This brief was not filed due to the Court's policy of not accepting foreign amicus briefs. It is posted here because the points it makes regarding violations of Vanunu's rights of expression and travel deserve to be widely known.

No. _____

IN THE

SUPREME COURT OF THE STATE OF ISRAEL

_____

MORDECHAI VANUNU
Petitioner,

v.

THE HEAD OF THE HOME FRONT COMMAND,
and
MINSTER OF THE INTERIOR
Respondents.

_____

On Petition for an Order *Nisi*

_____

BRIEF OF *AMICUS CURIAE*
THE INTERNATIONAL ASSOCIATION OF LAWYERS AGAINST NUCLEAR ARMS

_____

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INTERESTS OF AMICUS CURIAE

The International Association of Lawyers Against Nuclear Arms (IALANA) respectfully submits this *amicus* brief in connection with the renewed petition for order *nisi* of Mordechai Vanunu. Through its affiliate organizations in various countries, including counsel of record Western States Legal Foundation (WSLF) and the Lawyers' Committee on Nuclear Policy (LCNP), IALANA has a long history of legal and educational activity in issues of nuclear disarmament and in furtherance of the freedom of political expression related to nuclear issues.

IALANA, founded in 1989, is a non-profit, public interest organization dedicated to promoting the abolition of nuclear weapons and the strengthening of the international rule of law. It maintains four offices: the United Nations office in New York, New York; the northern office in Marburg, Germany; the southern office, in Wellington, New Zealand; and the South Asian office in Colombo, Sri Lanka. National affiliates of IALANA are located in Germany, the Netherlands, Italy, Japan, Sri Lanka, New Zealand, the United States, and the Russian Federation, and IALANA members come from numerous other countries as well. The president of IALANA is Judge Christopher G. Weeramantry, former vice-president of the International Court of Justice.

IALANA was a founder of the World Court Project, which began in 1992 to assist in presenting the question of the legality of the threat or use of nuclear weapons to the International Court of Justice (ICJ). In 1996, the ICJ rendered an historic advisory opinion holding that the threat or use of nuclear weapons is generally illegal, and that States are obligated to bring to a conclusion negotiations on nuclear disarmament in all respects. As

argued below, the decision materially impacts upon the standard of judicial review of this case. IALANA is active in monitoring and advocating a international governmental proceedings, for example Nuclear Non-Proliferation Treaty Review proceedings, the 1998 negotiation of the Statute of the International Criminal Court, and the deliberations of the UN Secretary-General's High-level Panel on Threats, Challenges and Change. IALANA also contributes in numerous civil society settings, for example the Towards a World Without Violence International Congress, June 23-27, 2004, part of Barcelona Forum 2004. IALANA is accredited to the United Nations through ECOSOC.

IALANA is directly represented on this brief by attorney Peter Weiss, vice-president and former president of IALANA, and president of the Lawyers' Committee on Nuclear Policy, U.S. affiliate of IALANA, and through two of its affiliate legal organizations, the *Western States Legal Foundation* (WSLF) and *Lawyers' Committee On Nuclear Policy* (LCNP), based in the United States.

WSLF is a non-profit public interest organization founded in 1982. As expressed in its by-laws, WSLF was founded in pertinent part to protect the freedom of expression of individuals and organizations opposed to nuclear weapons and nuclear power. WSLF, through legal and administrative forums, research and educational activities, seeks to promote the abolition of nuclear weapons, compel open public environmental review of nuclear technologies, and ensure appropriate management of nuclear waste. Grounded in nonviolence and rooted in both international and environmental law, the principle guiding WSLF's activities is democratization of decision making affecting nuclear weapons and related technologies, and the protection of freedom of expression of participants in

political and educational work.

WSLF's legal representation in the courts has included defending the freedom of expression of both individuals and municipalities opposing nuclear weapons and proliferation. Internationally, WSLF provides informational support to United Nations delegations and officials, and non-governmental organizations, including such forums as the Nuclear Nonproliferation Treaty (NPT) Five-Year Review Conference in 2000. WSLF is participating in the May 2005 NPT Review Conference in New York City .

Lawyers' Committee On Nuclear Policy (LCNP), founded in 1981, is a not-for-profit organization based in New York. An association of lawyer and legal scholars, LCNP engages in research and advocacy and occasional litigation in support of rule-of-law based nuclear disarmament, non-proliferation and global security. LCNP was a key organizer of the World Court Project that supported the UN General Assembly's request for an advisory opinion on nuclear weapons from the International Court of Justice. LCNP also assisted many states in making their written and verbal arguments to the ICJ, and was present at the hearings before the ICJ in 1995. Accredited to the United Nations through the Department of Public Information, LCNP monitors and advocates at meetings of the General Assembly's First Committee on disarmament and security, and at review proceedings for the Nuclear Non-Proliferation Treaty (NPT). LCNP coordinated the drafting of a model nuclear weapons convention in 1997, which was subsequently circulated by the Secretary-General to UN member states as a discussion document. LCNP was lead counsel for the challenge by U.S. Representative Dennis Kucinich and 31 other members of Congress to the U.S. unilateral withdrawal from the Anti-Ballistic Missile

Treaty. LCNP serves as the UN office for the International Association of Lawyers Against Nuclear Arms (IALANA).

SUMMARY OF AMICUS BRIEF

The renewed administrative orders of restriction directed to the Petitioner constitute broad prior restraints of fundamental rights of expression and travel protected by international law and domestic authority. These orders preclude the Petitioner from leaving the State of Israel, restrict his movement within the state, and forbid contacts with foreign media *regardless* of the character of the travel, or specific content of the speech involved. The travel ban extends to friends and enemies of the State of Israel alike. With the exception of the recently imposed restriction on any expression on the subject of nuclear weapons (whether fact or opinion), the restrictions do not purport to regulate the *content* of expression but are solely intended to restrict the *person* premised upon past conduct for which he has already served a full criminal sentence, and the fear by executive authorities that Petitioner may disseminate further secrets obtained while as a nuclear technician, albeit secrets now over twenty years old.

