

January 11, 2019

Judge Guido Raimondi
President of the European Court
Grand Chamber European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France

Re: Application for leave to intervene in *Privacy International and Others v. United Kingdom* (Application no. 46259/16)

Dear Judge Raimondi,

Pursuant to Article 36(2) of the Convention and Rule 44(3) of the Rules of the Court, the Electronic Privacy Information Center (“EPIC”) respectfully requests leave to submit written observations, as third-party intervener in *Privacy International and Others v. United Kingdom* (Application no. 46259/16). The case was communicated on 19 November 2018.¹

I. EPIC’s Mission

EPIC is a leading privacy and freedom of information organization in the United States. A public interest, non-profit research and educational organization in Washington, D.C., EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC does not accept contributions from private companies or grants from government agencies.

EPIC pursues a wide range of program activities including policy research, public education, conferences, litigation, publications, and advocacy. EPIC litigates open government cases, defends consumer privacy, coordinates civil society participation in international policy discussions, and advocates before legislative and judicial organizations about emerging privacy and civil liberties issues. EPIC also works closely with a distinguished board of advisors, who are experts in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world—epic.org.

EPIC also routinely files amicus briefs in key privacy and civil liberties cases; EPIC has participated as *amicus curiae* in close to one hundred cases in the United States. EPIC’s amicus briefs have been cited by the U.S. Supreme Court, including a unanimous majority opinion affirming digital privacy rights for cell phone users.² EPIC served as a third-party intervener with the European Court

¹ *Privacy International and Others v. United Kingdom* (Application no. 46259/16), <http://hudoc.echr.coe.int/eng?i=001-188504>.

² See *Riley v. California*, 134 S. Ct. 2473, 2490–91 (2014).

of Human Rights in *Big Brother Watch and Others v. the United Kingdom* (Applications nos. 58170/13, 62322/14 and 24960/15). EPIC is currently participating in *Data Protection Commissioner v. Facebook* before the Court of Justice for the European Union, a case concerning trans-continental data flows and U.S. surveillance.³

II. The Matter Before the Court

Privacy International and Others v. the United Kingdom is a challenge by human rights group Privacy International (PI), a German hacking collective, and UK, U.S., and Korean internet service providers to UK's use of hacking tools. The case concerns whether the Government Communications Headquarters (GCHQ) international hacking of devices' microphones & webcams, log users' keystrokes, and use of malware, violates the European Convention on Human Rights. In part, the case concerns application of the Article 8 right to privacy—the focus of EPIC's application to Intervene. Applicant PI has contended that section 7 of the Intelligence Services Act 1994 (“ISA”) does not provide the safeguards required by the Convention to limit interference with Article 8. Instead, PI contends, the ISA permits the Secretary of State to authorize acts outside the UK that would otherwise be unlawful under UK law.

The Court has posed six questions to the Parties:

1. Can the applicants claim to be victims of a violation of the Convention, within the meaning of Article 34 in particular in light of *Roman Zakharov v. Russia* [GC], no. 47143/06, §§ 170-172, ECHR 2015?
2. Have the applicants exhausted all effective domestic remedies, as required by Article 35 § 1 of the Convention?

In particular, in light of the “no determination” letter from the Investigatory Powers Tribunal did the applicants invoke before the national authorities at least in substance, the question of the jurisdiction of the United Kingdom?

Did the applicants invoke before the national authorities, at least in substance, the rights under Article 13 on which they now wish to rely before the Court?

3. Did the facts of which the applicants complain in the present case occur within the jurisdiction of the United Kingdom?
4. Has there been an interference with the applicants' right to respect for their private life, within the meaning of Article 8 § 1 of the Convention?

If so, was that interference in accordance with the law and necessary in terms of Article 8 § 2?

5. Has there been an interference with the applicants' freedom of expression, within the meaning of Article 10 § 1 of the Convention?

If so, was that interference prescribed by law and necessary in terms of Article 10 § 2?

³ EPIC, *Data Protection Commissioner v. Facebook & Max Schrems (CJEU)*, Epic.org, <https://epic.org/privacy/intl/dpc-v-facebook/cjeu/>.

