of material fall under the definition, thus also the Yaoi materials.

Secondly, there is the term 'of a child', which is not specified in the Optional Protocol Guidelines. However, as has been previously mentioned, the UNCRC sees a child as a person under the age of eighteen.[109] Chapter 2 has concluded that the main focus of Yaoi lies on

[104]McLelland, 'Introduction' (97) 25; Galbraith, 'Lolicon' (n 9) 83.
[105] UNCRC, art 34 sub c.
[106] Optional Protocol, art 2 sub c.
[107] CCPR 'Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (10 September 2019) UN Doc CRC/C/156 (Optional Protocol Guidelines) para 61.
[108] Optional Protocol Guidelines, para 61.
[109] UNCRC, art 1.

preteen and teen boys, meaning the characters of Yaoi are mainly under the age of eighteen and therefore seen as children according to the UNCRC.

Thirdly, the Committee on the Rights of the Child defined 'simulated explicit sexual activities.' It stated that this " (…) includes any material, online or offline, that depicts or otherwise represents a child appearing to engage in sexually explicit conduct".[110] This is an important statement by the Committee on the Rights of the Child since the characters in Yaoi are not 'real' children and do not represent real people. However, adding "or otherwise represents a child" implies that the 'person' does not have to be real, as long as it is represented and can be seen as a child. This is the case in Yaoi since the preteen, teen, and older characters are written or drawn as 'beautiful boys'. They are unmistakably written and drawn as children. As summarized in chapter 2, Yaoi's focal points are violent sexual activities, such as rape and non-consensual sex. This focus means that Yaoi also fulfills the 'explicit sexual activities' requirement.

Lastly, the material has to be primarily for sexual purposes. As previously mentioned, the readers are primarily heterosexual females who are reading primarily about homosexual male relationships. Furthermore, in some cases, Yaoi has a positive impact on readers, such as overcoming low self-esteem or anxiety. This could raise the thought that reading Yaoi is not primarily for sexual purposes. However, different researchers concluded differently. Mathews concluded in his research on Manga and censorship in Japan that Manga is "focused primarily on arousing sexual interest," which would suggest that Yaoi does the same since it is a Manga genre.[111] Arunrangsiwed, Ounpipat, and Cheachainart did focus their research specifically on Yaoi and concluded that the main purpose of Yaoi is to give women an opportunity to express their (dark) sexual fantasies and that the other additional positive impacts are of minor

[110] Optional Protocol Guidelines, para 62.
[111] Chris Mathews, 'Manga, Virtual Child Pornography, and Censorship in Japan' in Center for Applied Ethics and Philosophy (ed), *Applied Ethics: Old Wine in New Bottles?* (Center for Applied Ethics and Philosofy 2011) 171.

importance.[112] McLelland adds to this conclusion that women read Yaoi to "express their interest and enthusiasm for the youthful male body in an uninhibited manner."[113] This was also concluded by Kazumi, who also suggests that readers of Yaoi identify with "the delight in the characters' performance of 'transgressive' acts (…) and with the penis of the male characters and enjoy the sexual agency this gives them."[114] Looking at these conclusions, it can be reasonably argued that Yaoi is primarily created for sexual purposes. This also means that it is not necessary (according to the Committee on the Rights of the Child) to consider the context in which Yaoi is being used.[115]

The above shows that Yaoi fulfills all the requirements of article 2 of the Optional Protocol and, therefore, also article 34 sub c of the UNCRC, which means Yaoi is seen by the UNCRC as child pornography and should be prohibited by state parties.[116] The Committee on the Rights of the Child even explicitly stated in the Optional Protocol Guidelines that drawings that depict non-existing children or characters that appear to be underage involved in sexually explicit conduct should be included in states' legal provisions regarding child pornography.[117] Therefore, it can be concluded that Yaoi is seen as child pornography by the Committee on the Rights of the Child.

Now that it has been established that Yaoi is seen as child pornography by the Committee on the Rights of the Child and its encouragement to include precisely these kinds of materials in states' legal provisions regarding child pornography, it shows that two human rights are clashing: the right to freedom of expression (article 19 ICCPR) and the rights of the child (article 34 sub c of the UNCRC). Since both are United Nations human rights treaties,

[112] Proud Arunrangsiwed, Nititorn Ounpipat and Krisana Cheachainart, 'Women and Yaoi Fan Creative Work' (2018) 38(2) Executive Journal 59, 63-64.
[113] McLelland, 'The World of Yaoi' (n 25) 72.
[114] Nagaike Kazumi, 'Perverse Sexualities, Perverse Desires: Representations of Female Fantasies and Yaoi Manga as Pornography Directed at Women' (2003) 25(1) U.S.-Japan Women's Journal 76, 76.
[115] Optional Protocol Guidelines, para 62.
[116] Optional Protocol, art 1.
[117] Optional Protocol Guidelines para 63.

plus the fact that the United Nations has proclaimed that childhood is entitled to special care and assistance, both rights are also equal. Moreover, article 34 sub c of the UNCRC is a legal entitlement to which children have a claim, meaning it is according to the interpretation of the term ‘rights.’ This means all requirements of the restriction regarding rights are fulfilled, and it can be concluded that Yaoi can be restricted to protect the rights of the child.

## 3.5 Conclusion

As has been shown in this chapter, the right to freedom of expression can be restricted to protect the rights or reputation of others. Despite the restriction being laid down in article 19 sub 3 lit c, Human Rights Committee documents and the Vienna Convention were used to create a more practical interpretation. The findings in subsection 3.4.2 showed that there is currently not enough specific research done on the positive and negative effects of Yaoi on children. In combination with the cautious application of the ‘reputation restriction’ of the Human Rights Committee, it was concluded that Yaoi could not be restricted to protect the reputation of the child. Subsection 3.4.3, however, showed that Yaoi fulfills the United Nations requirements for child pornography and, therefore, freedom of expression is clashing with the rights of the child. Since they both are of the same equality, this subsection concluded that Yaoi could be restricted to protect the rights of the child. Thus, this chapter shows that Yaoi could be restricted by the first restriction category of the right to freedom of expression. In turn, chapter 4 will study whether Yaoi could be restricted by the second category of the right of freedom of expression.

# Chapter 4: To Protect National Security or Public Order, Public Health, or Public Morals

## 4.1 Introduction

A second category can also restrict freedom of expression. This second category consists of three restrictions grounds; to protect national security or the public order, protect public health, or protect public morals. This chapter will seek to find the definitions of these terms by using the interpretations of the Human Rights Committee and their case law, the Siracusa Principles, and the Vienna Convention. The concluding interpretations will be applied to Yaoi in order to conclude whether Yaoi can be restricted by one of these three restriction grounds and, therefore, by category two.

This chapter will make use of the interpretations stated in the Siracusa Principles, which will be set out in section two. Section three will dive into the restriction ground regarding national security and public order. Section four will then focus on restricting freedom of expression because of the protection of public health, and section five will study the last restriction ground regarding public morals. These sections will first find the definition and interpretations of the terms used with that restriction ground and then apply that definition to Yaoi. The last section will conclude.