This *amicus* brief addresses the legal standards of judicial review applicable to such prior restraints under recognized international authority, the limitations against overbreadth of such restrictions, and the privilege which attaches to speech which pertains to international norms of conduct concerning nuclear weapons and proliferation.

1) The administrative orders must be reviewed as an extremely broad prior restraint of fundamental freedoms guaranteed under Israeli and international law. The right to travel for Israeli citizens is guaranteed under domestic and international law. Section 6 of the Basic Law: Human Dignity and Liberty (1992) establishes that all citizens are free to leave the

State of Israel. Israel is a party to the International Covenant on Civil and Political Rights (ICCPR) which in Article 12 specifies the right to liberty of movement and freedom to leave her or his country.

Article 19 of the ICCPR, international jurisprudence including decisions under Article 10 of the European Covenant on Human Rights, the Basic Law and decisions of this Court further recognize the fundamental right of expression for all citizens, particularly in the arena of political speech. The regulation of such speech by civil or criminal sanctions is customarily subject to the strictest scrutiny, in which every presumption is given in favor of the speaker. The limitations to such protected expression are of course recognized in the realms of civil defamation, trade secrets and race-hatred speech. But in nearly all instances, such limitations involve publication of specific matter which is itself sanctionable. Moreover, such restraints typically arise from *judicial* action; the silencing of an individual by administrative order without a prior due process hearing does not find precedent in recent decisional law in international tribunals.

The characteristics of the renewed restrictions therefore conflict with international juridical doctrines of overbreadth and prior restraint as applied to fundamental freedoms such as expression and travel. Even with consideration of the 1945 Emergency Regulations or the 1948 State of Emergency Regulations, such forward-looking restraints should be subject to strict scrutiny, and equally as important, must be narrowly tailored to avoid any conflict with clearly protected speech that any Israeli citizen is permitted to engage in.

We respectfully submit that the standard utilized by the High Court in denying the prior petition (HCJ 5211/04) applied a standard that gave deference to State interests in concerns over future harm, not yet realized, to

the detriment of Petitioner's existing and present civil rights. As argued below, even prior restraints premised upon national security must be shown to be "necessary" to prevent future harm, and not simply as a deterrent or substitute for criminal sanctions. Assuming *arguendo* that any prior restraint in this setting is appropriate, the Court must carefully examine the reasonable and necessary relationship of the remedy to the anticipated harm. While all States enjoy the right to protect themselves, such protection does not extend to void the most basic exercise of political or social rights, premised simply upon the fear that an individual may, in the future, disclose information obtained twenty years in the past and which pertain to matters of current relevance.

2. Petitioner's right to oppose the use and deployment of nuclear weapons is privileged under international law. The doctrine of privilege for political speech is, of course, recognized under Anglo-European jurisprudence. Even though such speech may incidentally injure the standing of such politicians or the State in the international community, opinions which may be derogatory of public positions taken by politicians or a State will be protected against state sanction in virtually all courts.

In this case, Petitioner's notoriety extends not from commerce with enemies of the State of Israel, but by his publication, through international news media, of the fact of the State of Israel's acquisition and stockpiling of nuclear weapons. The subject matter of Petitioner's communications has been addressed in the highest international circles. While the State of Israel is not a signatory to the Nuclear Non-Proliferation Treaty (NPT), its decisions and actions in the realm of nuclear armaments are subject to the development of customary and advisory international law in this area. The illegality of the threat and use of nuclear weapons was recognized by the

historic opinion of the International Court of Justice (ICJ) issued on 8 July 1996. The ICJ confirmed that its decision was rooted in humanitarian law, and invoked the Nuremberg Charter. The significance of the Nuremberg Charter to Petitioner's case cannot be understated, since, as discussed below, it imposes responsibilities upon the citizens of a State which exceed the State's authority to insist upon unquestioning loyalty, in instances where a fundamental violation of international humanitarian law is at stake.

There is no question that Petitioner's speech is controversial and his opinions may even prejudice the State of Israel's relations with the international community. However, given the paramount political importance of this issue, and the growing international normative and juridical opposition to the development of nuclear stockpiles, any prior restraint of such speech on these issues, let alone speech on any subject to foreign media, cannot survive under existing legal standards.

ARGUMENT

I. THE RESTRICTIVE ORDERS ARE SUBJECT TO STANDARDS OF JUDICIAL REVIEW AS A PRIOR RESTRAINT OF FUNDAMENTAL RIGHTS

A. Petitioner's Freedom of Expression Is A Fundamental Interest.

The renewed orders restraining Petitioner's rights as an Israeli citizen to speak on nuclear issues, and to communicate with foreign nationals and media, implicate guarantees under Article 19 of both the Universal Declaration of Human Rights (Universal Declaration)[1] and the

[1] Article 19 of the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

International Covenant on Civil and Political Rights (ICCPR).[2] The ICCPR elaborates upon the rights outlined in the Universal Declaration.[3] Consistent with international norms as embodied in ICCPR, and the State of Israel's own Basic Laws, Respondents' broad prior restraint of Petitioner's speech must be subjected to the strictest possible legal scrutiny.

