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 Commission for Human Rights, to the Human Rights Council, and to the Special Rapporteur on the Right to Privacy

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Pursuant to Resolution 34/7 of 23 March 2017 of the Human Rights Council on 'the right to privacy in the digital age', the High Commissioner for Human Rights has invited submissions on this issue, and requested comments under specific heads.[1] This submission addresses in particular items 1, 4 and 5(c) of that request. My qualifications to make this submission are noted at the end. Because the Council has requested submissions less than 2,500 words, this submission will refer to my other publications for details.

1 Data privacy laws have been enacted globally, with high standards

Since 1970, countries from almost all regions of the world, have enacted data privacy laws that meet or (usually) exceed the minimum standard for such as law, as set by the standards required for compliance with Council of Europe data protection Convention 108 of 1981 and the OECD privacy Guidelines of 1980 ('1st generation' data privacy standards). By 2018, 124 countries have enacted such laws.[2] The rate of enactment by countries of new data privacy laws is increasing in recent years,[3] so that the majority of UN member states have now enacted such laws and they are rapidly becoming ubiquitous. An additional 30 countries have Bills for new laws in various stages of the legislative process.

Since the European Union adopted its general data protection Directive in 1995, and the Council of Europe amended its data protection Convention 108 in 2001 to match the most important aspects of the EU Directive, we can say that there has been a 'European standard' which gives a higher level of protection to privacy than do the OECD Guidelines (which were not significantly strengthened in a 2013 update). Since 1995, what were originally 'European standards' have become global standards ('2nd generation' standards) due to their widespread adoption by countries throughout the world enacting some or all of this higher level of privacy standards.

My research has demonstrated this high level of global adoption of 'European standards', first in relation to all non-European countries that had enacted data privacy laws (average adoption in

[1] Human Rights Council *Call for inputs to a report on "the right to privacy in the digital age"* <http://www.ohchr.org/EN/Issues/DigitalAge/Pages/ReportPrivacy.aspx>

[2] Greenleaf, G 'Global data privacy laws 2017: 120 national data privacy laws now include Indonesia and Turkey' (2017) 145 *Privacy Laws & Business International Report,* 10-13 <https://papers.ssrn.com/abstract_id=2993035>; Since that report of 120 laws, further laws have been enacted in

[3] Greenleaf, G 'Countries with data privacy laws – by year 1973-2016' (2017) 146 *Privacy Laws & Business International Report,* 18 < https://papers.ssrn.com/abstract_id=2996139>

2012 of 6.9 out of 10 distinctively European or 2nd generation standards),[4] and more recently in relation to the 20 non-European countries with the highest GDP that have adopted data privacy laws (average adoption of 5.95/10 such standards in 2017).[5] The current global standard for data privacy laws is closer to the standards of the EU Directive and of Convention 108 than it is to those of the OECD Guidelines.

The evolution of global data privacy standards has not ceased. The European Union's General Data Protection Regulation (GDPR) will come into force on 25 May 2018, with a considerably higher set of standards, as could be expected to be necessary after more than 20 years development of the Internet and associated technologies since the 1995 Directive. The Council of Europe will also finalise in 2018 the 'Modernised' Convention 108, which will contain many but not all of the strengthened GDPR provisions, and which I describe as 'GDPR Lite'.[6] A '3rd generation' of data privacy standards is emerging. Many countries outside Europe with data privacy laws have already enacted some of these '3rd generation' standards even before they are fully in force across Europe.[7]

2 Data protection Convention 108 is the only viable global agreement

Data protection Convention 108 is an open convention, to which any country can apply to accede, not only European countries. Such 'globalisation' of Convention 108 has been actively encouraged by the Council of Europe since 2010, with positive results. The Convention now has 51 parties, with four from outside Europe (Tunisia, Uruguay, Mauritius and Senegal). These are in addition to all its 47 European member states, including those as culturally diverse as Russia and Turkey. The Convention's governing body has also accepted requests to accede by five countries still completing the accession processes (Argentina, Mexico, Morocco, Bukina Faso, and Cape Verde), so Convention 108 is gaining considerable strength in Latin America as well as in Africa, and will soon have 56 parties. Accredited observers to the Convention's Consultative Committee include Japan, South Korea, New Zealand, the Philippines, Indonesia, Israel, and Ghana.

Accession to Convention 108 offers countries numerous advantages, which cannot be set out in detail here,[8] but they include (i) realistic prospects of global adoption; (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.

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[4] Greenleaf, G, The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' International Data Privacy Law, Vol. 2, Issue 2, 2012 <https://ssrn.com/abstract=1960299>

[5] Greenleaf, G 'European data privacy standards in laws outside Europe' (2017) 149 Privacy Laws & Business International Report, 21-23 < https://papers.ssrn.com/abstract_id=3096314>

[6] Greenleaf, G 'Renewing Convention 108: The CoE's 'GDPR Lite' initiatives' (2016) 142 *Privacy Laws & Business International Report,*14-17 <https://papers.ssrn.com/abstract_id=2892947>

[7] For example, mandatory data breach notification (DBN) reports to a data protection authority (DPA) for serious data breaches (also found in the 2013 revised OECD Guidelines) are already required in such 'high GDP' countries as Australia, Canada, Japan, Korea, Philippines, South Africa, and Vietnam, and in many other countries; DPAs are empowered to make binding decisions and issue administrative sanctions including fines in Australia, Singapore, South Africa, and Taiwan.