## 4.2 The Siracusa Principles

The Siracusa Principles[118] first belonged to the doctrine of legal experts in international law in 1984 and were later adopted by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities.[119] This means that according to article 38

[118] UNCHR 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) UN Doc E/CN.4/1985/4 (Siracusa Principles).
[119] Rahadyan F Harris and Natlia C Simanjuntak, 'Implementation of The Siracusa Principles as Foundations for Reformulation of Social Restriction Policies in Public Health Emergencies' (2022) 8(1) Unnes Law Journal: Jurnal Hukum Universitas Negeri Semeang 39, 54.

paragraph 1 sub d of the 1920 International Court of Justice Statute[120] (which regulates sources of international law), the Siracusa Principles are a valid source of international law, more specifically secondary law.[121] This is why the Siracusa Principles will be used as an accompanying rule for interpretation in this chapter. The document contains interpretations of specific terms regarding limitations of ICCPR rights, including interpretations of the restriction grounds on the right to freedom of expression. The interpretations of the Siracusa Principles will only be used when they can make an important contribution to the final interpretation of a particular restriction ground.

## 4.3 Protection of national security or public order

This section will dive into the national security and public order restriction on freedom of expression. Since the two terms are applied in different contexts, they will be studied separately. First, the national security restriction will be interpreted and applied to Yaoi. Secondly, the public order restriction will be interpreted and also give a conclusion about the application of the interpretation to Yaoi.

### *4.2.1 Defining national security and applying it to Yaoi*

The term 'national security' will first be explored. The Human rights Committee did not explicitly interpret the restriction ground in General Comment 34. They did, however, give some warnings about the application of this restriction and a few case examples. The Human Rights Committee firstly emphasized that "extreme care" must be taken when implementing measures on the national security restriction ground, focusing on treason laws.[122] It gave examples that measures relating to "suppression or withholding from the public information of

[120] Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945).
[121] Harris and Simanjuntak (n 119) 54.
[122] General Comment 34, para 30.

legitimate public interest" (including information regarding the commercial sector) and prosecuting people for handing out such information are not compatible with article 19 sub 3.[123] The Human Rights Committee did not give a further interpretation of 'national security'. Therefore, case law regarding restrictions on the national security ground and the Siracusa Principles will be explored to create a more inclusive definition, which will be combined with the interpretation created by using article 31 of the Vienna Convention.

Looking at different case laws, it shows that the Human Rights Committee is critical of this restriction ground since they often highlight its misuse in their conclusions.[124] This carefulness is because states create laws based on this restriction ground that are too vague or cause "disproportionate interference" with the right to freedom of expression.[125] Examples of cases are *Sohn v. Korea*, *Tae Hoon Park v. Korea,* and *Keun-Tae Kim v. Korea*. The Human Right Committee concluded that they all failed to "specify the nature of the threat" and created disproportionate interference to that person's right to freedom of expression.[126] 'Specify the nature of the threat' could be ( as an example) that a state shows that certain documents or speeches have such an effect on the people that it could threaten national security.[127] In general, the Human Rights Committee has only allowed measures restricting freedom of expression on the national security ground when the expression includes "incitement of crimes, violence, or mass panic".[128] In *A.K. and A.R. v. Uzbekistan,* the Human Rights Committee concluded that the state's restriction was compatible with article 19 sub 3.[129] The state did specify the nature

[123] General Comment 34, para 30.
[124] McGonagle (n 50) 469.
[125] McGonagle (n 50) 469.
[126] CCPR 'Jong-Kyu Sohn v. Republic of Korea' (3 August 1996) Communication No 518/1992, UN Doc CCPR/C/54/D/518/1992; CCPR 'Tae Hoon Park v. Republic of Korea' (3 November 1998) Communication No. 628/1995, UN Doc CCPR/C/64/D/628/1995; CCPR 'Keun-Tae Kim v. Republic of Korea' (4 January 1999) Communication No 574/1994, UN Doc CCPR/C/64/D/574/1994.
[127]*Keun-Tae Kim* (126); Joseph and Castan (n 68) 1346.
[128] Ambika Kumar, 'Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights' (2006) 7(1) Chicago Journal on International Law 351, 354.
[129] CCPR 'A.K. and A.R. v. Uzbekistan' (31 March 2009) Communication No 1233/2003, UN Doc CCPR/C/95/D/1233/2003.

of the threat correctly, and the Human Rights Committee was convinced of the concerned state of Uzbekistan with the threat to Uzbekistan's national security, which was a violent overthrow of Uzbekistan's government.[130]

The Siracusa Principles document states that a national security restriction may only be invoked when the restrictive measures "protect the existence of the state or its territorial integrity or political independence against force or threat of force".[131] The document also notes that the national security restriction cannot be used to justify measures that are too vague, which is in line with the findings above. Therefore, it is implied that the freedom of expression can be restricted to protect national security when the state's political independence or territorial integrity is at significant risk, with restrictive measures that are not too vague or arbitrary.

Lastly, the national security restriction will be interpreted by the Vienna Convention. The Lexico Dictionary contains a definition of 'national security,' being; "The safety of a nation against threats such as terrorism, war, or espionage."[132] Generally, this can be interpreted as being the same as the implied definition mentioned above. The safety of a nation against threats such as terrorism, war, and espionage, would mean that a state's political independence or territorial integrity is at significant risk. This is also not an unreasonable interpretation, which fulfills the requirement of reasonableness. Moreover, it has to comply with the object and purpose of the ICCPR and article 19. Looking at the preamble of the ICCPR, the purpose of the ICCPR is to recognize the dignity of each individual and to promote conditions within states to allow the enjoyment of civil and political rights (this purpose will also be used in the other sections). [133] The definition does not harm the dignity of individuals or the enjoyment of the ICCPR rights since it wants to protect them. Therefore, this interpretation is in line with the

[130] *A.K and A.R.* (n 129).
[131] Siracusa Principles, para 29.
[132] 'National secuirty' (Lexico) "The safety of a nation against threats such as terrorism, war, or espionage" <https://www.lexico.com/definition/national_security> accessed on 10 June 2022.
[133] ICCPR, preamble.

object and purpose of the ICCPR and article 19 and with that all three principles of article 31 sub 1 of the Vienna Convention.

This interpretation of the national security restriction is not likely to apply to Yaoi. Even though Yaoi is seen as child pornography (which was concluded in the previous chapter) and contains violence, it does not threaten national security. The openly sold and accepted Yaoi Manga and fan Manga do not create a risk for the political independence of Japan since it does not threaten the Japanese governance in a way that is risking its independence and sovereignty. It also does not threaten the territory of Japan in a way that threatens or is risking border changes in Japan. Therefore, it can be concluded that Yaoi can-not be restricted based on national security.