We start from the fundamental premise that, "[the] freedom of expression enjoys constitutional status [in Israel] as part of the right to human dignity anchored in the Basic Law: Human Dignity and Liberty." HCJ 4804/94, *Station Film Co. v. The Film Review Board*, IsrSC 50(5) 661. The freedom of expression in Israel has been recognized by this Court as being among those fundamental rights which stems directly "from the nature of [Israel] as a freedom-loving democracy," HCJ 243/62, *Israel Film Studios Ltd. v. Gary* , IsrSC 16 2407, 2415.

"The spiritual and intellectual development of man is based on his ability to freely formulate his world views." HCJ 399/85, *Kahane v. Managing Committee of the Broadcasting Authority*, IsrSC 41(3) 255, 273. "[F]reedom of expression is a prerequisite for democracy. HCJ 4804/94,

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[2] Article 19 of the International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 [hereinafter ICCPR]. The State of Israel is a party to the ICCPR. HCJ 3278/02, *Center for the Defense of the Individual v. Commander of the IDF Forces in the West Bank*, §24.

[3] *See also* Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force Sept. 3, 1953; Article 13 of the American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/Ser. L./V/II.23 Doc. Rev. 2, entered into force July 18, 1978; and Article 9 of the African [Banjul] Charter of Human and Peoples' Rights, June 26, 1981, OAU Doc. CAB/LEG/67/3/Rev.5.

Station Film Co., supra. "The free voicing of opinions and the unrestricted exchange of ideas among people is a *sine qua non* for the existence of a political and social regime in which the citizen can weigh—without fear—what is required, to the best of his understanding, for the benefit and welfare of both the public as well as the individual, and how to ensure the continued existence of the democratic regime and the political framework in which it operates." HCJ 372/84, *Klopfer-Nave v. Minister of Education and Culture*, IsrSC 38(3) 232 at 238.

The protections afforded expression - especially that of political content - are so universal as to beggar any comprehensive citation to authorities. Addressing a petition raising defenses to libel under Article 10 of the European Convention (footnote 3, *supra.)* by an elected Spanish representative in a newspaper article, the European Court on Human Rights remarked:

> "The Court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society' (internal citations omitted)."

[1992] ECHR 48, *Castells v. Spain*, at ¶42.

The foregoing normative principle is equally emphasized under Commonwealth law. In denying injunctive relief to a petitioner claiming a breach of confidence (misuse of private trade information), Justice Mann of the Chancery Division remarked:

> "The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always

> understandable and humane on the facts of the particular case before them... Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible.

[2004] EWHC 1075 (Ch), *Tillery Valley Foods v. Channel Four Television*, ¶16.

B. <u>Petitioner's Fundamental Rights of Travel and Movement.</u>

Respondents' prior restraints on Petitioner's freedom of movement, including a bar to leaving the country, are subject to the same strict scrutiny as the prior restraint against his freedom of expression. These freedoms have been recognized by the State of Israel in section 6 of the Basic Law: Human Dignity and Liberty, which specifies at subsection (a) that "[A]ll persons are free to leave Israel." Article 12 of the ICCPR guarantees the lawful movement of citizens within the territory of a State, and that "[E]veryone shall be free to leave any country, including his own."

As Justice T. Or commented regarding the supreme importance of the freedom of travel:

> "In Israel, freedom of movement is guaranteed as a basic right (internal citations omitted). It includes each and every person's right to exit the State (internal citations omitted). It also encompasses a person's freedom to move throughout and across the state of Israel (internal citations omitted).... This right is essential to individual self actualization .... As the Chief Justice of the American Supreme Court noted, freedom of movement 'may be as close to the heart of the individual as the choice of what he eats, or wears, or reads.' See *Kent v. Dulles*, 357 U.S. 116, 126 (1958)."

HCJ 5016/96, *Horev v. The Minister of Transportation*, IsrSC 51(4), 1 at

108, ¶17. We therefore propose to the Court that the same standards of judicial review applicable to freedom of expression should be applied to prior restraints of the right to travel under the Basic Law and ICCPR.

C. The Judicial Standards Applicable To Prior Restraints of Fundamental Rights.

This Court has cited with approval the United States' legal doctrine that prior restraints on fundamental freedoms such as expression are disfavored, and subject to presumptions against enforcement. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." HCJ 680/88, *Schnitzer v. The Chief Military Censor*, IsrSC 42(2), 617, quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

The significance of *Schnitzer's* reference to *New York Times* is profound since, in that case, the United States Supreme Court reviewed a civil lawsuit by the executive branch of the United States government to enjoin certain newspapers from publishing the Pentagon Papers, a secret history by the Defense Department of the origins of the United States' ongoing war in Vietnam. Just as in the Petitioner's case, the government sought to justify its attempt on prior restraint on national security grounds. The Court concluded that the executive had failed to meet its "heavy burden of showing justification for the imposition of such a restraint", and vacated the order of a lower court restraining publication of the Papers.

Justice Black's concurrence in *New York Times* speaks just as clearly today as it did to Daniel Ellsberg's release of the classified history of the Vietnam War:

> " The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government

> provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes--great man and great Chief Justice that he was--when the Court held a man could not be punished for attending a meeting run by Communists.
>
> 'The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.'"

Id. at 719-20. While the State of Israel is not a constitutional system *per se*, it has recognized to some degree that such freedom of expression is part of the general right of human dignity protected by the Basic Law. *Schnitzer, supra.*[4]

New York Times has procedural as well as substantive relevance to Petitioner's case. As with other legal precedents (such as the *Observer and the Guardian* decision, *infra.)*, the executive department of the United States did not dispute the necessity of yielding to the civil jurisdiction of the judiciary to exercise the restraint on expression, and therefore bore the burden of persuasion. In contrast, the Petitioner in this case has been

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[4] See CCPR/C/81/Add.13, United Nations, Human Rights Committee, Covenant on Civil and Political Rights, *Consideration of Reports Submitted By States Parties Under Article 40 Of The Covenant, Addendum, Israel*, 2 June 1998, 183-4.

compelled to seek *nisi* review (and hence bear the heavy burden of persuasion to overcome an administrative order) to overturn a self-executing executive order. The significance of the shift of the burden of persuasion from the executive to the restricted person cannot be understated.[5] As already applied in the prior petition (HCJ 5211/04), the procedural setting of this case thus inherently skews the appropriate standard of judicial review against Petitioner.

