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BALANCING GLOBALISATION'S BENEFITS AND COMMITMENTS: ACCESSION TO DATA PROTECTION CONVENTION 108 BY COUNTRIES OUTSIDE EUROPE

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Balancing globalisation's benefits and commitments:
Accession to data protection Convention 108 by countries outside Europe

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This is a slightly expanded version of an invited presentation to the Council of Europe Convention 108 'Globalisation' Conference, 17 June 2016, Strasbourg, France.[1] Some further reflections on comments made by other speakers at the Conference have also been added. Implications of the Brexit result, a week later, have not been considered.[2]

The 'globalisation' of Council of Europe data protection Convention 108 beyond its European origins has been underway since the start of this decade, when the first non-European accession (by Uruguay) was assessed and approved. It is a large step across the globe from Uruguay to Mauritius, so the global nature of this process was demonstrated by the completion of the second non-European accession with Mauritius' deposit of its instrument of accession in a ceremony at today's Conference. Four other non-European countries are now at various stages of the accession process,[3] and there is increasing interest from other countries (by both governments and NGOs), exemplified by participants in today's conference from 16 countries outside the Council of Europe,[4] and from many international organisations.

The global context of Convention 108 'globalisation'

The expansion of Convention 108 beyond Europe is now of greater importance, and makes more sense, because of the expansion of the number of countries with data privacy laws, and particularly of countries outside Europe, in recent decades.

Since the first national data privacy law (in Sweden) in 1973, by June 2016, 111 countries have now enacted data privacy laws, the most recent being Turkey and Sao Tome & Principe. By the completion of each decade, the number of laws has expanded from 10 (1970s) to 20 (1980s), to 40 (1990s), to 80 (2000s), and now to 111 (two-thirds through the 2010s). The most striking indicator of the globalisation of data privacy laws is that since 2015, the majority of these laws (57/111) are from outside Europe. Furthermore, only a quarter of the laws are

* Valuable comments have been received from Sophie Kwasny and Jill Matthews. Responsibility for all content remains with the author. The Council of Europe funded my participation in the Conference.

[1] Programme 'Convention 108: from a European reality to a global treaty', 17 June 2016 <http://www.coe.int/en/web/human-rights-rule-of-law/international-conference-convention-108>

[2] Convention 108 is a Council of Europe treaty, and Britain's status as a Party will not be affected directly by its withdrawal from the EU.

[3] Cape Verde, Morocco, Senegal, Tunisia.

[4] Australia, Belarus, Benin, Burkina Faso, Cape Verde, Ghana, the Holy See, Indonesia, Japan, Mauritius, Mexico, Morocco, Senegal, Tunisia, the USA and Uruguay.

now from countries of the European Union. Europe's percentage share of data privacy laws will continue to shrink – it cannot expand without a redefinition of 'Europe'.[5]

By 2011 the data privacy Acts outside Europe included on average about 7/10 of the higher 'European standards'.[6] Within this average there is considerable variation. By 2016, with 57 laws now from outside Europe, about half are stronger '2nd generation' revised laws, often from revisions since 2010. My unsystematic observation is that they are closer on average to the higher 'European standards' than they were five years ago.[7]

Most of the laws outside Europe include data export restrictions, often similar to the 'adequacy' requirements of European laws, but with many significantly different forms of limitation which cannot be simply described as variations of 'adequacy'. As a result, the issue of data export limitation is no longer a question of to where will Europe allow personal data to be exported. The plethora of export limitations outside Europe potentially have just as much impact on imports into Europe.

The past 45 years of steady global expansion of data privacy laws is likely to continue. At least 24 more countries have official Bills for new data privacy Acts.[8] Some additional countries which do not have comprehensive data privacy laws do have e-commerce and/or consumer privacy laws of broad scope, including China and Indonesia. Nor do these proposed laws seem to involve a diminution in standards.

Despite the expansion of laws outside Europe, it would be unrealistic to suggest that another 56 accessions to Convention 108 are either possible or desirable. Many of these laws fall outside the requirements of Convention 108, including for reasons of insufficient scope, democratic deficits, constitutional questions, lack of a data protection authority, and other matters not easily remedied. The number of potential Convention 108 'candidates' for accession has yet to be assessed, but the potential for greater 'globalisation' is clear.