### *4.2.2 Defining public order and applying it to Yaoi*

This subsection will interpret the public order restriction to freedom of expression and conclude whether this restriction can be applied to Yaoi. It is important to note that public order is not the same as public safety since the latter is not a justified restriction ground. However, public safety could fall under public order, for example, in the context of traffic safety.[134] In General Comment 34, the Human Rights Committee only gave two examples of applying the public order restriction. It is permissible to use the public order restriction to "regulate speech-making in a particular public place" and "maintain orderly court proceedings".[135] The Siracusa Principles state that public order is "the set of rules that ensure society's functioning or the set of fundamental principles on which society is founded".[136] Studying case law shows other examples of using the public order restriction. In *Reyes et al. v. Chile*, Chile considered particular public banners a "disturbance of the public order", since they "might be burned",

[134]Taylor (69) 571; CCPR 'Stambrovsky v. Belarus' (24 October 2014) Communication No 1987/2010, UN Doc CCPR/C/112/D/1987/2010.
[135] General Comment 34, para 31.
[136] Siracusa Principles, para 22.

which the Human Rights Committee considered too speculative.[137] It concluded that it was the function of the state itself to safeguard the public order and that it was the state's duty to ensure that the banners were not burned.[138] With this ruling, the Human rights Committee implied that "a general appeal to the public order restriction is manifestly insufficient".[139] In the *Gauthier v. Canada* case, the Human Rights Committee stated that the restriction might be justified to support the operation of the parliament.[140] The Human Rights Committee concluded in *Baban v. Australia* that the public order restriction could also relate to prisoners, justifying the relocation of a prisoner due to a hunger strike to protect the public order.[141]

How about interpreting public order through the Vienna Convention? There is no meaning of 'public order' found in the general dictionaries. Therefore, 'public' and 'order' will be looked at separately and later will be combined to come to one interpretation. The dictionaries generally give the same definition of 'public', being "relating to or involving people in general, rather than being limited to a particular group of people."[142] Regarding the term 'order,' the Cambridge Dictionary states, "a situation in which rules are obeyed, and people do what they are expected to do."[143] Lexico states 'order' as "a state in which the laws and rules regulating public behavior are observed, and authority is obeyed.[144] Combined, these definitions suggest that 'public order' means 'a situation relating or involving people in general in which rules are obeyed, and people do what they expected to do.' This is in line with the

[137] CCPR 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2627/2015' (25 March 2015) UN Doc CCPR/C/121/D/2627/2015.
[138]CCPR 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2627/2015' (25 March 2015) UN Doc CCPR/C/121/D/2627/2015; Taylor (69) 572.
[139] Taylor (69) 572.
[140] Taylor (69) 572; *Gauthier* (52).
[141] CCPR 'Omar S Baban v. Australia' (6 August 2003) Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001.
[142] 'Public' (Cambridge Dictionary) <dictionary.cambridge.org/dictionary/english/public> accessed 10 June 2022; 'Public' (Merriam-Webster) <www.merriam-webster.com/dictionary/public> accessed 10 June 2022 'Public' (Lexico) <www.lexico.com/definition/public> accessed 10 June 2022.
[143] 'Order' (Cambridge Dictionary) "A situation in which rules are obeyed and people do what they are expected to do" <https://dictionary.cambridge.org/dictionary/english/order> accessed on 10 June 2022.
[144] 'Order' (Lexico) "A state in which the laws and rules regulating public behavior are observed and authority is obeyed" <https://www.lexico.com/definition/order> accessed on 10 June 2022.

principle of good faith since this interpretation is not absurd or unreasonable. It also complies with the object and purpose of the ICCPR and article 19 since the interpretation does not cross the line regarding the dignity of individuals or allowing the enjoyment of civil and political rights.

In general, when combining all the findings above, the public order restriction is used in a situation regarding civic regulations that control the behavior of the public in certain public places.[145] This interpretation of the restriction shows that it is not likely for the restriction to apply to Yaoi. The restriction is meant to regulate human behavior in public places to protect the public order. As shown above, in the *Reyes et al. v. Chile* case, forms of expression such as art could be part of the restriction. However, in that case, the focus is more on the public placement of the art piece instead of restricting specific art because of its contents. Therefore, it is concluded that Yaoi could not be restricted to protect the public order.

### 4.4 Protection of public health

The second restriction ground of the second category is the protection of public health. The Human Rights Committee does not elaborate further on their interpretation in General Comment 34. It also does not give any examples in which context the public health restriction can be applied. There are also no article 19 cases of the Human Rights Committee that address restrictive measures based on the public health ground. This restriction ground is probably more interpreted in combination with other ICCPR rights.[146] Therefore, this section will lay its focus more on interpreting public health using the Vienna Convention, the Siracusa Principles, and a few interpretations from scholars.

First, public health will be interpreted by using article 31 sub a of the Vienna Convention. What is the ordinary meaning of public health? Looking at the dictionaries, it

[145] Taylor (69) 574.
[146] Joseph and Castan (n 68) 1366.

generally comes down to "the protection and improvement of a community or population's health."[147] However, this does not clarify the specific term 'health.' What does 'health' specifically mean when checking the dictionaries? Most dictionaries used generally refer to 'health' as "the condition of a person's mental or physical state."[148] Thus, this suggests that public health means "the protection and improvement of a population's mental or physical condition." This interpretation of public health is not unreasonable (so it complies with good faith) and does comply with the object and purpose of the ICCPR and article 19. States who have ratified the ICCPR are obligated to ensure basic human rights, which is also emphasized in the preamble of the ICCPR.[149] This also means economic, social, and cultural rights, and thus the right to health. This right is a fundamental part of the understanding of a life in dignity, and since recognizing the inherent dignity of each individual is part of the purpose of the ICCPR, the interpretation of public health above complies with the object and purpose of the treaty. This indicates that the interpretation fulfills all three principles of article 31 sub a of the Vienna Convention and will be used further.

The Siracusa Principles document states when public health restrictions may be invoked. The document states that a state may use restrictive measures based on the public health ground when dealing with a "serious threat to the health of the population or individual members of the population".[150] It also adds that the measures taken "must be specifically aimed

[147] 'Public health' (Lexico) "The health of the population as a whole" <https://www.lexico.com/definition/public_health> accessed on 10 June 2022; 'Public health' (Merriam-Webster) "The art and science dealing with the protection and improvement of community health (…)" < https://www.merriam-webster.com/dictionary/public%20health> accessed on 10 June 2022; 'Public health' (Cambridge Dictionary) "The government system for providing for the health needs and services of all the people of a country or region" <https://dictionary.cambridge.org/dictionary/english/public-health> accessed on 10 June 2022.
[148] 'Health' (Lexico) "A person's mental or physical condition" <https://www.lexico.com/definition/health> accessed on 10 June 2022; 'Health' (Merriam-Webster) "The condition of being sound in body, mind, or spirit" <https://www.merriam-webster.com/dictionary/health> accessed on 10 June 2022; 'Health' (Cambridge Dictionary) "The condition of someone's body or mind, or the state of being well" <https://dictionary.cambridge.org/dictionary/english/health> accessed on 10 June 2022.
[149] ICCPR, preamble.
[150] Siracusa Principles, para 25.

at preventing disease or injury or providing care for the sick and injured".[151] Together with the findings from above, this suggests that restrictive measures may be invoked when there is a serious threat to the mental or physical condition of a state's population or individual members of that population and that these restrictions must be aimed at preventing disease or injury or providing care for the mentally or physically sick and injured. The 'serious threat' could be of different sizes, such as a whole pandemic, and more minor threats, such as misleading advertising on a particular openly sold product.[152]

Could Yaoi fall under this interpretation? There are different opinions on whether Yaoi is or could be harmful. The media suggests that young people tend to imitate the characters of tv shows or movies.[153] This would suggest that the readers of Yaoi would imitate the characters' actions, which would be problematic since the main focus of Yaoi is on violent and inappropriate sexual actions. There even are examples of this happening, such as Pilipino teenagers recreating the "torture strategies" from the 50 Shades of Grey movie, which caused the death of one of the teenagers.[154] Others see Yaoi as harmful because the creators of the fan Manga are creating stories about sexual abuse and that creating such fan Manga reflects their own needs.[155] Some scholars, however, have different opinions on this view. McLelland has remarkably stated in multiple pieces of research that restricting Yaoi would be a way to harm young people because otherwise, they cannot express "their sexual fantasies in a secure, supportive environment."[156] Levine also supports this statement and even added that young