The standard of strict scrutiny applied to judicial review of State regulation of fundamental freedoms such as expression or travel is broadly recognized. The European Court of Human Rights has specified that the specific restrictions on speech must be provided by law, protect a legitimate interest recognized under international law, and are necessary to protect that interest. [1991] ECHR 50, *The Sunday Times v. United Kingdom*, ¶10(b); *see also* [1979] ECHR 1, *The Sunday Times v. United Kingdom*, ¶65.[6] Any exception to the freedom of expression "must be narrowly

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[5] The state, as a civil plaintiff, ordinarily bears the burden of persuasion in requesting an interlocutory or permanent injunction:

> Unless the material before the court at that stage fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[1991] ECHR 50, *The Sunday Times v. United Kingdom*, ¶10(b).

[6] Under the standards employed in the European Court of Human Rights, the Court's inquiry into whether an exception cannot be categorical but based upon specific facts:

> It is not sufficient that the interference involved belongs to that class

interpreted and the necessity for such restrictions must be convincingly established." [1992] ECHR 51, *Thorgeirson v. Iceland*, ¶63. In short, under European standards of review, restrictions on speech are a last resort, and even in those instances, broad brush prior restraints against the person will not be found. Any prior restraints against expression are generally limited to recognized instances, such as race-hatred speech, defamation of individuals or protection of intellectual property rights, and narrowly tailored to the injurious content at issue.[7]

Article 10 of the European Convention of Human Rights[8] does not

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> of the exceptions listed in Article 10 (2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.

[1979] ECHR 1, *The Sunday Times v. United Kingdom*, ¶65. The earlier *Sunday Times* decision reviewed contempt orders against a British newspaper that published articles about the thalidomide controversy during an ongoing civil lawsuit.

[7] See generally Farrior, Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech, 14 *Berkeley Journal of International Law* (1996) 1; Timofeeva, Hate Speech Online: Restricted or Protected? Comparison of Regulations In the United States and Germany, 12 *Journal of Transnational Law and Policy* (2003) 253.

[8] Article 10 of the European Convention on Human Rights states in pertinent part:

> "1. Everyone has the right of freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

prohibit prior restraints in all instances, but as interpreted Article 10 "calls for the most careful scrutiny" of such measures. 14 EHCR 153, *Observer and the Guardian v. United Kingdom* ¶¶60-70. In the *Observer* case, discussed more fully below, the European Court on Human Rights held that an interlocutory injunction against the publication of the memoirs of a former secret service agent was permissible only to the extent proportionate to its aims.

The "proportionality rule" followed by Commonwealth courts reaches a strict scrutiny standard not dissimilar to other jurisdictions. In Great Britain, the appropriate rule on restraint of expression is stated as: (a)

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In addressing the developing law of the right to privacy, the Law Reform Commission of the Republic of Ireland distinguished political speech from expression which more closely impinges on the right to privacy of individual citizens:

> "The protection afforded to freedom of expression is at its strongest when connected to matters that are squarely political or colourably in the public interest... Out of defense to the role played by media in a democratic society, the European Court (on Human Rights) will very closely scrutinize any prior restraints on expression such as preventative injunction."

Irish Law Reform Commission, *Privacy: Surveillance and the Interception of Communications*, [1998] IELRC 3.

the objective must be sufficiently important to justify limiting a fundamental right; (b) the measures designed to meet the objective are rationally connected to it; and (c) the means used to impair the right or freedom are no more than necessary to accomplish the objective. [2003] UKHL 23, *Regina v. British Broadcasting Corporation ex parte ProLife Alliance*.[9] Under the second and third prongs of the proportionality test, the subject restraining orders upon Petitioner raise considerable questions. Since the *fact* of expression or travel is enough, regardless of content or intent, the element of 'rational connection' is troublesome in this case. Likewise, the problem of overbreadth embodied in the third prong of the proportionality rule must arise by an order which is not limited to either the specific harmful speech or travel to an avowedly hostile State, but is, on its face, to be enforced regardless of content.

The Court should respectfully consider the profound consequences flowing from the fact that the restrictions are the product of administrative action, and not judicial decision. In the classic instances of civil injunctions against publication, such as the *Observer and the Guardian* case, the injunction is an interlocutory order which will be reviewed at trial. Even in this setting, the courts strongly disapprove of prior restraints outside the classic libel or trade secrets arenas. *New York Times, supra; The Sunday Times, supra*.[10] Given the stringent scrutiny to which court-made prior restraints are subjected, self-executing administrative orders issued without any hearing ought to be reviewed under even more rigorous and

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[9] See also [1991] ECHR 50, *The Sunday Times v. United Kingdom*, ¶50.

[10] See generally Cardonsky, Towards A Meaningful Right To Privacy In The United Kingdom, 20 *Boston University International Law Review* 393 (Fall 2002).

questioning standards beyond ordinary deference.

