

***University of New South Wales Law Research Series***

**Convention 108+ and the Data Protection  
Framework of the EU**

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## Convention 108+ and the data protection framework of the EU

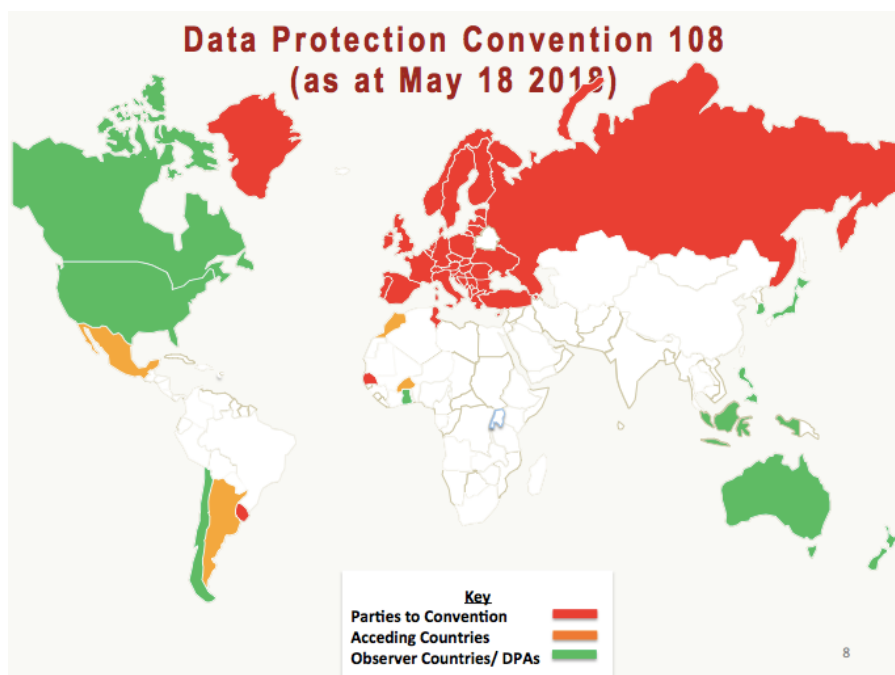
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*Speaking Notes for Conference presentation at 'Convention 108+ Tomorrow's Common Ground for Protection'* (Council of Europe, Palais de l'Europe, Strasbourg, 21 June 2018). Because these are Speaking Notes, footnotes etc which are normal in academic work are not provided, but there are References at the end to my supporting papers.

The global context in which the Modernised Convention 108 arrives is that there are now 126 countries that have data privacy laws, and more than 30 additional countries that have official Bills at some stage of the legislative process. Seventy nine of these 126 countries – over 60% - are located outside Europe. In addition, countries all over the world with data privacy laws are revising their existing laws.

### The expansion of Data Protection Convention 108

Although it originated from the Council of Europe, since 2011 data protection Convention 108 is steadily being '**globalised**'. In addition to its 47 European parties, **five** countries outside Europe are now **Parties**: Uruguay, Mauritius, Senegal, Tunisia and Cape Verde (finalised this week). **Four** more countries have had **Accession requests** accepted, but have not yet completed the accession process: Morocco, Argentina, Mexico, and Burkina Faso. Eleven other countries, or their DPAs, are now **Observers** on its Consultative Committee.



### Data Protection Convention 108 reaches completion

After a date yet to be fixed in 2018, when 108+ is open for signature, no new accessions to 108 will be allowed without ratification of 108+ as well. Convention 108's expansion will then be complete. However, Convention 108 still applies between its existing Parties.

The standards of 108 are probably now lower than is required for EU GDPR adequacy. The gap between the GDPR and 108 is too large to meet the *Schrems* ‘essentially equivalent’ test. This has not yet been tested in any EU adequacy decisions, but is likely to be the case.

**The result is that**, although Convention 108 is close to the current global average for data privacy laws, the average standard of these law will be raised by GDPR and 108+ influence and requirements.

### Relationship between 108 and 108+

‘Modernised’ Convention 108 is now also called ‘108+’. It was finalised on 18/05/2018 and will be open for signature later this year. Any of current 52 Parties to 108 may sign 108+ and ratify it once they comply with its standards. Any new accession will have to be to 108+ as well as 108.

There are two matters that, as far as I understand, are not yet certain:

- (i) Whether the four non-European states previously invited to accede to 108 must also sign and ratify 108+, not 108 alone.
- (ii) Whether, up until 108+ is open to signature, other non-European countries might be invited to accede to 108, if they are suitably qualified?