[151] Siracusa Principles, para 25.
[152] Nowak, *U.N. Covenant* (n 71) 462; Taylor (69) 574; Martha Matthews, 'Freedom of Expression', in Jonathan Todres, Mark E Wojcik and Cris Revaz, *The United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (Brill 2006) 143, 146; Jacob Appel, 'If it Ducks like a Quack: Balancing Physician Freedom of Expression and the Public Interest' (2021) Journal of Medical Ethics 1, 1 (Forthcoming).
[153] Proud Arunrangsiwed, 'Like Me & Follow Me: A Relationship between Homophily and Belief of Superheroes' Fans' (2015) 18(2) Journal of Communication Arts Review 35.
[154] Arunrangsiwed, 'Equality, Friendschip and Violence' (n 38) 4001.
[155] Rebecca W Black, 'Online Fan Fiction and Critical Media Literacy' (2009) 26(2) Journal of Computing in Teacher Education, 75; Lewis W Bolt, 'The Hidden Authors: A Study and Survey of Fan Fiction Writers' (Thesis, University of Tennessee 2004).
[156] McLelland, 'The international Yaoi Boys' (n 18) 93; McLelland, 'The World of Yaoi' (n 25) 77.

people have the "entitlement to pleasure," thus, it would be harmful to their mental well-being to restrict this.[157] This means that, according to different research, Yaoi could be harmful to the mental or physical condition of individuals, but restricting it could also have negative effects on the mental well-being of individuals. When looking at the interpretation made previously, Yaoi could pose a threat to the mental or physical condition of a state's population or its individual members. However, the question is whether Yaoi could be seen as a serious threat. Cases where Yaoi could be harmful to the physical condition of a whole population or the population's individuals are very rare and do not occur often. [158] Therefore, it is arguable whether Yaoi can be seen as a serious threat to the physical well-being of (individual members of) the population. Moreover, considering the purpose of the ICCPR and the state's obligation to ensure the right to health for all individuals of the state, it could be argued that the public health restriction is not likely to be applicable to Yaoi. Restricting basic human rights is not done lightly, and there is no hard research on the serious threat of Yaoi to the mental or physical condition of individuals.

### 4.5 Protection of public morals

The last restriction ground to limit the freedom of expression is to protect public morals. This restriction ground is known for being weak and undefined because of "the lack of a universally applicable common standard" and because public morals can differ widely per state.[159] The Human Rights Committee even recognized this in the *Hertzberg v. Finland* case.[160] Nowak and Vospernik even called this restriction: "the least clear and most

[157] Judith Levine, *Harmful to Minors: The Perils of Protecting Children from Sex* (University of Minnesota Press 2002) 617.
[158] Arunrangsiwed, 'Equality, Friendschip and Violence' (n 38) 4000.
[159]Taylor (69) 574; Joseph and Castan (n 68) 1369.
[160] CCPR 'Leo Hertzberg et al. v. Finland' (2 April 1982) Communication No 61/1979, UN Doc CCPR/C/OP/1 at 124.

controversial of all legitimating grounds for justifying restrictions.[161] However, the Human Rights Committee highlighted the public morals restriction in General Comment 34. It referenced General Comment 22 and noted that "the concept of morals derives from many social, philosophical and religious traditions" and that these morals cannot come from "a single tradition."[162] This could imply that states have a margin of appreciation when determining public morals and when to implement the public morals restriction. However, this is certainly not the case. Only the European Convention on Human Rights allows states a margin of appreciation when imposing restrictions on freedom of expression to protect public morals.[163] The only case where the Human Rights Committee stated that states have a margin of appreciation regarding this restriction was *Hertzberg v. Finland*.[164] Currently, the Human Rights Committee rejects the margin of appreciation doctrine, which it even emphasized in General Comment 34.[165] Nevertheless, public morals can still vary between states, which means that the application of the public morals restriction may also vary between states.[166] This can be seen in *Delgado Páez v. Colombia*, where the Human Rights Committee allowed a restriction regarding the freedom to choose how to teach a certain religion because of the "special relationship between Church and State in Colombia."[167] It is important to understand how the Human Rights Committee does not allow a margin of appreciation but does allow that public morals can still vary between states. The Human Rights Committee does not grant states to have space for maneuver when determining their own public morals. This means no margin of appreciation; otherwise, the states themselves can justify their own restrictions. However,

[161] Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief', in Tore Lindholm and others (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer 2004) 159.
[162] General Comment 34, para 32.
[163] Febrian Nurhidayatuloh, 'Is Public Morality able to Restrict Human Rights?' (Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom, ICGLOW, 2019) <https://repository.unsri.ac.id/id/eprint/49034/contents> accessed on 16 May 2022.
[164] *Hertzberg* (160).
[165] General Comment 34, para 36.
[166] Joseph and Castan (n 68) 1371.
[167] CCPR 'William Eduardo Delgado Páez v. Colombia' (4 October 1985) Communication No 195/1985, UN Doc CCPR/C/39/D/195/1985.

the Human Rights Committee itself can decide in a particular case that the public morals of that state differ from other states owing to special cultural traditions. Therefore, the application of the public morals restriction may vary from state to state, but not through a margin of appreciation from states themselves.

The Human Rights Committee also added in General Comment 34 the significant statement that restriction based on public morals "must be understood in the light of universality of human rights and the principle of non-discrimination." However, it did not define what public morals means precisely. This statement implies that when two morals clash, where one is bound to culture, and the other one to the universality of human rights, the human rights moral will outweigh the cultural one.[168] However, it may be possible for the Human Rights Committee to allow a restriction due to special cultural traditions. Situations where morals clash can be seen in different concluding observations, where the Human Rights Committee used a "universalistic reading of public morals."[169] In the concluding observation of Iraq, it stated: "While the Committee observes the diversity of morality and cultures internationally, it recalls that they must always be subject to the principles of universality of human rights and non-discrimination."[170] It can also be seen in the concluding observations for Mauritania: "The Committee respects the cultural diversity and moral principles of all countries, but recalls that these always remain subordinate to the principles of the universality of human rights and non-discrimination." In *Fedotova v. Russia*, the Human rights Committee explicitly implied the "universalistic reading of public morals" for the first time.[171] Russia

[168] Vincent W Vleugel, *Culture in the State Reporting Procedure of the UN Human Rights Treaty Bodies: How the HRC, the CESCR and the CEDAWCee Use Human Rights as a Sword to Protect and Promote Culture, and as a Shield to Protect against Harmful Culture (*Intersentia 2020).
[169] Ignatius Y Nugraha, 'From 'Margin of Discretion' to the Principles of Universality and Non-Discrimination: A Critical Assessment of the 'Public Morals' Jurisprudence of the Human Rights Committee' (2021) 39(3) Nordic Journal of Human Rights 243, 249.
[170] CCPR 'Concluding Observations on the Fifth Periodic Report of Iraq'(3 December 2015) UN Doc CCPR/C/IRQ/CO/5 para 11.
[171] CCPR 'Fedotova v. Russian Federation' ( 31 October 2012) UN Doc CCPR/C/106/D/1932/2010 para 10.5; Nugraha (169) 251.

