



Abstract

At the Supreme Court  
Sitting as the High Court of Justice

HCJ 6732/20

**Petitioners:**

1. The Association for Civil Rights in Israel (ACRI)
2. Adalah – The Legal Center for Arab Minority Rights in Israel
3. Physicians for Human Rights – Israel
4. Privacy Israel

Represented by Attorneys Gil Gan-Mor and Dan Yakir  
**The Association for Civil Rights in Israel**

- Versus -

**Respondents:**

1. The Knesset
2. The Government
3. Israel Security Agency
4. Ministry of Health
5. Privacy Protection Authority

**Petition for the Granting of a Decree Nisi and Request for an Urgent Hearing**

The honorable Court is asked to issue a decree nisi addressed to the Respondents instructing them to come and state cause as follows:

- A. Why it should not be determined that the Authorization of the Israel Security Agency to Assist in the National Effort to Curtail the Spread of the New Corona Virus and to Promote the Use of Civilian Technology to Locate Persons Who Were in Close Contact with Patients (Temporary Provision), 5780-2020 (hereinafter – **the ISA Tracing Law** or **the Law**) is annulled.
- B. Why it should not be determined that section 11 of the Israel Security Agency Law, 5762-2002 (hereinafter – **the ISA Law**) is annulled for the purpose of the ISA Tracing Law; or, alternatively, that the powers granted by section 11 of the ISA Law cannot be used for the purpose of the ISA Tracing Law.
- C. Alternatively, why it should not be determined that the government's declaration of Sept, 19, 2020 authorizing the ISA to assist the Ministry of Health is annulled.

### **Introduction and Request for an Urgent Hearing**

This petition strikes at the core of the protection of individual liberties and the rule of law.

The law that forms the focus of this petition authorizes the ISA to undertake the mass and ongoing surveillance of the citizens of the state, and to direct a tracing tool that was created and intended purely for security purposes in order to assist in the implementation of epidemiological investigations as part of the attempt to confront the Coronavirus. The Law constitutes an extension of the emergency regulations and government decisions that were already discussed before the honorable Court in [HCJ 2109/20 Ben Meir v Prime Minister](#) (April 26, 2020) (hereinafter – the **Ben Meir** case). On the basis of the decisions, and now – on the basis of the Law, the ISA has activated its tracing means since March, with the exception of a brief period when the tracing was halted in accordance with the government decision and at the request of the Head of the ISA.

The ISA tracing actions were resumed on July 1, 2020, almost three months ago, when the second wave of infection was rising, when it was claimed that the tracing actions would enable the “flattening of the curve” and prevent a second closure. Since then, the ISA tracing actions have led to the placement in isolation of around half a million citizens. Despite this, just before Rosh Hashanah a second closure was imposed, and the infection indexes are the highest since the beginning of the epidemic by any possible measure.

No-one disputes that the Coronavirus has presented the State of Israel with an unprecedented civilian crisis. There is still no sign of an end to the crisis, and it can be expected to continue to accompany us for a protracted period and to present individuals, society, and the economy with difficult challenges.

The legislature indeed set its sights on the desire to flatten the curve of infection. However, even a path paved with good intentions is liable to lead to a nightmare, and, as the honorable Court has stated, “is a step that might cause any lover of democracy to lose sleep” (**Ben Meir**, para. 37 of President Hayout’s opinion). Under the cloak of the crisis, and in the shadow of feelings of frustration, fear, and despair, Israel has become a country that permits the ongoing and severe violation of basic rights. Even now, no democratic country has dared to take such extreme action and to recruit its secret services to the effort to halt the epidemic.

The mass surveillance of innocent citizens is inherently improper, even for security needs. It is all the more improper when it is activated against citizens as part of the struggle against a civilian crisis. It will be hard to put this genie back into the bottle. This is why tracing of this type is disproportionate.

When the ISA was first authorized to assist in uprooting COVID-19, in March, this was implemented through emergency regulations, and later through empowerment under the ISA Law. The petitions submitted in response to these steps warned of the constitutional damage, but also focused on the proceeding.

The circumstances were also different. The outbreak of the crisis stunned the entire world, but was regarded as a one-time and temporary event that presented an apocalyptic threat to human society. In these circumstances, the government claimed, it had no alternatives, the health system was unprepared, it had been unable to establish a system for cutting the chain of transmission, and its ability to perform tests was inadequate – and, accordingly, there was no alternative but to turn to extreme measures in order to cope with a crisis in which more was unknown than known. Despite this, in the ruling in which it accepted the petitions, the honorable Court established that the authorization of the ISA could not continue without explicit authorization in primary legislation. In addition, the Court saw fit to address at length the substance of the matter – the severe constitutional damage caused by the use of the ISA's tracing tool, emphasizing the need to develop and present alternatives.

Despite the findings of the judgment in **Ben Meir**, the government, and the Knesset in its wake, chose to continue to authorize the ISA, even when the availability of tests improved significantly, from some 8,000 tests a day in the first wave to over 40,000. The health system is much better prepared than before, and a phone application for locating where infections occurred is available to citizens. The argument that there is no alternative has been replaced by a new tune: now the ISA tracing is not a matter of lacking alternatives, but rather a "supplementary tool." Thus the time has come to determine the substantive issue: the question of the constitutionality of a law that authorizes the ISA to use surveillance tools created to thwart security threats for the purpose of contact tracing and epidemiological investigations.

We are in the midst of a long-term crisis that can be expected to continue for a considerable time and which requires us to balance the need to return, as far as possible, to routine life and the protection of public health; between social and economic needs and the dangers of morbidity. Precisely because this is an ongoing crisis, we may no longer turn a blind eye to the use of draconian and undemocratic means and to a reality in which we become accustomed to such means.

The violation of constitutional rights is extremely serious and is unparalleled in the entire democratic world. Moreover, as time passes a bleak picture is gradually emerging, and it is becoming apparent that the recourse to the ISA's tracing tools has been undertaken in order to conceal failings in the management of the crisis, and in particular so that this can serve as a substitute – and an extremely inefficient one – for a proper system for conducting epidemiological investigations. Once again it has emerged that technology, however sophisticated and splendid, can indeed sometimes enhance human action, but it cannot replace it.

From the beginning of July through September 22, 2020, some 166,000 patients or carriers of the virus and around half a million Israelis were put into isolation on the basis of the ISA's determination that they had come into close contact with a patient. The ISA's tracing is locating around one-fifth of all patients. Approximately one-third of those placed in isolation appealed, and over 60 percent of the appeals were accepted. In other words, this is a tool that causes severe disruption to everyday life and seriously impairs public trust in the health system, while the ongoing reliance on the ISA's tracing means has lead tens of thousands of people into isolation without any objective medical

justification. Neither has this tool prevented the spread of the virus, and its contribution to cutting the chain of transmission is limited. At the same time, it seriously undermines public trust. Many people are afraid of erroneous identification, and some prefer to leave their telephone at home in order to avoid the violation of their privacy and erroneous orders to self-isolate. Thus it emerges that the violation of human rights inherent in the ISA's tracing is not even particularly efficient in securing its declared purpose, while it entails an extremely heavy price.