I will state my personal opinion about what would be good policy outcomes on these questions, provided that questions of treaty law make this possible:

- (i) It would be a lost opportunity if the 4 countries already invited to accede could not do so. They will greatly enhance – in fact double – the globalization of the Convention. There will be no harm done, because they will, like all other Parties, be required to accede to 108+ in 5 years by 2023.
- (ii) Similarly, if there are other countries that wish to apply to accede to 108 and are suitably qualified, it would be a lost opportunity if they did not have the opportunity to be invited to do so prior to 108+ becoming open to signature. From my own part of the world, I would be very pleased to see two countries with strong data privacy laws – New Zealand and Korea – being given the opportunity to do so if their governments wish to apply.

When will Convention 108+ be in force between all 52 (or more) Parties? There are two options: (i) When all existing Parties (52 or more) have ratified it; OR (ii) In 5 years (2023), provided 38 Parties have ratified it. GDPR means 28 EU states can ratify now if they choose. Another 10 (including new ratifications) will be needed by 2023.

Until then, ratifying Parties may declare that 108+ has Interim in-force status only between themselves and similarly declaring Parties (ie reciprocal in-force status).

**The result is that** Convention 108 will soon be closed, but the window of accession may still open for an uncertain few months yet; the future standard is Convention 108+.

### Which countries might be eligible to accede to Convention 108+?

Of the 126 countries with data privacy laws, 38 are not eligible to accede, for various reasons: they are not a State; or not a democracy; their law is not comprehensive of both public and private sectors; or there is no DPA in their law.

Potential for accession to Convention 108+	126 countries with data privacy laws	No.
<b>Not eligible to accede</b>	Not a State (18); Not a democracy (2); Not comprehensive (10); No DPA in law (8)	<b>38</b>
<b>Not yet eligible – DPA not yet appointed</b>	Angola, Nicaragua, Seychelles, Niger, Guinea-Conarky, Mauritania, Algeria, St Kitts and Nevis	<b>8</b>
<b>Possibly eligible – Lower GDP</b>	São Tomé and Príncipe, Costa Rica, Gabon, Ghana, Lesotho, Malawi, Benin, Mali, Cote d'Ivoire, Bahamas, Antigua & Barbuda, Cayman Islands, St Lucia, Trinidad & Tobago	<b>14</b>
<b>Possibly eligible – Higher GDP</b>	Korea, South Africa, Japan, Australia, Peru, Philippines, Colombia	<b>7</b>
<b>Probably eligible – EU Directive 'adequate'</b>	Canada, Israel, New Zealand	<b>3</b>
<b>Conv 108+ – invited to accede to 108 and 108+</b>	Burkina Faso, Morocco, Argentina, Mexico	<b>4</b>
<b>Conv 108 Parties (non-European)</b>	Senegal, Mauritius, Uruguay, Tunisia, Cape Verde	<b>5</b>
<b>Conv 108 Parties (European)</b>	All Council of Europe Member States (47)	<b>47</b>
<b>Total number of countries</b>	<b>Of the 126, up to 88 could be eligible to accede to Convention 108+ by meeting its standards</b>	<b>126</b>

Other than the current 47 European parties and 5 non-European parties, another 36 non-European countries currently with data privacy laws could be eligible to accede if they were willing to raise the standards of their law to those of Convention 108+. Of these, the most significant are the three countries already assessed as 'adequate' by the EU, and the group of seven countries with higher GDPs. Their accession would indicate both greater global reach of 108+, and its increasing economic significance. The above list is not intended to suggest that many of these countries could at present accede to Convention 108+.

### New 108+ requirements cover most new EU GDPR requirements

We can identify 13 new elements in Convention 108+ which are the same as new elements in the GDPR, although often expressed in more general terms.

1. **Proportionality** required in all aspects of processing;
2. **Stronger consent** requirements ('unambiguous' etc);
3. Greater **transparency** of processing;
4. Some **Mandatory Data Protection Impact Assessments (DPIAs)**;
5. **Limits on automated decision-making**, including the right to know processing logic (was also in EU Directive);
6. Data protection **by design and by default**;
7. **Biometric and genetic data** require extra protection;
8. Right to **object to processing** on legitimate grounds (also in Directive).
9. Direct **liability for processors** as well as controllers;
10. **Data breach notification** to DPA required for serious breaches;
11. DPAs to make decisions and issue **administrative sanctions/remedies**;
12. Demonstrable **accountability** required of data controllers
13. Parties must allow and assist evaluation of **effectiveness**.

### Non-European countries implementing some 108+ principles

Even from a quick assessment of 30 of the 75 laws outside Europe, it is clear that at least 10 of the 13 new Convention 108+ principles are being implemented outside Europe.