restricted ‘gay propaganda’ because of the protection of public morals, and the Human Rights Committee responded by recalling section 32 of General Comment 34, that “any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.”[172] It did the same in *Kirill Nepomnyashchiy v. Russia* by referring to that statement in General Comment 34. This means that it is not allowed to implement restrictive measures to protect a specific state’s public morals. The Human Rights Committee stated several times that public morals must come from many different traditions and “must be understood in light of the universality of human rights.”[173]

Thus, it can be concluded that public morals can differ per state but always be understood in light of the universality of human rights. However, this still does not specify the term ‘public morals’. Therefore, article 31 sub a of the Vienna Convention will be used to make an interpretation of the term. First is the ordinary meaning of public morals. General dictionaries, such as the Cambridge or Oxford Dictionary, do not contain a specific definition of ‘public morals’. Therefore, the definition of the two terms separately will be combined. Looking at those general dictionaries, ‘morals’ is almost always defined as “standards of whether a certain behavior is good or bad, or right or wrong.”[174] These dictionaries also give almost the same definitions regarding the term ‘public’, being “relating to or involving people in general, rather than being limited to a particular group of people.”[175] When combining these definitions, you can create a definition for ‘public morals’. Nugraha attempted this definition and came up with: “standards of right or wrong, good or bad that are shared by a society or

[172] *Fedotova* (171).
[173] Nugraha (169) 252.
[174] ‘Moral’ (Cambridge Dictionary) “Standards for good or bad character and behavior <dictionary.cambridge.org/dictionary/english/moral> accessed 17 May 2022:”; ‘Moral’ (Lexico) “Concerned with the principles of right and wrong behavior” <www.lexico.com/definition/moral> accessed 17 May 2022; ‘Moral’ (Merriam-Webster) “moral practices or teachings: modes of conduct” <www.merriam-webster.com/dictionary/morals> accessed on 17 May 2022.
[175] ‘Public’ (Cambridge Dictionary) <dictionary.cambridge.org/dictionary/english/public> accessed 17 May 2022; ‘Public’ (Merriam-Webster) <www.merriam-webster.com/dictionary/public> accessed 17 May 2022; ‘Public’ (Lexico) <www.lexico.com/definition/public> accessed 17 May 2022.

people in general instead of being restricted to a certain group or private individuals."[176] This definition does comply with the principle of good faith because the definition does not seem absurd or unreasonable, meaning that it has passed the requirement of reasonableness. Lastly, this definition of public morals also complies with the previously mentioned object and purpose of the ICCPR and specifically article 19 of the ICCPR. This means that the definition of Nuhagra complies with all three principles of article 31 sub a of the Vienna Convention and will be used as the interpretation of 'public morals.'

The Siracusa Principles only give an interpretation of 'public morals' regarding states who apply a margin of appreciation. Therefore, this interpretation will not be used with the public morality restriction ground.

With this information, we can fully interpret the restriction regarding public morals and apply it to Yaoi. A state can impose restrictive measures to protect standards considered good or bad, right or wrong, and shared by a society or people in general instead of being restricted to a particular group or private individuals. Furthermore, these standards can differ between states but must be understood in light of the universality of human rights. Because child pornography should be prohibited under the UNCRC and 196 states have ratified this treaty, it can be reasonably assumed that it is a 'bad' or 'wrong' standard. Since it was concluded that Yaoi is considered child pornography under the UNCRC, it can be argued that Yaoi is 'bad' or 'wrong' through the eyes of the international public in general. Plus, even though morals may differ between states, since Yaoi violated the rights of the child, it can reasonably be said that it has to be prohibited in light of the universality of human rights. Therefore, Yaoi could be prohibited to protect public morals.

[176] Nugraha (169) 256.

#### *4.4.1 A state's duty regarding the public morals restriction*

Another essential element to add is that the Human Rights Committee has raised pornographic material as an issue that can be the basis of restrictions based on public morals.[177] In General Comment 28 regarding article 3 ICCPR (the equality of rights between men and women), the Human rights Committee stated that in relation to article 19: "As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material."[178] This implies that states have a duty to restrict pornographic material that portrays women and girls as objects of violence or degrading or inhuman treatment. This duty, however, could be interpreted more broadly when using article 31 sub 3 lit c of the Vienna Convention. It can be broadened by looking at the principle of universality of human rights (which also relates to the 'universalistic reading'). This principle means that all people are equally entitled to their human rights.[179] Regarding the Human Rights Committee statement, this would imply that not only pornographic material containing women and girls must be prohibited, but also pornographic material containing men and boys. This is the same when using that interpretation method with the UNCRC because the UNCRC protects the rights of all children, girls, and boys. So interpreting the statement of the Human Rights Committee with the UNCRC would also imply that the pornographic material that must be prohibited could contain men and boys. Therefore, the statement of the Human Rights Committee in General Comment 28 can be interpreted that states have a duty to restrict

[177] Taylor (69) 576.
[178] CCPR 'General Comment 28: Article 3 The Equality of Rights Between Men and Women' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 22.
[179] 'What are Human Rights?' (United Nations Human Rights: Office of the High Commissioner) <https://www.ohchr.org/en/what-are-human-rights> accessed on 18 May 2022.

pornographic material that portrays women, girls, men, and boys as objects of violence or degrading or inhuman treatment.

Then the question remains whether Yaoi fulfills these requirements. It has been previously shown that the focal point of Yaoi is on extreme explicit sexual romance stories between homosexual, clearly underage boys. These stories contain rape, incest, BDSM, and more extreme sexual activities and almost always contain an attacker and receiver in the stories. The main underage character is the 'receiver' and thus is always the victim of the extreme sexual activities. This would imply that the characters in Yaoi stories are indeed objects of violence or degrading or inhuman treatment. Then the question remains whether Yaoi fulfills the 'portray' requirement. Did the Human Rights Committee encompass cartoons when it stated that the pornographic material has to 'portray' women and girls? The Human Rights Committee did not give an interpretation of 'portray,' which is why the ordinary meaning of the word will be used. 'Portray' is mostly defined as "to show somebody or something in a picture."[180] This suggests that the pornographic material does not have to be a 'real' human being since 'portray' includes showing 'something' in a picture and not only 'someone.' Therefore, it can be argued that Yaoi is pornographic material that portrays men and boys as objects of violence or degrading or inhuman treatment.

Combining the fact that a state has a duty to restrict pornographic material that portrays women, girls, men, and boys as objects of violence or degrading or inhuman treatment (which Yaoi fulfills) and that Yaoi complies with the interpretation of the public morals restriction, Japan has the duty to prohibit Yaoi to protect public morals.

[180] 'Portray" (Cambridge Dictionary) "to show somebody/something in a picture" <https://www.oxfordlearnersdictionaries.com/definition/english/portray> accessed 10 June 2022; 'Portray' (Lexico) "Describe (someone or something) in a particular way" < https://www.lexico.com/definition/portray> accessed on 10 June 2022.