In addition, it has become clear that the reliance on the ISA's tracing is preventing the necessary improvement of the human system of investigations, and is delaying the advancement of technological means that are no less effective, and probably more so, than the ISA's tracing means – “civilian” alternatives that do not entail the violation of human rights, and hence also do not cause such a serious breach of public trust, a vital and essential resource in any effort to eliminate an epidemic.

**Accordingly, the honorable Court is asked to order an urgent hearing in the petition.**

### **The Factual Infrastructure**

#### **The Petitioners**

1. The Petitioners are civil society organizations active in the defense of human rights. The **Association for Civil Rights in Israel** (ACRI) is a nonprofit and is the oldest human rights organization in Israel. It has been active since 1972 in the defense of human rights, including the right to privacy and liberty. The **Adalah Center** is an association whose purpose is to defend human rights in general, and the rights of Arab citizens in particular. ACRI and Adalah were among the petitioners in **Ben Meir**. Physicians for Human Rights (hereinafter “PHR”) is a registered organization that brings together physicians and medical personnel in the defense of human rights and aims to work to defend and promote human rights relating to health in areas under the control of the State of Israel, in particular the issues of accessibility and equality in health services for different groups.

Petitioner 4, **Privacy Israel**, is an organization that was established recently against the background of the increasing violation of the right to privacy over the past few years. Its founders are academic researchers from the fields of law, the social sciences, computer science, and engineering, as well as former senior civil servants. The organization works to fortify, cultivate, and promote privacy and the protection of personal information in Israel and the perception of privacy as a constitutional right.

#### **Background: The Spread of COVID-19**

2. In Israel, as in the rest of the world, COVID-19 is spreading, and the government is taking various measures to address it. The aim of these measures, as the Ministry of Health explains, is to minimize the injury to human life, maintain public health, and to slow the spread of the virus in order to avoid an excessive burden on the health system.

3. The virus causes a new disease that in most patients is manifested, at most, in mild symptoms, however, a small percent of those infected are liable to decline into a serious health condition, to develop pneumonia and severe acute respiratory syndrome or other serious syndromes that can potentially even lead to death among some of those infected. The mortality rate among known cases varies from country to country and depends, among other factors, on the age of those infected and the quality of treatment; when at-risk populations are protected, the mortality rate among those infected falls in most countries. This is also the case in Israel, where the mortality rate is approximately 0.7 percent of identified cases.
4. The Ministry of Health believes that in the absence of a vaccine, vigorous steps are needed to slow the rate of spread of the virus; otherwise the number of those infected, and particularly of seriously cases, is liable to grow rapidly beyond the capacity of the health system at any given time, so that patients who could be saved with optimal care are liable to die.
5. Like many other governments around the world, the government has taken a long series of steps. Many of the steps relate to restrictions on the public for the purpose of slowing down the spread of the epidemic, including: provisions concerning isolation for those infected with the virus, as well as for people returning from abroad or suspected cases of infection; provisions for physical distancing between people; provisions for the wearing of masks outside the home; provisions for preventing gatherings in public spaces and businesses; the closure of educational institutions and non-essential workplaces; local closures, and even a general closure including a prohibition against leaving home otherwise than for the purposes defined in exceptions to the decision. The decision on a national closure was taken by the government just before Rosh Hashanah.
6. These actions can halt the spread of the virus, but as they become stricter, they also carry an unbearable economic, social, and health cost. Accordingly, and contrary to the decisions taken during the initial period of the spread of the virus in Israel, the government is striving to achieve a balance between maintaining routine life in the shadow of the epidemic and maintaining public health, and to avoid a protracted closure as much as possible, so that even now, when the country is under a closure and the restrictions are at their peak, it is still possible to go out to the workplace. This balance also entails the violation of individual liberties. Thus, for example, binding rules of behavior intended to reduce risk have been imposed, such as wearing a mask whenever people leave their homes, restricting gatherings, and taking steps to enforce the restrictions and prohibitions. All these limit freedom of movement, freedom of vocation, and personal autonomy. Some of the measures do not appear to be strictly observed by some of the public and are not being enforced.
7. Alongside the above, the government is working to expand the system of tests, improve the ability to treat patients, and optimize epidemiological investigations intended to reach as quickly as possible those who may have been infected and to cut the chain of transmission – actions that are at the center of the dispute concerning the law that is the subject of this petition.

8. As Professor Sigal Sadetzky, who until recently served as the head of the Public Health Services in the Ministry of Health, explained in her detailed letter to the Director-General of the Ministry of Health, addressing the need to halt the spread of the virus requires a combination of strategies, each of which will reduce to some extent the rate of infection, while only their combined effect will lower the transmission rate and permit life under the routine of Corona.
9. In her letter of responses to the Petitioners, Talia Agmon, Deputy Legal Advisor to the Ministry of Health, detailed some of the steps taken since the first wave: for example, the number of tests has increased from 8,000 a day to 40,000 a day, and in November there will be 100,000 tests a day. Like Professor Sadetzky, she also emphasizes the importance of combining strategies.

**Epidemiological Investigation and Locating Contacts as a Tool in the Fight against the Spread of the Epidemic**

10. Since infection of Coronavirus is transmitted through droplets and the virus is passed through close contact between people, when a patient is detected, an **epidemiological investigation** is undertaken, in which framework the Ministry of Health attempts to obtain as comprehensive information as possible about that patient's close contacts with others in order to determine who had contact with the patient liable to cause infection and to isolate such people rapidly from society in order to cut the chain of transmission.
11. The investigation is intended to track the contacts between a confirmed Coronavirus patient and others during the period of potential infection. The investigation is undertaken by questioning the patient as soon as possible after a positive laboratory result is received. The investigation relates to the patient's movement routes and contacts, in order to reach as quickly as possible anyone who was in close contact with the patient and to isolate them until 14 days have passed from the date of the close contact with the confirmed patient.
12. The efficacy of the epidemiological investigation also depends also on other capabilities, such as, for example, the ability to perform tests and receive results rapidly, since a delay in laboratory results also implies a delay in diagnosing a person as a patient, and hence a delay in undertaking the investigation for a confirmed patient – thus incurring additional days when any person who was in the proximity of that patient and may have been infected continues to move around and infect others.
13. Moreover, the epidemiological investigation alone cannot eliminate the circles of infection since, as noted in the detailed position paper dated April 20, 2020 by Professor Hagai Levine, the chairperson of the Association of Public Health Physicians, and Professor Nadav Davidovitch, the chairperson of the Public Health Forum, due to the characteristics of the virus, a symptomatic patient diagnosed by laboratory means represents only the "tip of the iceberg" of wider transmission of the virus.