[8] For details, see Greenleaf, G 'Balancing Globalisation's Benefits and Commitments: Accession to Data Protection Convention 108 by Countries Outside Europe' (June 23, 2016) UNSW Law Research Paper No. 52 <https://ssrn.com/abstract=2801054>

Convention 108 has clearly left its European moorings and is rapidly become a global treaty with parties from across the world. Of the 124 countries with data privacy laws, 112 are UN member states, so the soon-to-be 56 parties to Convention 108 will already represent half of all UN member states with data privacy laws. In fact, on a realistic estimate, a maximum of only 24 more could accede at present (given a total of 80),[9] so this is already a Convention with a very high percentage of potential parties.

In my submission, Convention 108 is the only global data protection convention that has any practical prospects of being developed and adopted. The development of a new UN convention from scratch is an unrealistic illusion: agreement on the terms of a new convention would take many years, and could perhaps never be achieved; and even once its terms were agreed, it would take decades to achieve 56 ratifications from across the globe. In contrast, the standards of Convention 108, and its ratifications, have been developing for nearly 40 years. My conclusion, therefore, is that maximizing the opportunities presented by Convention 108 is the UN's best option.

3 Avenues open to the UN to advance adequate protection of privacy

The single best and most effective strategy that the United Nations can adopt to strengthen 'national legislative and regulatory frameworks concerning the collection, processing, retention or use of personal data' (as the call for submissions puts it), is to develop a package of measures to align UN policies with data protection Convention 108. I submit that this would involve seven inter-related steps being taken by the relevant UN organs (as well as by the Council of Europe). In brief,[10] these are:

1. That the UN and its organs should accept and advocate that the standards embodied in of Council of Europe data protection Convention 108, including its stronger 'modernized' version, are now international 'best practice', consistent with the International Covenant on Civil and Political Rights (ICCPR) article 17 concerning privacy. An UNCTAD report in 2016 recommended similarly.

2. The UN General Assembly could consider updating its *Guidelines for Regulation of Computerized Data Files* (1990), which recommended adoption by member states of a full set of basic data privacy principles, so as to align them with the standards embodied in Convention 108, including its stronger 'modernized' version.

3. That the UN Human Rights Committee could update its 1989 'General Comment' on ICCPR art. 17 to further align it with both Convention 108 and with art. 8 of the European Convention on Human Rights (ECHR). The UN Human Rights Committee's 1989 General Comment 16 interprets ICCPR art. 17 as requiring many (but not all) of the basic data protection rights typically found in data privacy legislation.[11]

4. The International Conference of Data Protection and Privacy Commissioners (ICDPPC) in 2013 recommended creation of a 3rd Optional Protocol to the ICCPR, to adopt an

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[9] Greenleaf, G 'Data Protection Convention 108 Accession Eligibility: 80 Parties Now Possible' (2017) 148 Privacy Laws & Business International Report, 12-16 <https://papers.ssrn.com/abstract_id=3062415>

[10] For an earlier published version, see Greenleaf, G, 'The UN Special Rapporteur: Advancing a Global Privacy Treaty?' (2015) 136 Privacy Laws & Business International Report, 7-9 <https://ssrn.com/abstract=2672549>

[11] *General Comment No. 16* (Art. 17) 08/04/1988 <http://www.unhchr.ch/tbs/doc.nsf/0/23378a8724595410c12563ed004aeecd >

international privacy standard (consistent with ICCPR art. 17), however a revision of the General Comment is a simpler and more feasible approach.

5. UN organs could recommend that UN Member States should consider applying to accede to Convention 108, once their laws meet the standards required by the Convention. Whether individual States decide to do so will depend in part upon whether the Convention maintains high standards for new accessions to the Convention and for adherence of all existing parties to those standards.

6. The 1st Optional Protocol to the ICCPR allows individual citizen of UN member states that have adopted the Protocol to make 'communications' (complaints) to the UNHRC that their country has not adhered to its ICCPR obligations (including Article 17), and empowers the Human Rights Committee to make recommendations to Member States (but not binding decisions, unlike the European Court of Human Rights under Article 8, ECHR). Convention 108's governing bodies should require non-European countries acceding to the Convention to also accede to the ICCPR 1st Protocol.

7. That the UN Human Rights Committee should accept 'communications' (complaints) from individuals in Member States, that the standards of Convention 108 are not observed (although such complaints would technically be that art. 17 ICCPR had not been observed). This would apply to those States parties to both (a) the ICCPR 1st Optional Protocol and (b) Convention 108, and would place citizens of non-European states that have ratified both in a position closer to European citizens (who have the benefit of ECHR art. 8). Some citizens in states with binding regional human rights agreements equivalent to the ECHR (for example in Latin America) would not need to rely on this mechanism.

By adopting some or all of these means, the United Nations could accelerate and strengthen the existing momentum that Council of Europe data protection Convention 108 has already achieved in becoming the only global data protection Convention, and create an effective means by which to strengthen national legislative and regulatory frameworks'.

Qualifications of submitter

My qualifications to make a submission on the right to privacy are, in brief, as follows. I have been involved in data protection and privacy issues for over 40 years, as an official (NSW *Privacy Committee Act 1975*), an academic, privacy advocate, and a consultant. As an academic, I have published over 100 articles concerning privacy, and my most recent book, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (OUP, 2014; paperback 2017), is a study of privacy and data protection in all 28 countries in Asia, including India. I am the Asia-Pacific Editor for *Privacy Laws & Business International Report*. As a consultant, I have among other engagements authored or co-authored five reports to the European Commission concerning the levels of data protection in various Asia-Pacific countries. As a privacy advocate, I am a co-founder and member of the Board of the *Australian Privacy Foundation* since 1987, and founder of the *Asian Privacy Scholars Network*. In 2010 I was made a member of the Order of Australia (AM) for my contributions to advancing free access to legal information, and to the protection of privacy, and in 2017 was elected as a Fellow of the Australian Academy of Laws (FAAL). I am a co-founder of the free access online law service, the Australasian Legal Information Institute (AustLII).