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[5] Greenleaf, G 'Global data privacy laws 2015: 109 countries, with European laws now in a minority' (2015) 133 *Privacy Laws & Business International Report,* 14-17 <http://ssrn.com/abstract=2603529>

[6] By 'higher' is meant those data privacy principles which differentiate the Directive (and Convention 108 plus Additional Protocol) from the 1980 OECD Guidelines: see Greenleaf, G 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' (2012) *International Data Privacy Law*, Vol. 2, Issue 2 <http://ssrn.com/abstract=1960299>

[7] A systematic study is needed to assess whether this observation is correct 'on the eve of the GDPR', to follow up my 2011 study, 'The Influence of European Data Privacy Standards Outside Europe'.

[8] The 24 countries known to have official Bills are Antigua & Barbuda; Barbados; Bermuda; Brazil; Cayman Islands; Chad; Dominica; Ecuador; Ethiopia; Falkland Islands; Grenada; Honduras; Indonesia; Jamaica; Kenya; Mauritania; Niger; Nigeria; Qatar; Saint Kitts and Nevis; Swaziland; Tanzania; Thailand (private sector); and Uganda.

Thirteen benefits of Convention 108 accession

Why should countries outside Europe consider acceding to what has been, until recently, a treaty with only States from the Council of Europe as parties? At least thirteen distinct benefits can be identified: (i) realistic prospects; (ii) no realistic alternative; (iii) voluntary obligations; (iv) international 'best practice' recognition; (v) reciprocal data exports; (vi) moderate standards; (vii) minimum standards; (viii) a 'whitelist' substitute; (ix) 'adequacy' assistance; (x) development assistance; (xi) business benefits with exports and imports; (xii) individual benefits from minimum protections; and (xiii) assistance to international organisations. Each is briefly sketched below.

The significance of these potential benefits, or potential disadvantages, will vary between countries. For each country, they require a balanced assessment of the interests of that country and its government, of businesses operating within it, and of its citizens and residents. There is no need to suggest that every potentially eligible country should accede to Convention 108: only that they should give serious consideration to the potential advantages and implications of so doing.

(1) *Realistic prospects* – Convention 108 has realistic prospects of 'globalisation', so involvement in it is not a waste of time. It already has 48 parties (soon to be 53), nearly 50% of all countries with data privacy laws. This is an impressive start for any treaty. Council of Europe Conventions can become successful global conventions, as the Cybercrime Convention has shown, with 8 non-European ratifications among its 48 parties.[9] Convention 108 is likely to soon exceed it on both measures, despite having far fewer financial resources to support its globalisation than the funding made available in relation to the cybercrime treaty.

(2) *No realistic alternative* – There is no other binding global privacy agreement (OECD offers only 'guidelines'; APEC's Framework is not enforceable; APEC CBPR is just a series of 'safe harbours'). No new UN or other treaty is likely to be developed from scratch or ever be ratified. 'Interoperability' between international instruments is illusory unless they are of equivalent legal standards and status, and no others exist.

(3) *Moderate standards* – Only moderate privacy standards are required for accession to Convention 108. These standards are approximately what is required for EU 'adequacy', not equivalence with the Directive (nor with the recently adopted GDPR). Such standards are what countries outside Europe have been enacting 'bottom up'. This

[9] *Council of Europe Convention on Cybercrime* (ETS 185); parties include Australia, Canada, Dominican Republic, Japan, Mauritius, Panama, Sri Lanka, and the United States. South Africa has signed but not ratified. <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=X0Ew8rDc>

standard can be thought of as half way between the 1980s OECD standards and those of the Directive.[10]

(4) *Minimum standards* – Convention 108 is a 'minimum standards' agreement. Countries may enact higher local standards if they wish, but if they do not, they must still meet the minimum standards. Convention 108 does not therefore require reduction of national data protection standards.

(5) *Voluntary obligations* – Convention 108 accession is a voluntary acceptance of reciprocal obligations. Treaties are mutual, not unilateral. The perception, held by some countries, of EU adequacy as an imposed standard is not applicable to Convention 108.

(6) *'Best practice' recognition* – Accession to Convention 108 provides recognition that a country's data protection standards have achieved 'international best practice', in the opinion of an increasingly global group of the country's peers.