14. Another difficulty in cutting the chain of transmission lies in the fact that the infectious stage of the disease occurs before the onset of symptoms, as well as among carriers of the virus who do not show symptoms. In addition to the fact that the investigation is undertaken at a late stage relative to infection, the Coronavirus tests are not sufficiently accurate or sensitive enough, so that 30% of the tests of those who have been infected with the disease show up as negative and hence no epidemiological investigation is undertaken in their regard.
15. Consequently, even a “perfect” epidemiological investigation can only cut the chain of transmission in 50% of cases. When the spread of the virus is extensive, and there is a heavy burden on the testing system, the ability to cut the chain of transmission is also reduced, and the dominant means are restrictions on gatherings, physical distancing, and personal protection. Hence the effectiveness of the system for cutting the chain of infection is particularly vital for the stage when the economy is open and the number of patients is small. However, it emerges that the manner in which epidemiological investigations are being conducted in Israel severely impairs their effectiveness.
16. First and foremost, the system of epidemiological investigations suffers from an acute shortage of personnel. In routine times 27 epidemiological nurses work in the system, and they must obviously receive reinforcements in the event of the outbreak of an epidemic. According to the Ministry of Health, there are currently 700 full-time positions alone involved in investigations. In addition, 260 researchers from the Home Front Command have undergone training and are due to join the system. 700 positions represents one investigator for every 13,000 people. In this figure Israel lags behind other countries confronting the spread of the epidemic: one researcher for every 4,000 residents in Germany, and one researcher for every 2,200 residents in England.
17. During the period following the first wave and the closure, the government did not act as required to strengthen the human investigation system. Dissatisfaction with the state of the epidemiological investigations, as well as with the manner in which these were activated, was also apparent in an interview with Professor Ronni Gamzu, who was appointed to integrate the government’s struggle against the spread of the virus. The comments in the interview, given after a visit to the site of the investigations in the Tel Aviv District, again expose the neglect of the investigation system by the Ministry of Health. For example, criticism was leveled at the fact that the investigators use their personal telephones during the process. The Ministry of Health admits that as a result of a shortage of personnel, no investigations are carried out today for 10% of the patients, and that only 68% of the investigations are completed in less than 24 hours.
18. Thus the relevant Respondents did not take advantage of the time window to streamline the human investigation system by adding personnel or work tools. This failing serves as an excuse and pretext for the need to authorize the ISA, but it could be easily corrected, and there have been some preliminary signs of this recently. A stronger system for cutting the chain of infection in the IDF has recently been

established, and within a short time it should enhance the efficiency of the human investigation system.

19. By way of grounds for the need for the ISA tracing, the Ministry of Health claims that reinforcing personnel cannot overcome memory problems, cognitive problems of language difficulties among patients who find it difficult to provide accurate information concerning their whereabouts. These problems are not unique to Israel, and in any case they can at the most explain the need to use technological means regarding the movements and location of some patients, but not to trace all patients indiscriminately. This argument is also irrelevant regarding the tracing of persons who may have come into contact with the patient. This cannot explain why it is necessary to use the ISA tracing for persons willing to offer precise details of their movements and whereabouts, based in part on the voluntary tracing application. Regarding language difficulties, if there is a difficulty in this regard, the solution is to recruit researchers who are fluent in the various languages.

#### **Technological Measures Complement the Epidemiological Investigations**

20. An epidemiological inquiry relies primarily on questioning and analysis. Technological measures can be used to streamline investigations, but cannot under any circumstances replace them.
21. A review by the National Information and Knowledge Center for the Battle against Corona noted, for example, that in some countries an automated investigations system has been established, allowing a person who has been infected to complete a digital form detailing their contacts even before the human investigation. This creates a commitment on the part of the infected person to examine their contacts, and saves valuable time in investigating those details that the infected person can provide without difficulty. This means does not yet exist in Israel, a fact that lengthens the questioning period and causes a loss of valuable time.
22. In some countries, a person is required to scan a barcode when entering a crowded public place. **Dr. Tehilla Schwartz Altshuler and Atty. Rachel Aridor Hershkowitz** of the **Israel Democracy Institute** mentioned in their study that the scanning of the QR code using a cellular device or identification card creates a digital logbook of all the places where the person was present over the course of the day. If the user is found to be positive for the Coronavirus and **grants their consent**, the information is forwarded to the Ministry of Health's server for the purpose of locating contacts.

#### **Voluntary Applications for Locating Contacts as an Ancillary Tool in Epidemiological Investigations**

23. Since the beginning of the epidemic, many countries have been working to develop technological means for locating contacts, due to the nature of person-to-person infection – droplet infection based on close contact between people. Briefly, applications for the digital location of contacts collect information indicating physical proximity between two different users. Proximity is gauged by comparing GPS signal-based location data, Bluetooth Low Energy (BLE) signals, and Wi-Fi signals.



24. The accuracy level of GPS-based location data is 5-20 meters. Wi-Fi signals offer an accuracy of up to 3 meters in closed commercial buildings, but their use is limited mainly to buildings such as shopping malls and office buildings, rather than open spaces. BLE signals have a relatively low strength and their level of accuracy is higher than that of GPS-based location data, at around 3-5 meters.
25. Reliance on each of these signals entails advantages and disadvantages. There is no technology – not even the ISA’s tracing by sophisticated means – that is without flaws or provides a complete answer to the need. However, BLE signals are undoubtedly considered more accurate in locating close contact compared to location data, and their use can provide an alert about close contacts without revealing location data, so that in terms of privacy protection, too, they are preferable.
26. A series of privacy experts in Israel also wrote to the Foreign Affairs and Defense Committee noting that attention to the Coronavirus around the world by technological means tends to prioritize decentralized location of contacts rather than centralized location tracing, since the latter is sufficient to provide warning of close contact with a confirmed carrier, and indeed to do so more accurately, without violating privacy and while reducing the risk of misuse of information. According to the experts, as of the end of May, 39 countries had offered applications for installation in smartphones, and in 22 of these countries the application operates on the basis of decentralized BLE technology.