## 4.6 Conclusion

This chapter has dived into the second category of restriction ground of article 19 sub 3 regarding freedom of expression. All three restriction grounds, to protect national security or public order, public health, or public morals, have been interpreted by several different elements. The second section concluded that the Yaoi could not be restricted based on national security or public order ground. Yaoi does not threaten Japan's political independence or territorial integrity, and it does not relate to human behavior in public places. The third section showed that restricting freedom of expression based on public health meant that there has to be a severe threat that relates to the mental or physical well-being of a (part of a) population. After examining certain research, it turned out that it could be the case that Yaoi is harmful to the mental as well as the physical well-being of individuals. However, some researchers concluded that prohibiting Yaoi causes mental harm. Since the research shows that the possible harm of Yaoi currently does not occur often, it was concluded that Yaoi is likely not seen as a serious threat. Therefore, it is not likely for Yaoi to be restricted based on the protection of public health. Lastly, the question was whether Yaoi could be restricted to protect public morals. Since Yaoi is seen as child pornography by the UNCRC and many states agreed to this definition when ratifying the treaty, it could be argued that Yaoi is seen as a 'bad' or 'wrong' standard in the eyes of society and therefore can be restricted based on the public morals ground. Moreover, when interpreting General Comment 28 of the Human Rights Committee, it turned out that Japan even has the duty to prohibit Yaoi because of its pornographic material.

Thus, based on the findings noted above, it can be concluded that Yaoi could be restricted by one of the three restriction grounds of category two: to protect the public morals.

# Chapter 5: Conclusion

With the invention of the computer and the Internet, discussion arose whether images depicting no ‘real’ children could qualify as child pornography. There has been given some clarification by the United Nations, but questions on certain materials remain. One particular material which still causes scholarly discussion is Manga. Manga are comic book stories and is an ancient art form in Japan. There are Manga genres that are known to focus on underage characters who conduct sexual activities. There is much international pressure on Japan to criminalize and prohibit these Manga genres since they qualify as child pornography under the CRC and the Optional Protocol, which Japan has ratified.

There are also Manga genres that are generally known for not focusing on underage characters. One of the most prominent genres is Yaoi. However, when examining recent developments within the genre, it was concluded that the true focal points of the Yaoi genre actually are on clearly underage characters (preteens and teens) engaging in violent and explicit sexual content with other underage characters and older men. When applying the definition of child pornography under the UNCRC and Optional Protocol to these new focal points of Yaoi, Yaoi fulfills all requirements. This means that the international pressure on Japan to ban specific Manga genres also includes Yaoi.

However, Japan declared that Manga, which includes Yaoi, falls under the right to freedom of expression. Japan does have a possible restriction to this freedom, which is to protect the public welfare. This restriction does not have a definition in the Japanese Constitution, and the Supreme Court rarely uses the restriction. However, the right to freedom of expression is a fundamental human right under international law. The applicable provision of the right to freedom of expression is set in Article 19 of the ICCPR, which Japan also has ratified. This means that Japan is bound to the provisions under the ICCPR. Article 19 of the

ICCPR states that the right to freedom of expression can be restricted by four restrictions grounds, divided into two categories. Freedom of expression can be restricted to protect the rights and reputation of others, to protect national security or public order, to protect public health, or to protect public morals. If Yaoi meets the requirements of these restriction grounds, it could be restricted and, therefore, is not protected by freedom of expression.

The first category of the restriction grounds is to restrict freedom of expression to protect the rights or reputation of others. Both terms are used in different contexts. It is not likely that Yaoi could be restricted in order to protect the reputation of others. This restriction ground has to be applied with much caution, which the Human Rights Committee emphasized. Since there is not enough research done on the positive and negative effects of Yaoi on children, it was concluded that it is not likely that Yaoi poses a threat to the reputation of children and that the genre could not be restricted based on this ground. This leaves the second ground of category one, to restrict Yaoi to protect the rights of others. Since Yaoi fulfills the UNCRC and Optional Protocol definition of child pornography, it means that the right to freedom of expression is clashing with the rights of the child. Since these rights are both equally important and adding that the United Nations finds that children have to be taken care of with extreme care (including their rights), it can be concluded that Yaoi could be restricted based on this ground.

The second category starts with the protection of national security or public order. There is no indication that Yaoi threatens Japan's political independence or territorial integrity, which means that Yaoi can-not be restricted to protect national security. Yaoi also does not relate to human behavior in public places, which means that Yaoi also does not qualify for the public order restriction. For Yaoi to qualify for the public health restriction, it has to be seen as a severe threat to the physical well-being of a (part of a) population. There is no consensus on whether Yaoi is harmful to people, and almost all research is about the mental well-being of

people instead of the physical one. Statements or research that mention the physical harmfulness of Yaoi does not emphasize it as a severe threat to a part of a population. Thus, Yaoi is not seen as a severe threat to the physical well-being of a (part of a) population, meaning it can-not be restricted to protect public health. The last restriction ground is to protect public morals. Since Yaoi is seen as child pornography under the UNCRC and its Optional Protocol and states agreed to this definition when ratifying these treaties, it can be reasonably argued that Yaoi is seen as a 'bad' or 'wrong' standard in the eyes of society. Therefore, it can be restricted to protect public morals. Moreover, since Yaoi is pornographic material that portrays boys as objects of violence or degrading or inhuman treatment, Japan even has a duty to protect public morals and therefore has to prohibit Yaoi.

With Yaoi fulfilling the requirements of two restriction grounds, to protect the rights of children and to protect public morals, it can be concluded that Japan should prohibit and criminalize Yaoi. Moreso, Japan even has the duty to implement effective measures to prohibit and criminalize Yaoi. If Japan does so, they are a step closer to complying with the UNCRC and Optional Protocol, as well as the ICCPR.

# Bibliography

## Primary sources

### *International Treaties*

1. Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) ILC Vol 1155, 331;

2. Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990) UNGA Res A/RES/44/25;

3. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (opened for signature 16 March 2001, entered into force 18 January 2002) UNGA Res A/RES/54/263;

### *Constitutions*

1. Constitution of Japan 1946 (opened for signature 3 November 1946, entered into force 3 May 1947) Ministry of Justice;

### *Subsidiary Regulation*

1. UNCHR ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (28 September 1984) U.N. Doc E/CN.4/1985/4;

2. CCPR ‘General Comment 28: Article 3 The Equality of Rights Between Men and Women’ (29 March 2000 U.N. Doc CCPR/C/21/Rev.1/Add.10;

3. CCPR ‘Concluding Observations of the Human Rights Committee: Croatia’ (30 April 2001) U.N. Doc CCPR/CO/71/HRV;

4. CCPR ‘Concluding Observations of the Human Rights Committee: Azerbaijan’ (12 November 2001) U.N. Doc CCPR/CO/73/AZE;

5. CCPR ‘Concluding Observations of the Human Rights Committee: Israel’ (21 August 2003) U.N. Doc CCPR/CO/78/ISR;

6. CCPR ‘General Comment 34: Article 19 Freedom of Opinion and Expression’ (12 September 2011) Un Doc CCPR/C/GC/34;

7. CCPR ‘Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2627/2015’ (25 March 2015) U.N. Doc CCPR/C/121/D/2627/2015;

8. CCPR ‘Concluding Observations on the Fifth Periodic Report of Iraq’(3 December 2015) U.N. Doc CCPR/C/IRQ/CO/5;

9. CCPR ‘Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography’ (10 September 2019) U.N. Doc CRC/C/156;

*Jurisprudence*

1. ECHR ‘Handyside v. U.K.’ (7 December 1976) App No 5493/72;

2. CCPR ‘Leo Hertzberg et al. v. Finland’ (2 April 1982) Communication No 61/1979, U.N. Doc CCPR/C/OP/1 at 124;

3. CCPR ‘William Eduardo Delgado Páez v. Colombia’ (4 October 1985) Communication No 195/1985, U.N. Doc CCPR/C/39/D/195/1985;