Two years ago, this very Court employed such a standard of strict scrutiny, and hence lessened deference, to an administrative censorship decision in granting an order *nisi* in favor of the screening of films depicting IDF operations in Jenin and their aftermath in HCJ 316/03, *Bakri v. Israeli Film Council*. This Court began by noting the broad leeway given expression generally in the law:

> The fact that expression may be offensive, rude, or grating cannot serve as a reason not to protect it. This was noted by Justice Mazza in HCJ 2888/97, *Novick v. The Second Television and Radio Authority*, at 201:
>
> > Freedom of expression was not only intended to protect accepted and popular opinions, expressed under peaceful conditions, but also—and this is the central test of the freedom of expression—deviant, infuriating, and exasperating opinions, expressed after difficult events, in a callous and offensive fashion.
>
> Also appropriate in this regard are the words of the English judge, Lord Denning.
>
> > Freedom of speech [is] amongst our most precious freedoms. Freedom of speech means freedom not only for the views of which you approve, but also freedom for the views you most heartily disapprove.
>
> *Verrall v. Great Yarmouth Borough Council*, [1981] Q.B. 202, at 216.

Id. at ¶*9.* This Court remarked that the "limitations clause" in section 8 of the Basic Law: Human Rights and Dignity "permits the violation of a right only where the authority to violate that right is granted by statute, if the violation is consistent with the values of the State of Israel, and if the violation has an appropriate purpose and is not disproportionate." *Id.* at

¶10. The Court enunciated:

> Proportionality is measured by three tests. The "suitability test" ensures that the measure which violates the right is suited to the purpose of the violation. The "minimal violation" test confirms that the measures taken are those which violate the right least. The "relativity test" ensures that the benefits of the violation bear a reasonable relation to its costs. These tests weigh the purpose of the violation against the injury done to the person whose rights are infringed.

Id. On their face, these statements of law parallel Anglo-European tests applied to prior restraints of expression. A question before this Court is whether a special test has been applied to Petitioner alone.

This Court went on in *Bakri* to cite American authority protecting the freedom of political expression:

> The Council, however, like every other government body, has no monopoly over the truth. It was not granted the authority to expose the truth by silencing expression that members of the Council consider to be lies. In general, revelation of the truth in a free and open society is a prerogative given to the public, which is exposed to a spectrum of opinions and expression, even false expression. As stated by Justice John Harlan of the United States Supreme Court:
>
> > The Constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.
>
> *Cohen v. California*, 403 U.S. 15, 26 (1971).

Id. at ¶12. The Court conclusively adopted this position in the *Bakri* case.

It continued:

> When we are dealing with expression whose truth is disputed, the freedom of expression has special significance if that expression has important political implications. This is the case here, where the political intentions and factual claims of the film are virtually undistinguishable. As we have already noted, the petitioner did not even attempt to present a balanced picture of the events in the film. His goal was simply to express the Palestinian story. The Council does not have the authority to restrict expression that is principally ideological or political, simply because the government, part of the public, or even a majority of it, disagrees with the views expressed.
>
> In Britain, where similar questions have arisen, the House of Lords has ruled that political expression can not be restricted unless such restrictions are necessary to protect against violence or obscene content. See, e.g., *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 1 All E.R. 1011. In *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 All E.R. 103, 106, Lord Bridge stated that any attempt to limit criticism of governmental authorities "amounts to political censorship of the most insidious and objectionable kind."

Id. The Court concluded that the order of the Board failed the three-pronged test of proportionality, even though it offended the political sensibilities of the majority of Israeli citizens. As notable as its other findings, the Court expressly disapproved an earlier decision banning a film:

> Respondents wish to rely on HCJ 807/78, *Ein Gal v. Israel Film and Theater Council*, where we approved the decision of the Israel Film and Theater Council to ban the screening of a documentary film. The film claimed that the Arabs of Israel were expelled from their land by the Jews. The Council prohibited the film, reasoning that it was false and prejudiced, disgraced the State of Israel, weakened its position in the world, and could incite to violence. Since this judgment was handed down in 1979, however, times have changed, and so has the law. In light of the development of the law since then, this ruling can no longer stand. In any case, I am of the opinion that

Israeli society is now able to deal with such expressions.

Id. at ¶16.

We respectfully submit that this Court's prior decision in *Bakri* is in conformance with the tribunals of other nations on the fundamental freedom of expression, and the administrative restrictions, however reasoned, are not.[11]

D. The National Security Exception: The Lessons of the *Observer* and *Sunday Times* Cases and the "Necessity" Requirement

Both the Basic Law and the ICCPR recognize that the State may restrict the freedom of expression "only as necessary" for "the protection of national security." ICCPR, Art. 19(3)(b). But no decisional authority suggests that the mere presence of a national security interest eliminates the foregoing standards of judicial review of prior restraints of expression or travel. Moreover, the decisional authorities on this issue involve not bans on speech or travel whose sole criteria is the *identity* of the *person*, but rather the character and content of the specific speech, publication, or information. A former employee possessing trade secrets is free to converse or associate with anyone he or she likes, just so long as the secret information itself is not communicated. A pornographer may be restricted in his sale of the content of certain materials, but is free to publish a letter critical of the House of Lords. Not so Petitioner; his speech and travel are proscribed regardless of prospective content. This aspect of the restrictive order inhibits any meaningful discussion of proportionality since it sweeps up all manner of expression, both profound and mundane.

Respondents appear to assert that the national security exception

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[11] See also 4804/94 *Station Film v. The Film Review Board* (also striking down censorship of a film).

dispenses with the need to specifically evaluate in a concrete and objective manner the nexus between the "harm" and specific speech. But if we look to the discussion of the national security exception by the European Court of Human Rights in *Observer and the Guardian v. United Kingdom*, [1991] ECHR 49, and its companion case, *The Sunday Times v. United Kingdom,* [1991] ECHR 50, such an all-sweeping rule does not find sustenance. These cases, which received wide notoriety, involved efforts by the British government to obtain injunctions against the publication of "Spycatcher", memoirs written by a former MI5 officer, Peter Wright. The book dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. Mr Wright asserted, *inter alia*, that MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labour Government, burgled and "bugged" the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad. Mr Wright claimed in his book that Sir Roger Hollis, who led MI5 during the latter part of Mr Wright's employment, was a Soviet agent. These statements are certainly related in character, if not degree, to those of Petitioner's.