(7) *Reciprocal data exports* – Convention 108 provides for reciprocal personal data exports between Parties to the Convention. These reciprocal benefits apply to all Convention 108 parties,[11] not only to the 28 EU countries but also to another 19 European countries, and to a growing list of non-European countries. In practice, the European Union's data protection 1995 Directive has added a requirement of an 'adequacy' assessment in order for such data exports to occur from EU countries,[12] and Convention 108's Additional Protocol has set a similarly worded 'adequacy' standard for data exports to third countries. In effect, this allows the Convention's data export provisions to be treated as a 'minimum standard' for data exports, but allowing a group of countries (such as the EU) to apply a higher standard,[13] as is explicitly allowed in proposals for the 'modernised' Convention.

(8) *A 'whitelist' substitute* – Numerous non-European laws allow government or DPAs to specify 'whitelists' of countries to which personal data may be exported,[14] but no such whitelists have ever been made. They are politically sensitive and complex to compile. Parties to Convention 108 need not decide which other countries have

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[10] Greenleaf 'The Influence of European Data Privacy Standards Outside Europe' (above); see also G Greenleaf *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (OUP, 2014), Chapter 17.

[11] European countries also receive reciprocal benefits from these provisions, which an EU adequacy finding does not provide.

[12] Uruguay obtained an EU adequacy assessment as well as acceding to the Convention.

[13] Such a higher standard could not exceed the limits imposed by Article XIV(c)(ii) of the GATS (General Agreement on Trade in Services, 1995): see G Greenleaf 'The TPP & Other Free Trade Agreements: Faustian Bargains for Privacy?' < http://ssrn.com/abstract=2732386>

[14] In Asia alone these include Japan, Malaysia, Macau SAR, and Hong Kong SAR (section not in force).

'adequate'/sufficient laws: the list of Parties to Convention 108 could be used as a national whitelist.

(9) *'Adequacy' assistance* – Accession to Convention 108 provides strong assistance for an EU adequacy finding. This is made explicit in GDPR recital 105 which says that in assessing the adequacy of a third country's data protection, the EU will 'in particular … taken into account' accession to Convention 108. At the Conference, EU representatives stressed that all aspiring EU member states have been required to accede to Convention 108, and that they were very satisfied that the standards of the 'modernised' Convention 108 would be consistent with the GDPR although 'not a carbon copy'. Council of Europe Secretary-General Jagland observed that Convention 108 had the 'strong support of the EU'.

(10) *Assistance to international organisations* – International organisations involved in such areas as policing, financial surveillance, humanitarian assistance and security, must develop procedures for data transfers and ensure that their members adhere to them. If a member is a party to Convention 108 this gives reassurance that international privacy standards are being met. The participation in the Conference of INTERPOL, Eurojust, the International Commission on Civil Status, Europol and the International Committee of the Red Cross are examples of this.

(11) *Development assistance* – European DPAs are committed to assist less developed DPAs where desired and to collaborate on assistance projects. At the Conference, the DPAs of Morocco and Tunisia explained two bilateral cooperation agreements on data transfers they had entered with Belgium.

(12) *Business benefits* – The benefits to businesses (controllers) arise because reciprocal Convention 108 obligations means that businesses will have fewer problems with both data exports to, and imports from, other Parties. This applies to all other Parties, including those in Europe. Convention 108's advantages for businesses in developing countries have recently been espoused by UNCTAD.[15]

(13) *Individual benefits* – Benefits to individuals (data subjects) are significant because enforceable global-standard privacy laws apply wherever their personal data is exported. Foreign DPAs are required to provide assistance to them wherever their data goes.

[15] UNCTAD *Data Protection Regulations and International Data Flows: Implications for Trade and Development*, April 2016, <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1468>

Some of these factors will change when the 'modernisation' of Convention 108 is complete,[16] but its standards will still be less demanding than those of the EU's Regulation (GDPR): 'not too hot, not too cold', a moderate global standard.

Convention bodies' obligations

When a country accedes to Convention 108, it makes serious commitments. It must implement a law with the global-standard principles and enforcement mechanisms required by Convention 108. It should permit data exports to other Parties to the Convention (under the conditions described above), and may do so to third-party countries where the Convention standards for data exports are met (in short, an 'adequacy' standard). It should not permit data exports outside those requirements. These commitments by acceding countries are only justifiable if the Convention bodies ensure that new accessions meet and enforce these standards, and that all parties ensure continuing enforcement.

Because the national commitments are significant, the enforcement of the treaty must be equally so. The 'Convention bodies' (Consultative Committee (T-PD), Secretariat and Committee of Ministers) have significant responsibilities to acceding countries (and all Parties) and their citizens. In particular, they must do what is within their powers to ensure that Parties are only required to export their citizens' data to other countries which have sufficiently high standards of data protection, and take an 'international standard' approach to the enforcement of those protections.