Convention 108+ standards	Laws outside Europe (Minimum - 30/75 assessed)	No.
<i>DPA to make binding decisions and issue administrative sanctions including fines</i>	Australia, Singapore, South Africa, Taiwan, Madagascar, Ivory-Coast, Chad, Benin, Mali, Senegal, Cayman Islands, Burkina-Faso, Guinea, Gabon, Angola, Guinea-Bissau, Madagascar, Mauritania	19
<i>Right to object (processing based on controller or public interests)</i>	Mali, Mauritius, Senegal, Niger, Ghana, Benin, Burkina-Faso, Guinea, Gabon, Angola, Chad, Guinea-Bissau, Ivory Coast, Madagascar, Mauritania	16
<i>Data breach notification to DPA (at least) for serious breaches</i>	Australia, Canada, Japan, Korea, Philippines, South Africa, Vietnam, Mauritius, Ghana, Cayman Islands, Benin, Burkina-Faso, Chad, Israel, Mexico	15
<i>Stronger consent ('unambiguous'; children etc)</i>	Korea, Canada, Mauritius, South Africa, Ghana, Chad, Mali, Ivory Coast, Mauritania, Benin	10
<i>'Sensitive data' to include biometrics and/or genetic data</i>	Mauritius, South Africa, Ghana, Benin, Gabon, Chad, Guinea-Bissau, Ivory Coast, Madagascar, Mauritania	10
<i>Mandatory DPOs for sensitive or large scale processing</i>	Korea; South Africa, Ghana, Niger, Benin, Guinea, Israel, Mexico. Philippines	9
<i>Direct liability for processors as well as controllers</i>	Canada, India, Korea, Philippines, Taiwan, Mauritius, Ghana, Benin	8
<i>DPA must cooperate in international complaints</i>	Japan, Mauritius, Ghana, Philippines	4
<i>Demonstrable accountability</i>	Mauritius, South Africa	2
<i>Mandatory DPIAs if high risk</i>	Mauritius, Benin	2

An increasing number of non-European countries will be eligible to request accession as their reform processes are completed.

### However, 108+ does not explicitly include some of the new GDPR principles

There are at least nine additional new principles in the GDPR which are not explicitly included in 108+. Some of these nine principles may be implied by 108+.

1. obligations to apply **extra-territorially**, if goods or services offered, or behaviour monitored locally;
2. **local representation** required of such foreign controllers or processors;
3. right to **portability** of data-subject--generated content;
4. right to **erasure/de-linking** (right 'to be forgotten');
5. mandatory Data Protection Officers (**DPOs**) for **sensitive processing**;
6. data breach notification (**DBN**) to **data subjects** (if high risk);
7. **representative actions** before DPAs/courts by public interest privacy groups; and
8. maximum administrative **finest based on global annual turnover**;
9. requirement to **cooperate** in resolving complaints with international elements, with any other DPA (as distinct from 108+ members).

The significance of this 'gap' between the GDPR and 108+ is not yet completely clear.

### Where 108+ accession can require higher standards than GDPR adequacy

On the other hand, 108+ accession can sometimes require higher standards than GDPR adequacy. To examples are:

- (i) GDPR adequacy can be satisfied by provisions applying only to personal data coming from EU countries (US Privacy Shield; possibly Japan); but Convention 108+ accession requires provisions which apply to all personal data within a country's jurisdiction (not only that coming from 108+ Parties)



- (ii) GDPR adequacy may apply only to specified sectors; 108+ accession requires application to all sectors.

Result: Some countries may obtain adequacy decisions but not be eligible to accede to Convention 108+.

### Will 108+ accession & compliance also indicate GDPR ‘adequacy’?

GDPR recital 105 says Convention 108 accession will ‘in particular ... [be] taken into account’ in assessing GDPR adequacy.

Because Convention 108+ includes most important GDPR innovations (in less prescriptive form). Accessions to 108+, coupled with proper enforcement, should ensure that *most* of the GDPR requirements are met.

However, 108+ does not include all GDPR innovations. It is possible that GDPR ‘adequacy’ will not require any of these nine extra elements– but on the other hand some might be required or strongly desirable. ‘Adequate’ did not mean ‘identical’ under the Directive, and will not under the GDPR.

**The result** is that it is uncertain but possible that 108+ compliance may in practice be adequate. If so, the 108+ standards (which we can call ‘GDPR Lite’) may become **the new global standard by 2023**.

### Attractions of CoE 108+ accession to non-European countries

I think there at least fourteen distinct reasons for non-European countries to want to accede to Convention 108+.