### **The “Hamagen” Application**

27. In Israel the “Hamagen” phone application was developed, and launched in an initial version as early as the end of March 2020. “Hamagen” was developed using an open code system with the close supervision of privacy and security experts. The installation of the application is voluntary and is based on comparing the user’s location data (GPS) with the location data of confirmed Coronavirus patients held on the Ministry of Health servers. After installing the application, the user receives a random identification number from a central server at the Ministry of Health, while the user’s history of locations, alongside the history of the cellular networks used, is stored solely on the user’s personal device.
28. In the event that the user becomes sick, the history of location data saved on their application may be forwarded with their consent to the Ministry of Health, thereby enhancing the efficiency of the epidemiological investigation and warning others. In addition, any person who has installed the application receives a warning from the Ministry of Health whenever an overlap is found between the history of locations stored on their device and the history of locations of confirmed cases as updated in the servers of the Ministry of Health.
29. The first version of “Hamagen” monitors a place based on GPS and Wi-Fi, and accordingly its accuracy is substantially lesser than that secured by BLE-based tracing of contacts. However, in the event that the user receives an alert from the application, they can check the reliability of the information themselves and report

to the Ministry of Health on their entry into isolation, or alternatively report an error in the data. This dual test mechanism enables the user to avoid false tracing.

30. On June 23, 2020, the representative of the Ministry of Health to the Committee declared that a “Hamagen 2” application was ready for use, including the addition to BLE technology to trace close contacts. “Hamagen 2” was only launched on July 27, 2020, and it is now available for installation by most smartphone owners.
31. The potential for the installation of “Hamagen 2” depends on a decision by the government to market it to the public; on proper publicity; and on dialogue with local/religious leaders and opinion-makers. A representative survey of the Israeli public undertaken by Dr. Eran Toch and Oshrat Elon of Tel Aviv University, for the purpose of a study an advanced draft of which was forwarded to the Petitioners, shows that regarding “Hamagen 1,” the government managed to convince only 32% of respondents that the application helps stop the spread, and only 28% stated they would recommend to their friends to download the application (the researchers emphasize that in practice the percentage of downloads is lower than the survey data). The application was also recommended by privacy experts, as it stores personal information only on the device, but the survey indicates that the public perceives “Hamagen” as a threat to its privacy: 43% of respondents fear a violation of privacy.
32. The researchers reached the conclusion that **the most significant factor in downloading the application is the degree of confidence in the effectiveness of the tool**. However, concern at **the violation of privacy is the main factor impeding installation**. Other parameters were less significant (e.g. the general attitude toward the epidemic and trust in the leadership or instructions of the Ministry of Health). Among respondents who downloaded the application but later removed it, the main reason was a lack of confidence in the effectiveness of the application.
33. If the government conveys the message to the public the message that only the ISA’s tracing is effective, it can be assumed that it thereby reinforces the belief among people that “Hamagen” is not effective, or is even superfluous – perhaps something that it is “nice to have,” but not a necessity. Conversely, if the government were to begin to explain the benefit of “Hamagen” and its advantage in protecting users’ privacy, the willingness to download and use the application would increase. In a situation where the application replaced the ISA’s tracing, confidence in the application will increase and mutual responsibility among individual members of society will lead to its broad adoption. Since “Hamagen” is based on decentralized rather than centralized technology, it will also be easier to dispel fears of the violation of privacy, thereby also raising installation rates. The involvement of the ISA and the lively discourse about its tracing may actually exacerbate fear at the violation of privacy, eroding public trust and willingness to cooperate. The Ministry of Health has set an initial target of installation on 1.8 million telephones in order to achieve a significant effect. “Hamagen” is currently installed on 1.1 million devices.

#### **The Activation of the ISA in Israel to Monitor Location-based Contacts**

34. On March 15, 2020, the government decided for the first time to charge the ISA with tracing contacts. This is the only decision of its kind in all the democratic countries confronting the virus.
35. The ISA is a secret security body that operates under the terms of the ISA Law. It has received powers and effective operational tools for executing its missions, and particularly for preventative security tasks. Accordingly, the government regarded the activation of its capabilities as an effective tool for the purpose of tracing contacts.
36. Among other powers, the ISA holds far-reaching powers for the collection of information (section 8 of the ISA Law), including the authority to receive “communications data” from communications companies (section 11 of the Law).
37. Section 11 of the ISA Law establishes that the prime minister is entitled to order communication companies to transfer to the ISA communication data collected in their databases for the purpose of performing its functions in accordance with the Law. Once the information has been transferred to the ISA, use thereof requires a permit from the head of the ISA.
38. Indeed, section 11 of the Law created a tracing “monster” that none of the Members of Knesset imagined. An investigation published on March 27, 2020 in Yediot Acharonot describes the way in which the powers embedded in section 11 have been implemented over the last two decades. According to the report, the ISA enjoys direct access to the database of all the communication suppliers in Israel. It continuously and regularly stores the communications data and other personal information of the entire population of the country. This has led to creation of an enormous database known as “The Tool,” intended to allow the use of the information to prevent terrorism or subversion.
39. Atty. Eli Bahar, the former Legal Advisor of the ISA, discussed this database in his book **The ISA under a Test**, which was published recently. He explains that the types of information license holders are required to transfer to the ISA are stipulated in rules rather than in the Law. According to Bahar, these include location data (location of the end equipment held by the subscriber); subscription data (the type of service provided, name, address, subscriber’s identity number, details of means of payment, address at which the communication device is installed, and identifying details of the device within the subscriber’s network); and transmission data (the type of message transmitted, identifying details of the communication device serving as the source of the message, its destination or path, identifying details of the subscriber who is the source or destination of the message, date or broadcasting or receipt of the message, and the duration, volume, or scope thereof (Eli Bahar **The ISA under a Test – Security, Law, and Democratic Values** 152 (Israel Democracy Institute, 2020) (hereinafter – **The ISA under a Test**)).
40. These abilities explain the appeal of the ISA to the government for executing contact tracing. Indeed, every citizen in the country has discovered that the ISA is capable within a short period of time of knowing not only where they are at a given

moment, but also where they were at any given moment in the past, with whom they met, for how long, and so forth.