4. CCPR ‘Robert Faurisson v. France’ (2 January 1993) Communication No 550/1993, U.N. Doc CCPR/C/58/D/550/1993;

5. CCPR ‘John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada’ (5 April 1993) Communication No 359/1989, U.N. Doc CCPR/C/47/D/359/1989;

6. CCPR ‘Malcolm Ross v. Canada’ (1 May 1996) Communication No 736/1997, U.N. Doc CCPR/C/70/D/736/1997;

7. CCPR ‘Jong-Kyu Sohn v. Republic of Korea’ (3 August 1996) Communication No 518/1992, U.N. Doc CCPR/C/54/D/518/1992;

8. CCPR ‘Tae Hoon Park v. Republic of Korea’ (3 November 1998) Communication No. 628/1995, U.N. Doc CCPR/C/64/D/628/1995;

9. CCPR ‘Keun-Tae Kim v. Republic of Korea’ (4 January 1999) Communication No 574/1994, U.N. Doc CCPR/C/64/D/574/1994;

10. CCPR ‘Robert W. Gauthier v. Canada’ (5 May 1999) Communication No 633/1995, U.N. Doc CCPR/C/65/D/633/1995;

11. CCPR ‘Leonid Svetik v. Belarus’ (5 November 1999) Communication No. 927/2000, U.N. Doc CCPR/C/81/D/927/2000;

12. CCPR ‘Kim Jong-Cheol v. Republic of Korea’ (31 January 2000) Communication No 968/2001, U.N. Doc CCPR/C/84/D/968/2001;

13. CCPR ‘Rafael Marques de Morais v. Angola’ (1 April 2005) Communication No 1128/2002, U.N. Doc CCPR/C/83/D/1128/2002;

14. CCPR ‘Omar S Baban v. Australia’ (6 August 2003) Communication No 1014/2001, U.N. Doc CCPR/C/78/D/1014/2001;

15. CCPR ‘A.K. and A.R. v. Uzbekistan’ (31 March 2009) Communication No 1233/2003, U.N. Doc CCPR/C/95/D/1233/2003;

16. CCPR ‘Alexander Adonis v. The Philippines’ (26 April 2012) Communication No 1815/2008, U.N. Doc CCPR/C/103/D/1815/2008/Rev1;

17. CCPR ‘Fedotova v. Russian Federation’ ( 31 October 2012) U.N. Doc CCPR/C/106/D/1932/2010;

## Secondary Sources

*Books*

1. Cather K, ‘Must we Burn Eromanga?: Trying Obscenity in the Courtroom and in

the Classroom', in McLelland M (ed), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture* (Routledge 2017);

2. Cryer R, Friman H and Vasiliev S, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2019);

3. Döll O and Schmalenbach K, *Vienna Convention on the Law of Treaties* (2nd edn, Springer 2011);

4. Gillespie A A, *Child Pornography: Law and Policy* (Routledge-Cavendish 2011);

5. Joseph S and Castan M, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013);

6. Levine J, *Harmful to Minors: The Perils of Protecting Children from Sex* (University
of Minnesota Press 2002);

7. Madill A, 'Erotic Manga: Boys' Love, Shonen-ai, Yaoi and (MxM) Shotacon', in Smith C, Attwood F and McNair B (eds), *The Routledge Companion to Media, Sex, and Sexuality* (Routledge 2017);

8. Mathews C, 'Manga, Virtual Child Pornography, and Censorship in Japan' in Center for Applied Ethics and Philosophy (ed), *Applied Ethics: Old Wine in New Bottles?* (Center for Applied Ethics and Philosofy 2011);

9. Matthews M, 'Freedom of Expression', in Todres J, Wojcik ME and Revaz C, *The United Nations Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* (Brill 2006);

10. McGonagle T, 'The Development of Freedom of Expression and Information within

the U.N.: Leaps and Boiunds or Fits and Starts?', in McGonagle T and Donders Y (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press 2015);

11. McLelland M, 'Introduction: Negotiating "Cool Japan" in Research and Teaching', in McLelland M (ed), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture* (Routledge 2017);

12. Miyake T, 'History as Sexualized Parody: Love and Sex Between Nations in Axis Powers Hetalia', in Suter R and Otmazgin N (eds), *Rewriting History in Manga: Stories for the Nation* (Palgrave Macmillan 2016);

13. Nagaike K, *Fantasies of Cross-Dressing: Japanese Women Write Male-Male Erotica* (Brill 2012);

14. Nowak M and Vospernik V, 'Permissible Restrictions on Freedom of Religion or Belief', in Lindholm T and others (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer 2004);

15. — —, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, Arlington 2005);

16. O'Flaherty M, 'International Covenant on Civil and Political Rights: Interpreting Freedom of Expression and Information Standards for the Present and the Future', in McGonagle T and Donders Y (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press 2015);

17. Taylor PM, *A Commentary on the International Covenant on Civil and Political Rights: The U.N. Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020);

18. Vleugel VW, *Culture in the State Reporting Procedure of the U.N. Human Rights*

*Treaty Bodies: How the HRC, the CESCR and the CEDAWCee Use Human Rights as a Sword to Protect and Promote Culture, and as a Shield to Protect against Harmful Culture* (Intersentia 2020);

19. Yang L and Xu Y, 'The Love that Dare not Speak its Name: The Fate of Chinese Danmei Communities in the 2014 Anti-porn Campaign', in McLelland M (ed), *The End of Cool Japan: Ethical, Legal, and Cultural Challenges to Japanese Popular Culture* (Routledge 2017);

*Articles*

1. Amal BK, Ampera D and Natsir M, 'The Analysis of Fantasy and Representation of Female on Gay and Male Homoerotic Relationships in the Yaoi Genre' (2021) 3(2) Asian Social Science and Humanities Research Journal 57;
2. Appel J, 'If it Ducks like a Quack: Balancing Physician Freedom of Expression and the Public Interest' (2021) Journal of Medical Ethics 1 (forthcoming);
3. Arunrangsiwed P, 'Equality, Friendship, and Violence in Slash or Yaoi Fan Art' (2015) 9(12) International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering 3747;
4. — —, 'Like Me & Follow Me: A Relationship between Homophily and Belief of Superheroes' Fans' (2015) 18(2) Journal of Communication Arts Review 35;
5. — —, Ounpipat N and Cheachainart K, 'Women and Yaoi Fan Creative Work' (2018) 38(2) Executive Journal 59;
6. Basu S, 'Online Yaoi Fanfiction and Explorations of Female Desire through Sexually Exploited Male Bodies' (2020) 12(5) Rupkatha Journal on Interdisciplinary Studies in Humanities 1;

7. Black RW, ‘Online Fan Fiction and Critical Media Literacy’ (2009) 26(2) Journal of Computing in Teacher Education, 75;

8. Bolt LW, ‘The Hidden Authors: A Study and Survey of Fan Fiction Writers’ (Thesis,

University of Tennessee 2004);

9. Brennan J, ‘Slash Manips: Remixing Popular Media with Gay Pornography’ (2013) 16(4) M/C Journal <hhtp://journal.mediaculture.org.au/-index.php/mcjournal/article/view/677>;

10. Carter EL, ‘”Error but without Malice” in Defamation of Public Officials: The Value of Free Expression in International Human Rights Law (2016) 21(3) Communication Law and Policy 301, 321.