6. Did the applicants have at their disposal an effective domestic remedy for her Convention complaints, as required by Article 13 of the Convention?

III. EPIC's Intervention

EPIC proposes to intervene concerning Question 4 on the right to privacy in Article 8 of the Convention. EPIC seeks to provide information to the Court on unique privacy risks of government hacking and, based on that assessment, recommend application of the Court's Article 8 caselaw to this practice for the first time.

EPIC is in a strong position to support the Court's understanding of the scope and consequences of government hacking. As an *amicus curiae*, EPIC explained the risks of weakening device security to a U.S. federal court in *Apple v. FBI*.⁴ This pivotal case concerned whether Apple should be required to develop techniques to enable access to encrypted data stored on an iPhone. As the result of Freedom of Information Act lawsuit, EPIC also obtained disclosure of National Security Policy Directive 54, the foundational document for U.S. cybersecurity policy and the origin of the process for U.S. disclosure computer security—the Vulnerability Equities Process (VEP).⁵ EPIC has also provided advice to the US Congress regarding the recommendations of President Obama's Review Group on Intelligence Reform. EPIC Senior Counsel Alan Butler testified before the Advisory Committee on the Federal Rules of Criminal Procedure regarding “remote access” searches of electronic devices.⁶ EPIC President Marc Rotenberg is a faculty members at Georgetown Law, the author of several textbooks on privacy law, and has published on the role of NGOs and Experts in surveillance cases.⁷

EPIC has advocated for human rights standards to emerging state practices—including the application of this Court's influential safeguards for surveillance, the “Weber criteria.” Most recently, EPIC International Counsel Eleni Kyriakides urged adherence to well-established international safeguards to cross-border law enforcement access to data in an *amicus* brief for Supreme Court case *United States v. Microsoft*⁸ and in testimony to the European Parliament.⁹

⁴ Corrected Brief of Amicus Curiae Electronic Privacy Information Center (EPIC) and Eight Consumer Privacy Organizations, *In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300. California License Plate 35KGD203*, No. ED 15–0451M, (C.D. Cal. March 3, 2016), <https://www.epic.org/amicus/crypto/apple/EPIC-Corrected-Amicus-Brief.pdf>.

⁵ EPIC, *EPIC v. NSA - Cybersecurity Authority*, <https://epic.org/foia/nsa/nspd-54/>.

⁶ Alan Butler, Senior Counsel Electronic Privacy Information Center, Testimony and Statement for the Record on Proposed Amendments to Rule 41 of the Federal Rules of Criminal Procedure before the Judicial Conference Advisory Committee on Criminal Rules (2014), <https://epic.org/privacy/surveillance/remote-access/EPIC-FRCP-Rule-41-Amendments-Testimony.pdf>.

⁷ Marc Rotenberg, *In Re EPIC and the Role of NGOs and Experts in Surveillance Cases*, in *Surveillance, Privacy and Trans-Atlantic Relations* 155, 166 (2017).

⁸ Brief for EPIC and Thirty-Seven Technical Experts and Legal Scholars as Amici Curiae in Support of Respondent, *United States v. Microsoft*, 138 S.Ct. 1186 (2018) (No. 17-2), <https://epic.org/amicus/ecpa/microsoft/US-v-Microsoft-amicus-EPIC.pdf>.

⁹ *Hearing on e-Evidence*, European Parliament Committees, Civil Liberties, Justice and Home Affairs (Nov. 27, 2018), <http://www.europarl.europa.eu/committees/en/libe/events-hearings.html?id=20181112CHE05283>.

IV. Conclusion

EPIC respectfully requests leave to submit written comments. If leave is granted, EPIC will accommodate the form and schedule suitable the Court's needs in the provision of the written comments.

EPIC can be reached by phone at 1.202.483.1140, by email at kyriakides@epic.org, and by mail at 1718 Connecticut Ave. NW, Suite 200, Washington, D.C. 20009.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg,
EPIC President

/s/ Alan Butler

Alan Butler,
EPIC Senior Counsel

/s/ Eleni Kyriakides

Eleni Kyriakides,
EPIC International Counsel