### **The Controversy about the Efficacy of the ISA for Contact Tracing Compared to Human Investigation and the Contact Tracing Application**

41. As noted above, public health experts Prof. Levine and Prof. Davidovich note that the use of the ISA's tracing for locating the contacts of a confirmed patient is inefficient. The reason for this is that the ISA focuses solely on patients with a positive diagnosis, who are only the tip of the iceberg of the chains of infection.
42. On July 1, 2020, the use of the ISA's tracing was resumed following the enactment of a temporary provision for three weeks, which the Law that is the subject of this petition amended and replaced. Accordingly, the ISA's tracing has continued without interruption for almost three months. During this period, through September 16, 2020, 572,443 text messages have been sent on the basis of the ISA's tracing alone.
43. The scope of these text messages has enormous significance for the fabric of life. Each message constitutes an automatic isolation order for a period of up to 14 days, which for many people constitutes a factor that completely, abruptly, and surprisingly disrupts the routine of life and the possibility of earning a living. Many families are unable to observe the Ministry of Health's isolation instructions since there are small children in the home who cannot be separated from their parent, or since their home lacks a suitable room for isolation. As a result, the entire family is required to go into isolation, so that the circle of those in isolation expands far beyond the quantity of text messages sent.
44. Of all the hundreds of thousands of people obliged to isolate themselves due solely to the ISA's tracing, 32,692 positive carriers were ultimately discovered. The percentage of contacts that led to infection out of the total contacts located is 5.7%. For every contact that was detected and led to infection, almost 19 did not lead to infection. Since the tracing takes place from the outset in places where sick persons are present, it is difficult not to wonder how many patients would be discovered by means of a completely random survey of over half a million people, given that the rate of positive results in tests has for some time been around 10%. The ISA's tracing identifies patients at the unbearable cost of hundreds of thousands of isolations.
45. On July 1, 2020, there were 26,257 confirmed patients in Israel. On September 16, there were 170,465 confirmed patients in Israel. In other words, 144,208 patients were added during this period. Of these, the ISA's tracing found 32,692 – **22% of the patients**. Such is the marginal benefit of this tracing.
46. Accordingly, the contribution of the ISA's tracing to cutting chains of infection would seem to be smaller than described, while its price is unbearable – the isolation of tens of thousands of people without any epidemiological justification and damage to public trust. This, of course, is in addition to the extremely serious damage to basic rights and to democracy.

47. By comparison, human investigations **manage to predict contact leading to infection in four times more cases than investigations based on the ISA's tracing.**
48. In the letter from the privacy experts, they warn the members of the Foreign Affairs and Defense Committee that key systems with cellular location identify contacts even at a level of precision of several dozen meters, thereby causing many false alerts. This reality encourages a dangerous disregard for the warnings among the public and a loss of confidence in the system's messages. The experts warn that this will be reflected in a tendency for people to refrain from taking their telephones to "suspect" locations, such as supermarkets, events, and demonstrations.
49. This forecast was precisely realized with the resumption of the ISA's tracing at the beginning of July, when many thousands of people complained about erroneous isolation orders they had received. As of September 16, 2020, 281,374 appeals were submitted and 176,387 people were released from isolation following their appeal. Some of the appeals were only accepted after many days of isolation and frustration. The Ministry of Health does not believe that the large number of appeals reflects a lack of precision, and that the appeals system is based on trust. However, this trust is granted in accordance with the Law only when the individual declares that they were not at the place where they were alleged to have been. Accordingly, it is difficult to reconcile this with a situation where 63% of the appeals are accepted, a fact that indicates considerable imprecision and erroneous isolations.

#### **Damage to Public Trust due to the ISA's Tracing**

50. Cellular location is indeed a good preliminary indication for locating suspects of security offenses, when accompanied by additional means – technological and human – that focus and enhance its precision. However, it is not very successful in locating the close contacts of Coronavirus patients, when placed on its own without complementary means. The result is that there is a "cry wolf" effect here that erodes public trust and encourages people to ignore the instructions. Concern that people will ignore the instructions is heightened by the severe economic distress caused as a result of the isolation of those who cannot work from home, who have a business, who have children in various frameworks, and so forth.
51. Indeed, a survey by the Israel Democracy Institute from July 15, 2020, two weeks after the resumption of the ISA's tracing, shows a dramatic decline in public trust in the bodies managing the crisis. The survey states that there was a very sharp decline in the degree of trust regarding their handling of the Coronavirus issue, both regarding the Prime Minister and Minister of Health and regarding the professional medical and economic functions in the government. Trust in the professional functions slumped from 59% in mid-June to 40.5% in mid-July.
52. The wholesale placing of people in isolation without justification not only impairs public trust in the health authorities and cooperation with its instructions, but can also cause serious economic damage, crush small businesses, and impose a de facto closure on hundreds of thousands of families, despite the government's declared aim of avoiding disruption to life and to the economy.

### **The Decisions concerning the Empowerment of the ISA and the Legal Proceedings through the Enactment of the Law**

53. As noted, on March 15, 2020, the government decided for the first time to charge the ISA with undertaking contact tracing by means of the procedure established in section 7(b)(6) of the ISA Law, according to which the ISA will pursue **“an activity in another area as determined by the government, with the approval of the Knesset Committee for ISA Affairs, intended to protect and promote vital national interests for the national security of the state.”**
54. On April 26, 2020, the honorable Court accepted the petitions on the subject, ruling that it would not be possible to continue to use the ISA on the basis of the empowerment decision beyond April 30, 2020, and that if the government wished to continue to draw on the ISA’s services, this must be formalized in law. The honorable Court further established that it would be possible to continue to use the ISA for a few weeks if the legislation proceeding were initiated.
55. On July 20, 2020, the law was passed in the Knesset by a majority of 48 in favor to 23 against.
56. The Law constitutes a temporary provision for a period of six months. Pursuant to section 3 of the Law, the government may declare the authorization of the ISA to undertake actions required by the Ministry of Health in the execution of epidemiological investigations: the identification of location data for patients within a period of up to 14 days prior to their diagnosis with the disease, and identification of people who came into close contact with the patients during the said period. The Law further determines that during the period of validity of the declaration, the Ministry of Health will be permitted to transfer to the ISA a request to receive assistance, provided that the number of new patients on that day or on the preceding day exceeded 200.
57. The declaration is for 21 days at the most, and requires the approval of the Committee, which may approve the declaration, refrain from approving it, or approve it for a shorter period. Section 5 of the Law states that during the period of validity of the declaration, the ISA is authorized, at the request of the Ministry of Health, to process technological information about the patient to whom the request relates and about people who came into close contact with that patient during a period of up to 14 days prior to their date of diagnosis as a patient. Technological information includes identification data, location data, and communications data, with the exception of the content of a conversation.
58. On the basis of the information processing operations, the ISA is authorized to forwards to the Ministry of Health location data for the patient during a period of 14 days before the date of their diagnosis as a patient, and concerning those who came into contact with the patient: identification data, the date and time at which they came into close contact with the patient, and the location where the contact occurred. It was further determined that the assistance operations will be carried out on the basis of the technological information held by the ISA alone, in as

automated a manner as possible, and while protecting the privacy and dignity of the patient and those with whom they came into close contact.

67. Section 12A of the Law establishes that the Ministry of Health is to make available for public use, without payment and within seven days, civilian technology for locating contacts that will be installed and used solely with the user's informed consent and free will.

Although the Law does not mention a particular technology, the reference is to the "Hamagen 2" application. It should be emphasized that the Law does not create any conditioning between the authorization of the ISA and the launching of the civilian technology, and these can serve as complementary rather than alternative means. The approach of the chairperson of the Committee during the deliberations was that this constituted an additional protective layer, and that it was possible that in the future the government might choose to discontinue the use of the ISA based on the presence of civilian technology, though there is no such obligation.