11. Döring N, ‘Erotic Fan Fiction’ (2021) Encyclopedia of Sexuality and Gender 1;

12. Enriquez S and Lippert A, ‘Fandom and Sexuality in the Archives: Collecting Slash Fan Fiction and Yaoi/Boys’ Love Manga’ (2020) 31(2) Journal of the Fantastic in the Arts 182;

13. Galbraith PW, ‘Fujoshi: Fantasy Play and Transgressive Intimacy among “Rotten Girls” in Contemporary Japan’ (2011) 37(1) Signs: Journal of Women in Culture and Society 219;

14. — —, ‘Lolicon: The Reality of ‘Virtual Child Pornography’ in Japan’ (2011) 12(1) Image & Narrative 83;

15. Good MH, ‘Freedom of Expression in Comparative Perspective: Japan’s Quiet Revolution’, (1985) 7(3) Human Rights Quarterly 429;

16. Graham Jr W.R., ‘Uncovering and Eliminating Child Pornography Rings on the Internet: Issues regarding and Avenues Facilitating Law Enforcement’s Access to Wonderland’ (2000) 2000(2) Law Review of Michigan State University Detroit College of Law 457;

17. Holloway N, ‘Hadeel Al-Alosi: The Criminalization of Fantasy Material: Law and Sexually Explicit Representations of Fictional Children’ (2021) 50(1) Journal of Youth and Adolescence 202;

18. Howie E, ‘Protecting the Human Right to Freedom of Expression in International Law’ (2018) 20(1) International Journal of Speech-Language Pathology 12;

19. Kalim A, ‘Addressing the Gap in International Instruments Governing Internet Child

Pornography’ (2013) 21(2) Journal of Communications Law and Policy 428;

20. Karjalainen J, ‘Japan’s Limited Definition and Criminalization of Child Pornography and its International Legal Oblgations’ (Thesis, Tallinn University of Technology 2021);

21. Kazumi N, ‘Perverse Sexualities, Perverse Desires: Representations of Female Fantasies and Yaoi Manga as Pornography Directed at Women’ (2003) 25(1) U.S.-Japan Women’s Journal 76;

22. Keft-Kennedy V, ‘Fantasising Masculinity in Buffyverse Slash Fiction: Sexuality, Violence and the Vampire’ (2008) 7(1) Nordic Journal of English Studies 49;

23. Kumar A, ‘Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights’ (2006) 7(1) Chicago Journal on International Law 351;

24. Madill A, ‘Men on the market: Feminist Analysis of Age-stratified Male–Male Romance in Boys’ Love Manga’ (2016) 7(2) Studies in Comics 265;

25. McLelland M, ‘The World of Yaoi: The Internet, Censorship and the Global Boys Love Fandom’ (2005) 23(1) The Autralian Feminist Law Journal 61;

26. — —, ‘The International Yaoi Boys’ Love Fandom and the Regulation of Virtual Child Pornography: The Implications of current Legislation’ (2007) 4(1) Sexuality Research & Social Policy 93;

27. Mizoguchi A, ‘Male-Male Romance by and for Women in Japan: A History and the Subgenres of “Yaoi” Fictions’ (2003) 25(1) U.S.-Japan Women’s Journal 49;

28. Monterosso FS, ‘Protecting the Children: Challenges that Result in and Consequences Resulting from, Inconsistent Prosecution of Child Pornography Cases in a Technical World’ (2010) 16(3) Richmond Journal of Law & Technology 1;

29. Nugraha IY, ‘From ‘Margin of Discretion’ to the Principles of Universality and Non-Discrimination: A Critical Assessment of the ‘Public Morals’ Jurisprudence of the Human Rights Committee’ (2021) 39(3) Nordic Journal of Human Rights 243;

30. Parini I, ‘Censorship of Anime in Italian Distribution’ (2012) 57(2) Meta: journal des traducteurs/Meta: Translators’ Journal 325;

31. Rachovitsa A, ‘The Principle of Systemic Integration in Human Rights Law’ (2017) 66(3) International & Comparative Law Quarterly 557;

32. Harris RF and Simanjuntak NC, ‘Implementation of The Siracusa Principles as Foundations for Reformulation of Social Restriction Policies in Public Health Emergencies’ (2022) 8(1) Unnes Law Journal: Jurnal Hukum Universitas Negeri Semeang 39;

33. Santos FTA, ‘Yaoi: Voices from the Margins’ (2010) 31(1) Osaka University Knowledge Archive 215, https://ir.library.osakau.ac.jp/repo/ouka/all/7429/ahs31_215.pdf;

34. Schell BH and others, ‘Cyber Child Pornography: A Review Paper of the Social and Legal Issues and Remedies and a Proposed Technological Solution’ (2006) 12(1) Aggression and Violent Behavior 45;

35. Shackel R, ‘Regulation of Child Pornography in the Electronic Age: The Role of International Law’ (1999) 3(1) Macarthur Law Review 143;

36. Sun N, ‘Applying Siracusa: A Call for a General Comment on Public Health Emergencies’ (2020) 22(1) Health and Human Rights Journal 387;

37. Takeuchi CL, ‘Regulating Lolicon: Toward Japanese Compliance with its International Legal Obligations to Ban Virtual Child Pornography’ (2015) 44(1) Georgia Journal of International and Comparative Law 195;

38. Yukari F and others, ‘Transgender: Female Hermaphrodites and Male Androgynes’ (2004) 27(1) U.S.-Japan Women’s Journal 76;

39. Zanghellini A, ‘Underage Sex and Romance in Japanese Homoerotic Manga and Anime’ (2009) 18(2) Social & Legal Studies 159;

40. Zsila A and others, ‘Loving the Love of Boys: Motives for Consuming Yaoi Media’ (2018) 13(6) PloS one 1, <https://pdfs.semanticscholar.org/ba3f/082ae54fa697e17fc0d8078d9633d7b0861c.pdf>;

*Dictionaries*

1. Cambridge Dictionary, <dictionary.cambridge.org/dictionary/english/moral>;
2. Lexido, <www.lexico.com/definition/moral>;
3. Merriam-Webster, <www.merriam-webster.com/dictionary/morals>;

*Websites*

1. — —, ‘Strengthening the Convention on the Rights of the Child: Optional Protocols’ (Unicef) <https://www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols#:~:text=To%20help%20stem%20the%20abuse,from%20sale%2C%20prostitution%20and%20pornography>;

2. — —, ‘What are Human Rights?’ (United Nations Human Rights: Office of the High Commissioner) <https://www.ohchr.org/en/what-are-human-rights>;

3. Frennea M, ‘The Prevalence of Rape and Child Pornography in Yaoi’ (Proceedings

of the National Conference on Undergraduate Research, New York, April 2011) <https://apps.cur.org/ncur2021/archive/Display_NCUR.aspx?id=51669>;

4. Nurhidayatuloh F, ‘Is Public Morality able to Restrict Human Rights?’ (Proceedings

of the 3rd International Conference on Globalization of Law and Local Wisdom, ICGLOW, 2019) <https://repository.unsri.ac.id/id/eprint/49034/contents>.