The British government sought civil injunctions[12] against newspapers undertaking to publish excerpts from "Spycatcher." The Attorney General averred that the publication of any narrative based on information available to Mr Wright as a member of the Security Service

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[12] Again, as with *New York Times*, this is a critical distinction from the Minister's approach to Petitioner's case, since under civil standards applicable claims for injunctive relief, the government in *Observer* and *the Sunday Times* bore the burden of persuasion.

would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved, and would also undermine the confidence that friendly countries and other organisations and persons had in the Security Service.

It should be noted that at no time did the British government seek to preclude Mr Wright from speaking to the press or to travel; rather, the injunctions were directed to specific matter about to be published.[13] Before the European Court, the newspapers argued that the injunctions, based in large part on national security grounds, violated Article 10 of the European Covenant. The Court agreed that the restraints has a basis in law and has legitimate aims under the exception of Article 10(2). It found, however, that the injunctions failed under the third element that the prior restraints be justified as "necessary in a democratic society":

> "The adjective "necessary", within the meaning of Article 10 para. 2 implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.
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> The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered

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[13] "In this connection, it is to be noted that the injunctions did not erect a blanket prohibition. Whilst they forbade the publication of information derived from or attributed to Mr Wright in his capacity as a member of the Security Service, they did not prevent [petitioners] from pursuing their campaign for an independent inquiry into the operation of that service."

Observer, supra. at ¶64.

> pursuant to their power of appreciation. *This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".* (Emphasis ours)

Observer, *supra.* at ¶59.

Turning to the "necessity" test to national security concerns of disclosure, the European court expressly looked to the age of the information and the fact of prior publication. As here, whatever damaging information held by Mr Wright was "out" by the time of the final injunctions, and the British government could no longer hope to preserve the 'secret' nature of the revelations. Instead, as here, the government's objective was to *deter* third persons and Mr Wright from further dissemination of already circulated information, as well as to set an example for others who may hold similar secret information. This 'deterrence' objective, which traditionally is a function of the criminal courts, was not enough to meet the exception under Article 10, and the injunctions did not meet the 'necessary' element to satisfy a prior restraint. *Observer*, *supra*. at ¶69-70.[14]

The facts addressed in the Petition which are relevant to this inquiry are not disputed. Petitioner has not been employed at the NRC for over twenty years. His revelations concerning the State of Israel's nuclear stockpile occurred two decades ago, and for this, he was criminally

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[14] For a discussion of the *Observer* and *Sunday Times* cases, see e.g. Lubliner, The Sky Is Not Falling: Why The Human Rights Act of 1998 Will Not Radically Affect English Freedom of Expression Law, 16 *Emory International Law Review* 263 (2002).

prosecuted. The basis for a prior restraint, let alone the restrictions here, have long since dematerialized, and for the reasons stated in *Observer*, are inconsistent with developing law under appropriate international covenants.

II PETITIONER'S POLITICAL OPPOSITION TO THE STATE OF ISRAEL'S NUCLEAR POLICIES INVOKES THE ABOVE FUNDAMENTAL RIGHTS AND PRECLUDES PRIOR RESTRAINT

We now turn to the specific matter of content, and at the same time, the 'fear' expressed by Respondents concerning the potential for future harmful expression (and travel in furtherance thereof) by Petitioner.

Petitioner's past expression includes political critiques of a grave issue of international concern, namely accusations that the State of Israel has developed and stockpiled nuclear weapons in secret. The statements and opinions of Petitioner were of sufficient notoriety and importance that they were published by international newspapers in major cities throughout the world, and have been addressed in international tribunals such as the United Nations.[15] Petitioner's public revelation of the existence of the State of Israel's nuclear stockpile resulted in Petitioner's criminal prosecution and sentence to 18 years of penal confinement.[16]

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[15] *See, e.g.* United Nations General Assembly No. A/42/581, Report of the Secretary General, *Israeli Nuclear Armament*, 16 October 1987, 9, 13.

[16] This brief does not directly address the validity of such criminal sanctions based upon unauthorized release of secret nuclear information, but rather the legal viability of administrative prior restraints on future speech and travel upon a citizen. However, the foregoing discussion is highly relevant to any criminal proceeding arising from Petitioner's violation of the administrative restraining orders which do not involve exchange of technical secrets.

Any such prosecution of Petitioner for violation of the overbroad 2004 *ex parte* administrative order necessarily raises very serious questions of

There is little support in decisions from Anglo-European courts for prior restraints which have as their object the prevention of further "harmful" expression while eschewing any contours based on the actual *content* of such future speech. The bar to Petitioner on speech as to foreign media is complete, as is the bar to travel. As a consequence of the continuing administrative restrictions, Petitioner is *de jure* now a "stateless" individual, whose predicament is akin to the fictional protagonist in the well-known American short story *The Man without a Country*[17], who is perpetually enjoined from conversation mentioning the United States in his permanent exile on U.S. Navy vessels.