68. **The Data Protection Authority expressed its unequivocal position that the use of the ISA's tracing should be discontinued**, and that an adequate alternative exists in the form of the "Hamagen 2" application. The Authority had examined this application, determined that it was ready to be launched, and recommended its launching without delay.

### **The Legal Argument**

#### **Violation of Privacy and Personal Discretion**

69. The use of mass means of tracing the movements of patients, of the places where they have been present, of close contacts of other people with patients – all this without their consent – gravely violates the right to privacy.
70. The Data Protection Authority also noted the serious violation of privacy that accrues from the activation of the ISA's tracing. The Authority's chief concern relates to the coercive collection of location data without consent. The Authority is of the opinion that this entails a considerable risk to privacy, even when the data are transferred in an anonymous manner, due to the potential to de-anonymize the data after the information has been transferred to external hands.
71. The Authority notes that digital location data expose the unique trail each person leaves, and thereby permit the extrapolation of extremely personal information, such as the health and mental condition, beliefs, political opinions, sexual orientation, economic condition, personal and social contacts, employment status, and the person's personal status. The Authority further warns of the danger that personal information may seep out, since "the growing demand for location data creates an incentive for the unlawful uses of the information (for example, the sale of information to information traffickers), both by those permitted to access the database (ISA employees, the director, or the function holding the database) and

by an external hacker, entailing the exploitation of the information for the purposes of extortion, harassment, employment or insurance discrimination, and so forth.”

72. The article by Professor Michael Birnhack also addresses the authorization of the ISA to undertake contact tracing and an analysis of the ruling in **Ben Meir**. Birnhack argues that the violation of privacy inherent in the ISA’s tracing relates to medical information, information about location, and information about contacts and social encounters, as well as the generalized violation of privacy. Prof. Birnhack analyzes each of these violations and reaches the conclusion that the Law leads to the exposure of medical information, information about location data, and information about interpersonal relations, constituting private information worthy of protection.

### **The Violation of Liberty**

73. The Law violates the right to liberty. The Law permits the tracing of a person’s movements against their will, and as a result of this tracing the ordering of that person to enter into solitary confinement for up to two weeks, without any grounds or explanation, due to its confidentiality. The violation is sweeping, since the Law is based on a technological and non-human system and on an examination of location that is inaccurate in a significant percentage of cases in identifying close contact liable to cause infection. The Law only allows for the exercise of discretion within the scope of an appeal.
74. No-one disputes that an isolation order issued on the basis of a human epidemiological investigation also violates liberty. However, the vast difference is that human investigation requires justification and medical discretion, whereas an investigation based on an imprecise technological means entails a violation of liberty that lacks epidemiological justification. Thus, for example, in the case of the isolation of someone who was close to the patient, but beyond a wall or on a different floor, or someone who was sitting in a restaurant, but at a table eight meters away rather than two meters.
75. **A human investigation includes medical discretion.** For example, if a confirmed patient met his parents in an open space, while maintaining a distance of five meters and wearing masks, there will be no justification for placing them in isolation. Indeed, in various cases published in the media, the Ministry of Health released people from isolation who had been close to a sick person when the rules of social distancing and proper protection had been observed. By contrast, the position of the Ministry of Health is that a person placed in isolation due to a contact located through the ISA’s tracing is not to be released on the basis of their declaration that they observed the Ministry of Health’s rules concerning social distancing and protection.
76. The Law also violates liberty due to the disciplinary and regimenting effect of protracted mass tracing such as the ISA’s tracing, which cause a person to refrain from various actions. A person who knows that their movements are being monitored and exposed to the authorities will change their behavior and will be wary of their statements. This is particularly true when as a result of the activity



means are activated that send messages to a series of people in a manner that, in certain circumstances, may disclose encounters and locations of that person to third parties against the person's will.

77. The regimenting effect is reinforced due to the sense of arbitrariness in the activation of the means, which is effected without human discretion. As a result, people are liable to be reluctant to participate in demonstrations they would go to were it not for these means, since they will be afraid of the location of a patient in their surroundings and their placement in protracted isolation, even if they wear a mask, maintain distancing, and are careful.
78. The violation of liberty due to the ISA's tracing and isolation without epidemiological justification lead to the violation of a wide circle of rights: employment, freedom of movement, medical treatment, education, and so forth, and are also liable to cause unnecessary anxiety.

### **The Law is Unconstitutional**

#### **Means Exist that are More Effective and Do Not Violate Human Rights**

79. The test of the least injurious means is designed to examine whether there are effective means that achieve the purpose of the Law and that do not violate human rights, or violate human rights to a lesser degree.
80. In order to examine the alternative means, one must first set the measures in the Law in their proper context. As explained in the factual section of the petition, an epidemiological investigation is one of many means, and not the be all and end all. The investigation has inherent limitations, since it usually begins at a stage when widening circles of infection have already been created, since the infectious stage begins days before the confirmation of the virus in the laboratory, and may be symptomless. Technological means, whether the ISA's tracing or the application, are also applied with a considerable delay after the patient's infectious stage, when the circles of infection have already been created.
81. The activation of these means depends on the system of investigations, which is still far from offering a sufficiently rapid response, particularly in an extensive outbreak that places a heavy burden on the investigation system. The activation of the means as part of an investigation depends on a positive laboratory result, which may be received after a significant delay following infection, and which in 30% of cases gives a false negative result. The investigation does not examine secondary or tertiary circles of infection (the contacts of persons who came into contact with a patient), as this would add tens of thousands of people to the circle of those in isolation. Accordingly, the epidemiological investigation is an important tool, but one that forms part of an entire fabric of means, rather than an isolated means that stands alone between us and victory over the virus.
82. Investigations and digital means are not a substitute for adherence to rules of behavior such as wearing masks in enclosed spaces, physical distancing, avoiding

leaving the house when one is not feeling well, and so forth. These “dumb” measures, proper information, and enforcement are probably the main means of slowing down the spread of the epidemic and serious morbidity, alongside special protection for risk groups.