1. **only realistic** long-term prospects of a global data privacy agreement;
2. **voluntary and mutual** obligations, not impositions – a treaty;
3. valuable **participation** in Convention decisions, meetings, Guidelines etc;
4. **no punitive enforcement** measures (eg ISDS clauses) – diplomatic only;
5. international **‘best practice’ recognition** through accession;
6. requires minimum standards – **allows higher national standards**;
7. **moderate** standards (‘GDPR Lite’);
8. **reciprocal data export commitments** (subject to regional higher standards);
9. can be a **‘whitelist’ substitute** (if countries wish to adopt it);
10. assists in obtaining **EU adequacy** (GDPR Recital 105);
11. mutual **assistance** in improving laws and enforcement;
12. **business benefits** with export and import facilitations;
13. **individuals benefit** from international standard protections;
14. **assists international organisations** in multi-country operations;

Different reasons will appeal to different countries.

### Conclusion

Will 108+ become a global standard – ‘adequate’ for the EU, but not requiring radical changes to the existing/new data privacy laws of 126+ countries?

With 52 Parties already, soon to be 56, it is time to **rename** the Convention as the **‘Global Data Protection Convention 108+’**.

**References (papers by Graham Greenleaf)**

- 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' (2012) 2(2) *International Data Privacy Law*, <https://ssrn.com/abstract=1960299>
- 'Modernising' Data Protection Convention 108: A Safe Basis for a Global Privacy Treaty?' (2013) *Computer Law & Security Review*, Vol 29, Issue 4; <https://ssrn.com/abstract=2262296>
- 'International Data Privacy Agreements after the GDPR and Schrems' (2016) 139 *PLBIR* 12-15 <https://ssrn.com/abstract=2764864>
- 'Renewing Convention 108: The CoE's 'GDPR Lite' Initiatives' (2016) 142 *Privacy Laws & Business International Report*, 14-17 <https://ssrn.com/abstract=2892947>
- 'Balancing Globalisation's Benefits and Commitments: Accession to Data Protection Convention 108 by Countries Outside Europe' (June 23, 2016) <https://ssrn.com/abstract=2801054>
- 'Global data privacy laws 2017: 120 national data privacy laws now include Indonesia and Turkey' (2017) 145 *PLBIR*, 10-13 [https://papers.ssrn.com/abstract\\_id=2993035](https://papers.ssrn.com/abstract_id=2993035)
- 'European data privacy standards in laws outside Europe' (2017) 149 *PLBIR*, 21-23 [https://papers.ssrn.com/abstract\\_id=3096314](https://papers.ssrn.com/abstract_id=3096314)
- 'Data Protection Convention 108 Accession Eligibility: 80 Parties Now Possible' (2017) 148 *Privacy Laws & Business International Report*, 12-16. <https://ssrn.com/abstract=3062415>
- 'The UN Should Adopt Data Protection Convention 108 as a Global Treaty: Submission on 'The Right to Privacy in the Digital Age' to the UN High Commissioner for Human Rights, to the Human Rights Council, and to the Special Rapporteur on the Right to Privacy' (April 9, 2018). <https://ssrn.com/abstract=3159846>

International event on the modernisation of Convention 108, Council of Europe, Palais de l'Europe, Room 9, 21 June 2018

## CONVENTION 108+

### Tomorrow's common ground for data protection

- 14:30**      **Opening**
- Patrick Penninckx, Head of Information Society Department, Council of Europe
  - Eva Tomič, Ambassador, Permanent Representation of the Republic of Slovenia to the Council of Europe, Chair of the Group of Rapporteurs on Legal Co-operation
- 14:40**      **Session I – The long journey to Convention 108+**
- Jean-Philippe Walter, Vice-Chair of the Committee of Convention 108
  - Cécile de Terwangne, Professor at the Law faculty and Research Director, CRIDS
  - Jörg Polakiewicz, Legal adviser, Council of Europe
- 15:15**      **Session II – Convention 108+ and the data protection framework of the EU**
- Alessandra Pierucci, Chair of the Committee of Convention 108
  - Graham Greenleaf, Professor of Law & Information Systems, UNSW, Australia
  - Bruno Gencarelli, Head of the International Data Flows and Protection Unit, European Commission, EU
- 15:45**      **Break / Family Photo**
- 16:00**      **Session III – Convention 108+: exchange of take-aways**
- Lahoussine Aniss, Secretary general, CNDP, Morocco
  - Eduardo Berton, Chair, AAIP, Argentina
  - John Edwards, Commissioner, Privacy Commission, New-Zealand
  - Chawki Gaddes, Chair, INPD, Tunisia and Chair of the AFAPDP
  - Patricia Kurzcyn Villalobos, Commissioner, INAI, Mexico
  - Patricia Poku, Chair, Privacy Commission, Ghana
  - Jean-Luc Sauron, Conseiller, Conseil d'Etat, France
  - Pat Walshe, Director, Privacy Matters, United Kingdom
- 17:00**      **Closing**
- Gabriella Battaini-Dragoni, Deputy Secretary General, Council of Europe