As highlighted by the new restriction against any expression on nuclear issues of any kind, Petitioner's "statelessness" under the administrative orders arises from a subject of extreme international political

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double jeopardy, namely that the 2004 order was intended to trigger further punishment for Petitioner's past offense for which he served 18 years. In the United States, for example, citizens are constitutionally protected against multiple prosecutions or punishments for the same crime. This protection extends to punitive fines or sanctions imposed civilly or administratively. *See e.g. Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767(1994) (holding state tax of $181,000 imposed on persons arrested for drug possession and distribution had an "unmistakable punitive character" and "was fairly characterized as punishment")

[17] Hale, Edward Everett (1822–1909), *The Man without a Country* (Harvard Classics) 1917. The short story relates the fictional history of one Philip Nolan, who at his trial for treason as an associate of Aaron Burr in the early 19th century, swears to never hear the name of the United States. He is granted his wish. Nolan is ordered to be placed "on board a government vessel bound on a long cruise, and to direct that he should be only so far confined there as to make it certain that he never saw or heard of the country." Nolan is thus bound, for the next fifty-six years, to endlessly sail under this injunction. Hale's story emphasizes the terrible character of such punishment.

concern - the threat and potential use of nuclear weapons. In the United States, all political speech is to be permitted unless it immediately threatens public safety as a "clear and present danger." *See e.g. Brandenburg v. Ohio*, 395 U.S. 444 (1969).[18] Likewise, under the European Convention, the European Court has intervened to protect political speech of an opposition member of Parliament against criminal conviction. *Castells, supra.* Absent incitements to violence, or race-hate speech which itself violates fundamental norms of human dignity, there are few modern examples of prior restraint of pure political critique, especially on a subject of such paramount importance.[19]

The subject restrictions, including the new restriction on matters of nuclear weapons generally, encompasses matters of *opinion* as well as

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[18] *See generally* Douglas-Scott, The Hatefulness of Protected Speech: A Comparison of the American and European Approaches, 7 *William and Mary Bill of Rights Journal*, 305 (1999).

[19] For example, the overwhelming interest of the public in the ongoing health impacts of the use of the drug thalidomide was a significant factor in the European Court of Human Rights' decision to strike down contempt of court orders against the Sunday Times. [1979] ECHR 1, *The Sunday Times v. United Kingdom*, ¶66.

> Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary. *Id.* at ¶67.

fact.[20] Such opinion speech is not only *political* and hence privileged under the above standards[21], but it is subject to protection under developing international norms of conduct to control the threat, use, possession and spread of nuclear weapons. Particularly relevant here is the advisory opinion of the International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports, 1996, 226 (hereinafter *ICJ Opinion*). In its historic decision of 8 July 1996, the International Court of Justice concluded that the threat or use of nuclear weapons is generally illegal, and that all states are obligated to conclude negotiations to achieve nuclear disarmament.[22] The ICJ decision remains the most comprehensive discussion by any judicial tribunal on the development of treaty-based and customary international law concerning the legality of nuclear weapons threat, use, and possession.

In a formal conclusion, the ICJ held that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." (ICJ Opinion, ¶105(2)E). This conclusion is powerfully supported by key elements of the Court's analysis, including:

- Nuclear weapons have "unique characteristics," including "their destructive capacity, their capacity to cause untold human suffering,

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[20] Petitioner's twenty-year absence from any position of responsibility in Israel's nuclear weapons's establishment militates against a factual finding of "clear and present danger" to state security based upon the risk of further leaks of information pertaining to Israel's then-existing stockpile.

[21] *See e.g.* [1986] ECHR 70, *Lingens v. Austria*, ¶46.

[22] *See generally* John Burroughs, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (Munster: Lit Verlag, 1997).

and their ability to cause damage to generations to come;" their "destructive power … cannot be contained in either space or time;" a nuclear explosion "releases not only immense quantities of heat and energy, but also powerful and prolonged radiation," which "would affect health, agriculture, natural resources and demography over a very wide area," and "has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations" (¶¶35, 36);

• Under humanitarian law, "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, … the use of such weapons in fact seems scarcely reconcilable with respect for such requirements" (¶95);

• Self-defense warrants "only measures which are proportional to the armed attack and necessary to respond to it," and "a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law" (¶¶41, 42);

• The environment "represents the living space, the quality of life and the very health of human beings, including generations unborn," and "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives" and in implementation of the law applicable in armed conflict (¶¶29, 30, 33);

• The nuclear weapon states failed to demonstrate that any use of

nuclear weapons, including a "clean" use involving "low yield" weapons, could comply with legal requirements or avoid catastrophic escalation (¶94);

• [I]f the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal" (¶47).

The ICJ's holding that threat or use is generally illegal was qualified by the statement that "the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." (¶105(2)E). In explanation, the ICJ referred to the right of self-defence, the policy of deterrence (whose legality the Court declined directly to assess) and the elements of fact and law at its disposal. However, threat or use in such a circumstance remains subject to the requirements of humanitarian law. As the ICJ stated, a "fundamental" and "intransgressible" rule is that "[S]tates must *never* make civilians the object of attack and must consequently *never* use weapons that are incapable of distinguishing between civilian and military targets."(¶¶78, 79, emphasis supplied). The ICJ's finding of general illegality of threat or use was not dependent upon any particular treaty, but rather on the basis that a nuclear weapon necessarily has characteristics which cause untold environmental damage and civilian death, at odds with general international law based on both custom and treaty, including the Hague Regulations.

The ICJ also unanimously held that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." (¶105(2)F). The Court explained that Article VI of the Nuclear Non-Proliferation Treaty (NPT) imposes "an obligation to

achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith." (¶99). The Court observed that states comprising "the vast majority of the international community" are parties to the NPT. The Court further stated that "[v]irtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States." (¶100). The Court concluded that nuclear disarmament is "an objective of vital importance to the whole of the international community today." (¶103).