83. The epidemiological investigation is an important tool, but before discussing ways to render the investigation more efficient by technological means, it is important to consider the possibility of enhancing the efficiency of the investigative system by non-injurious means, such as recruiting additional personnel to undertake investigations, optimizing its work, and introducing enhanced means for the intake and storage of data. In all these areas there is still room for considerable improvement, as explained in the factual section.
84. Even if it might have been possible to show some understanding for the government’s actions in mid-March, it is difficult to understand why even today the system of epidemiological investigations is significantly smaller compared to other countries, and why it has only 700 contact investigators. It is difficult to understand why the expansion of the system is not being prioritized and granted resources and is proceeding at a leisurely pace.
85. It is difficult to understand why resources have not been invested in improving human investigations, not only in terms of skilled personnel but also in terms of resources for enhancing the intake of information. It is incomprehensible why some investigations that are recorded on paper and only thereafter entered into the computer. The use of personal telephones in implementing epidemiological investigations is unacceptable.
86. Some countries are confronting the epidemic solely by means of human investigations, without any technological means, or have complementary and voluntary means without high take-up rates among the public. Had the period until now, and particularly the lull between the first and second waves of the epidemic, been used to improve the human investigation system, the injurious Law could have been avoided.

### **Complementary and Less Injurious Technological Means**

87. An application such as “Hamagen” is undoubtedly a worthy technological alternative that can secure the purpose of assisting human epidemiological investigations. The violation caused is certainly very low in the case of “Hamagen,” since it is based on decentralized and voluntary technology that requires consent. The Data Protection Authority examined “Hamagen 2,” together with officials from the Ministry of Health, and concluded unequivocally that it is a more appropriate and proportionate alternative means than the ISA’s tracing. The Authority recommended the discontinuation of the use of the ISA’s tracing and the use of “Hamagen 2” as a complementary technological tool to human investigations.
88. We now turn to the question of whether an alternative means such as “Hamagen,” and especially “Hamagen 2,” constitutes an adequate alternative for achieving the purpose. To begin with, the purpose is to quickly identify the movement paths of

patients and to locate contacts at high risk for infection. “Hamagen 2” provides a solution both for the Ministry of Health’s need to reproduce movement paths and locations of confirmed patient quickly in order to enter this information into the Ministry’s servers and to the need to locate contacts at high risk for infection. More importantly, “Hamagen 2” enables the rapid dissemination of accurate information to those who come into close contact with diagnosed patients, in a manner that maintains the anonymity and privacy of both the patient and the contacts.

89. We will now move on to examining the improvement of human investigations in terms of **accuracy and efficiency**.
90. Regarding **accuracy** – there can be no doubt that means exist to protect privacy and secure better results than the ISA’s tracing, such as the “Hamagen 2” application, which includes the location of contacts at a higher level of accuracy on the basis of BLE technology and GPS- and Wi-Fi-based tracing of location simultaneously. The “Hamagen 2” application is potentially a more accurate tool, and one that together with the improvement of the human epidemiological investigation system could provide an indication of sufficiently close and protracted contact, while maintaining privacy, including cases that do not emerge in regular investigations. In addition, this tool helps in the rapid retracing of movement paths in the event of infection.
91. Contrary to the government’s claim, in terms of **efficiency**, too, the ISA’s tracing tool does not offer any advantage over a voluntary and decentralized technological alternative such as “Hamagen 2.”
92. As explained in the factual section, the ISA’s tracing is insufficiently accurate and, accordingly, many people are placed in isolation without any epidemiological justification. Erroneous isolation orders lead to a need for tests and place pressure on the already overburdened test system. The large number of appeals against erroneous isolation orders also seriously impedes the Ministry of Health’s human investigation system. By contrast, the “Hamagen” application includes an additional verification stage that offers further indication as to whether the case involves an error or a correct alert.
93. Another advantage of a contact location application such as “Hamagen 2” is **speed**. As mentioned, the application works in such a way that each mobile device has a code, and this code is recorded on all the phones that were in its vicinity for 15 minutes or more. Once a person is diagnosed as a Coronavirus carrier, that person’s code is entered into the system, and immediately all those with whom the person came into contact receive a notification instructing them to enter into isolation. By contrast, the use of the ISA’s tracing means wastes precious time due to the series of actions that must be executed: Transferring the telephone number of the diagnosed patient from the Ministry of Health to the ISA; time for checking the databases; time to send the reply back to the Ministry of Health; and time to send notifications.
94. It is true that, on the face of it, the ISA’s tracing means offers an advantage in enforcement as a centralized and coercive means, since any location of a contact

is immediately entered into the list of people required to isolate and forwarded to the police. Conversely, a voluntary alternative such as “Hamagen 2” relies on the personal responsibility of citizens to self-isolate and to notify the authorities. However, this is how democracies operate – by explaining and educating citizens to act responsibly, rather than by tracing them in a coercive manner based on fear.

95. Thus we can see that none of the means offers a perfect solution. However, even in the absence of a centralized ability to impose isolation, it can be assumed that with proper outreach the majority of people who received notification through the application of a close contact will follow the rules and self-isolate, go to get tested, or at the very least take special steps to protect themselves and their loved ones, and will be more aware of the possibility that they might develop symptoms. It is sufficient that most people will act in this manner in order to make a significant contribution to the goal of flattening the morbidity curve.
96. It should also be taken into account that if most of the population is not interested in installing the application, as the government anticipates, this constitutes a clear expression by the public of a lack of trust in the use of technology as part of the response to the epidemic. This reinforces still further the claim of the violation of privacy. It is impossible on the one hand to belittle the gravity of the violation of privacy on the grounds that most people are not concerned about the authorities tracing them, and are willing to accept this on the grounds of social solidarity, while in the same breath claiming that there is no alternative to tracing, since most people have not bothered to take thirty seconds out of their time to download a free application intended to provide them with protection.

#### **The “Hamagen 2” Application as a Complementary Means to the ISA’s Tracing – A Recipe for the Failure of the Application**

97. The Law clearly shows that the government regards the application as a complementary tool, and not as an alternative tool to the ISA’s tracing. In other words, if until now the tone of the government’s positions was that there is “no alternative,” because there is no alternative means, the statement now is that even if there is an alternative means and a choice, it will not replace the use of the ISA but will constitute a complementary means.
98. This is a recipe for thwarting the application. As explained in the factual section of the petition, the study by Dr. Eran Toch and Oshrat Elon found that the most important factor in downloading “Hamagen 1” was the level of effectiveness the user attributed to the application, while the most significant impeding factor was fear of the violation of privacy. The parallel activation of the ISA’s tracing will thwart the downloading of the application, since it will reduce to a considerable extent the sense of effectiveness of the application, given that it is activated alongside the ISA’s tracing, while exacerbating the sense of a violation of privacy due to the difficulty in distinguishing between the different means.
99. An effective campaign will have to be based on two parameters: firstly, the considerable benefit of downloading the application to the user; and secondly, emphasizing its voluntary character and the ability to control the information,

neutralizing the privacy concerns. Such a campaign cannot be pursued while the ISA's tracing is being activated.