These obligations are clear from in the proposed text of the modernised Convention 108, which will explicitly allow the Convention Committee to assess both the strength of enforcement at accession, and continuing compliance with Convention obligations.

However, the current Convention 108 does not explicitly recognise these responsibilities, and the current practice of the 'Convention bodies' does not make it transparent enough that they are being carried out. The Opinions of the Consultative Committee (T-PD) make it appear that only the 'law on the books' is assessed during the accession process, but not the key measures for its effective implementation (DPA resources, publication of enforcement activities etc). Such matters may well be routinely assessed during accession, but there is no public documentation of this. The Convention bodies all need to agree that this should be made transparent: there is nothing in the Convention, or in CoE treaty practice to prevent this, and it does not require a significant increase in the Secretariat's resources.

Because accessions will occur for some years to come under the existing Convention 108,[17] it is important that this transparency should be improved. Removing this 'transparency gap' will increase the confidence of other countries (and their citizens and businesses) in the benefits of accession to Convention 108.

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[16] Greenleaf, G 'Modernising' Data Protection Convention 108: A Safe Basis for a Global Privacy Treaty? ' (2013) 29(4) *Computer Law & Security Review* <http://ssrn.com/abstract=2262296>

[17] Until the 'modernised' Convention is completed and comes into force,

Individual rights and accession

Convention 108 requires that Parties' law must give individual rights to enforce data protection laws under domestic law. But it provides no international mechanism for individual data subjects (particularly those in non-European countries) to enforce national compliance with the Convention. Other Parties, and the Convention bodies, can only use diplomatic means if a Party is seen to be non-compliant.

In contrast, Europeans can initiate actions before the European Court of Human Rights (ECtHR) if a European state fails to protect their rights to data protection, particularly under Article 8 of the European Convention on Human Rights (ECHR).[18] They can thus indirectly enforce Convention 108 before an international court. This places citizens of non-European states that accede to the Convention at a disadvantage.

However, a partial solution may be found through closer alignment of Council of Europe and UN or other regional human rights mechanisms.[19] European countries cannot accede to Convention 108 without first being a party to the ECHR. Similarly, non-European countries should not be able to accede to Convention 108 unless they accede to a human rights convention with provisions equivalent to Article 8 ECHR, and some means of individual enforcement.

Regional human rights agreements in Africa or Latin America are one possibility. Otherwise, the UN's *International Covenant on Civil & Political Rights 1966* (ICCPR) includes in Article 17 provisions equivalent to ECHR Article 8. Most countries have ratified the ICCPR, except a few in Asia.[20] The 1st Optional Protocol to the ICCPR allows individual citizen of member states that have adopted the Protocol to make 'communications' (complaints) to the UN Human Rights Committee (UNHRC) that their country has not adhered to its ICCPR obligations (including Article 17). It empowers the UNHRC to make recommendations to Member States (but not binding decisions, unlike the ECtHR). The Protocol has been ratified by 115 UN Member States, including most of Latin America, Africa, Canada & Australasia.

At this Conference, UN Special Rapporteur on the Right to Privacy, Joseph Cannataci has repeated his endorsement of Convention 108 as one of the key contributors to global protection of privacy. It would be a valuable achievement if he could help make all these Conventions align better and, in a sense, 'interoperate'.

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[18] The interconnections between Convention 108, the ECHR, and the jurisprudence of the ECtHR, was a constant subject of discussion during the CAHDATA meeting in two days preceding this Conference.

[19] For more details of the following argument, see Greenleaf, G 'The UN Special Rapporteur: Advancing a global privacy treaty?' (2015) 136 *Privacy Laws & Business International Report,* 7-9 <http://ssrn.com/abstract=2672549>

[20] UN Treaties Collection, *International Covenant on Civil and Political Rights*; <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en>; 168 parties as at 12/05/2015.

Conclusion

Globalisation of Council of Europe data protection Convention 108 is of increasing importance in a world in which the majority of data privacy laws already come from countries outside Europe. The potential benefits of accession to non-European countries are numerous, but their value and significance is a matter for each country, and may change over time. However, the expansion of Convention 108 has implications for every country, and it is good policy for each country to be well-informed and consider carefully the potential benefits of accession.