Given the ICJs general framing of the obligation of nuclear disarmament, its reference to the very wide adherence to the NPT and to General Assembly resolutions on nuclear disarmament, and its reference to the "whole of the international community," it follows that the obligation of good-faith negotiation of nuclear disarmament applies to all states, including those few outside the NPT (Israel, Pakistan, India, perhaps the Democratic People's Republic of Korea). That indeed is the view of the President of the ICJ at the time, Mohamed Bedjaoui, who stated in his declaration accompanying the opinion:

> "As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold general obligation, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result. Indeed, it is not unreasonable to think that, considering the at least formal unanimity in this field, this twofold obligation to negotiate in good faith and achieve the desired result has now, 50 years on, acquired a customary character."

(¶23). General Assembly resolution 51/45M of December 1996 welcomed the ICJ's opinion, and in its first operative paragraph "underlined" the Court's unanimous conclusion regarding the nuclear disarmament obligation. It was adopted by a vote of 115 to 22, with 32 abstentions. A resolution of the same form has been adopted by similar majorities every year since then, most recently resolution 59/83 of December 2004, adopted by a vote of 132 to 29, with 24 abstentions. Operative paragraph one of that resolution provides that the General Assembly:

> "*Underlines once again* the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

Significantly, in a separate vote, the above paragraph was adopted by a vote of 170 to five (including Israel), with four abstentions.

In light of the foregoing developments, there exists at the very least the presumption that the threat or use of nuclear weapons in any circumstance would violate international humanitarian and other international law. Further, based on the NPT, the ICJ's opinion, and General Assembly resolutions, states are obligated not to acquire nuclear weapons and to negotiate their elimination if they do possess them. That Israel is not a party to the NPT and does not officially acknowledge possession of nuclear weapons does not bar the application of general obligations of international law regarding both possession and use. Further, whether Israel is complying with its obligations regarding threat, use, possession and disarmament of nuclear weapons is a matter of domestic and international concern. Evaluation of the state of compliance requires the dissemination of some significant amount of information about Israel's nuclear capabilities and policy. While the State of Israel is not a signatory to the

Nuclear Non-Proliferation Treaty (NPT), the stockpiling of such weapons, coupled with threats of use, confronts international law principles recognized in the ICJ's 1996 decision.

Prior statements of the United Nations confirm the status of nuclear weapons as an issue of grave international concern. In resolution 1653 of 1961, the General Assembly declared the use of nuclear weapons to be "contrary to the spirit, letter and aims of the United Nations, and, as such, a direct violation of the Charter of the United Nations," "contrary to the rules of international law, and to the laws of humanity," and "a crime against mankind and civilization." A later resolution, No. 46/37 D of 1991, called for a convention prohibiting the use of nuclear weapons.[23]

Clearly these developments establish a high level of tension between the State of Israel's possession of a nuclear stockpile with concomitant implied threat of use, and the international community.[24] While many

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[23] See Burroughs, *supra* at 27.

[24] "In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons." (ICJ Opinion, ¶98). All actually existing nuclear weapons programs have engendered extensive government secrecy, and the making of decisions by tiny elites that affected the populations not only of states possessing nuclear weapons but of the entire planet. The kind of unaccountable power wielded in secret by those empowered to plan for nuclear war and to protect the ultimate "state secrets" surrounding nuclear weapons are both ripe for abuse and by their very nature incompatible with democracy. As the ICJ noted, the only real antidote to this is "the long-promised complete nuclear disarmament" (*Id*.). Before this necessary end is achieved, the only brake on the dangers to democracy and human survival posed by the nuclear national security states and their characteristic secrecy is the maximum possible public scrutiny and open debate about the role nuclear weapons have played and continue to play, and how we will end the threat nuclear weapons pose to us all.

within the State of Israel, and certainly within its executive departments, consider matters of nuclear deterrence to lie outside judicial review entirely as a matter of supreme national security (and hence the exception to fundamental freedoms under the Basic Law and ICCPR), these issues nonetheless transcend national boundaries and are at the forefront of international political and legal efforts. If political speech is already afforded heightened protections under Anglo-European legal doctrines, certainly speech which concerns and is in furtherance of the developing international norms restricting if not altogether prohibiting nuclear weapons must be viewed in the context of privileged expression.

It was not coincidental that the ICJ's 1996 advisory decision touched on the issue of the individual's relationship to the state when it cited to the Nuremberg International Military Tribunal in finding that the humanitarian rules in the Hague Conventions applied to all civilized countries and were declaratory of the laws and customs of war.[25] The same Nuremberg Tribunal observed that, "[t]he very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." *U.S. et al. v. Goering, et al. (The Nuremberg Trial)*, 6 Federal Rules Decisions (F.R.D.) 69, 110 (1946).[26]

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[25] International Court of Justice, Decision of 8 July 1996, ¶80.

[26] " It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized." *The Nuremberg Trial, supra.*

The linkage between Petitioner's actions and the fundamental rights afforded under the Basic Law and ICCPR must therefore be examined not merely from the confines of the State's national security concerns, but also from the perspective of the conformance of the Petitioner (and the State) with international responsibilities and norms.

CONCLUSION

The administrative orders against Petitioner involve the broadest of prior restraints against basic freedoms guaranteed under Israeli law and international convention. Unlike nearly all of the international precedents guiding this Court, the orders did not result from an adjudicatory process but were purely administrative and *ex parte* in character. They make no effort to restrict specific content but are solely temporal. All foreign travel or Internet use is banned, all contact with foreign media is banned, regardless of content. The consequence of such orders is an extraordinary deprivation unknown in recent Anglo-European jurisprudence.

As an amicus curiae organization, IALANA submits this brief to guide the Court into careful and equitable deliberation of appropriate standards of judicial review consistent with fundamental jurisprudence of Commonwealth, European and American Courts, and consistent with the Basic Law and the ICCPR.

Respectfully submitted,

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