### **The Damage Caused by Activating the ISA Exceeds the Benefit**

100. The Law also fails to meet the third test of proportionality. It must be noted that even if "Hamagen 2" had not been launched, and even if its distribution is not as anticipated, there is no room to continue to activate the ISA's tracing, and other alternatives exist, such as optimizing the human interrogation system. The reason for this is the severe and protracted violation the use of the ISA's tracing causes as compared to its benefit.
101. Regarding the benefit – as explained at length in the factual section of the petition, exaggerated benefit is attributed to technological tools in curbing the epidemic, precisely at a stage when it has become widespread. The belief in the power of technological tools to flatten the curve and solve the crisis is a false one. The ISA's tracing offers an indication of contacts, but only 4-6% of the contacts lead to infection, and only approximately one-fifth of the patients received notification to self-isolate based on the ISA's tracing. This comes at the enormous price of hundreds of thousands of people who received orders to self-isolate.
102. Thus the ISA's tracing certainly makes a contribution to flattening the curve of morbidity, but it is doubtful whether the marginal contribution that these measures offer, compared to alternative solutions such as enhancing the human investigation system with the addition of voluntary applications, is as significant as the Respondents describe, if at all.
103. Against the marginal benefit, if any, the damage caused by the use of the ISA's tracing for a civilian need is long-term damage of the violation of the right to privacy and modesty and the right to liberty. Alongside this damage, other additional and substantial damages exist: The normalization of and habituation to mass surveillance by exceptional technological means for sundry purposes; damage to public confidence in the health authorities; and damage to the status of the state as the guardian of the right to privacy. All these will be detailed below. In addition, there would also appear to be considerable damage to the ISA's operations due to the exposure of its capabilities, and of the flaws of its tools – though this is a matter that lies beyond the Petitioners' expertise, and they shall not expand on this aspect.

### **The Danger of Precedent and the Slippery Slope**

104. In examining the benefit versus the harm of the Law as part of the third proportionality test, considerable weight must be attached to the serious risk of a slippery slope it creates. The ISA's tracing means are extreme and undemocratic. This is an extremely powerful tool that grants the Prime Minister enormous power to control and spy on citizens – not merely at a given point in time, but also to learn about the past, and to obtain private and intimate information on an unprecedented scale.

105. The strength of the tool is matched by the strength of the need to restrict it solely to the most exceptional cases: security needs in the narrow sense, and beyond this only in exceptional cases of “national security” needs in a slightly broader sense. It must be noted that the fear of using the tool is not limited to its use for malicious purposes but also to its use for vital non-security purposes.
106. The issue of reserving the means of security matters was raised explicitly during the enactment of the ISA Law and exposed in the protocols of the deliberations attached by the Knesset in its response to the petitions in **Ben Meir**. The fear at the leakage of the use of the ISA’s capabilities to civilian matters formed the focus of discussion and led to a narrowing of the authority established in section 7 of the ISA Law, relative to that requested by the government.
107. The legislative history shows that what worried the Members of Knesset who discussed the ISA Law was not necessarily the **abuse of powers** (an issue that was mainly of concern to the government), but rather the **leakage of uses**, precisely when these can serve a public purpose the government – or even a majority in the Knesset – consider worthy. The concern focused on pressure to use the ISA’s capabilities for uses that would in themselves seem to be proper to the government, but which do not relate to national security. The concern is that **precisely considerations of “efficiency” will lead to the authorization of the ISA to attend to civilian matters and to deviate from its function.**
108. The fear of elected officials at the seepage of authority into civilian matters is materializing before our eyes. The warnings that at the moment of truth the government would be unable to withstand public pressure to act, and would be unable to refrain from using the ISA’s capabilities, are manifesting themselves as we watch.
109. When there is a body such as the ISA that holds tracing capabilities not available to any other authority and that concentrates enormous power and authority, **the temptation for the government to use it in a health crisis is enormous.** In times of crisis any government would find it difficult to resist this temptation.
110. If the ISA can be used for epidemiological investigations, why not also use its tracing or investigative capabilities to track down individuals ordered to isolate at home, or those breaking quarantine? All in the name of the need to save lives and save the economy. And what will prevent the spread of tracing to other urgent matters? There are more than a few civilian matters where the ISA’s involvement could surely help to save lives, such as road accidents or confronting organized crime, or could help to advance other national interests (as perceived by the government). Economic stability is threatened by various crises, from strikes to demonstrations. **Once the guiding principle** that the ISA does not activate its tools in civilian areas **has been broken**, the path **to becoming a society of tracking** is shortened. The abnormal will become the norm.
111. The normalization of tracing is not reflected “merely” in the serious violation of the individual rights. Damage is caused to the system of government. This practice fundamentally changes the balances and brakes in a democratic society, where the

mass surveillance of civilians by the security services is supposed to be taboo. It is doubtful whether such damage to the system of government is reversible. Once we have crossed the Rubicon and normalized tracing for the needs of struggling against the spread of the Coronavirus, there will be no going back.

112. Another damage that must be granted weight in the constitutional balance is the damage to public trust. The damage to public trust is particularly severe as society faces an epidemic and an ongoing crisis. The public is required to make a very serious sacrifice in personal liberties and in the economy, and in return it expects the government to act credibly, exercise discretion, and limit the harm to the individual to the absolute minimum. When the public loses confidence in the measures taken by the health authorities, due to a sense of arbitrariness and over-enforcement, this is liable to severely impair the ability to mobilize the public, which is a condition for overcoming the epidemic.

### Conclusion

The State of Israel is in an acute health and economic crisis, like many countries around the world, and it is taking many acute steps to slow down the spread of the epidemic. This is not a crisis that threatens the existence of the state, but it is causing, and will probably continue to cause for a considerable period, a difficult and challenging confrontation in protecting the normal fabric of life while preventing acute damage to public health that will incur complex costs. However, even when confronting the =COVID-19 crisis, action must be in accordance with the law, and extreme steps constituting the suspension of constitutional rights and causing mortal damage to the most fundamental checks and balances of a democratic system of government must not be taken. Just as a democratic nation combats security threats only through the tools granted it by law, and in a proportionate degree, so, too, a nation must not struggle against the spread of the COVID-19 in an unbridled manner, through tracing by a secret organization that does not constitute a proper means in the common struggle of all citizens against the spread of the virus – a struggle that requires public confidence in decision-making, transparency, and the greatest possible minimization of damage to the individual.

Authorizing the ISA to undertake mass and protracted tracing of citizens of the state in order to assist in an epidemiological investigation is unconstitutional. This is one of those cases in which a clear red line must be drawn, and the state must be obliged to locate more proportionate alternatives for securing its goals – and such alternatives exist.

**Accordingly, the honorable Court is asked to issue a decree nisi as requested at the start of the petition and, after receiving the Respondents' replies, to render this absolute.**

September 24, 2020

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Gil Gan-Mor, Atty.

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Dan Yakir, Atty.