



Convention 108 and Convention 108+ *Instruments of universal vocation*

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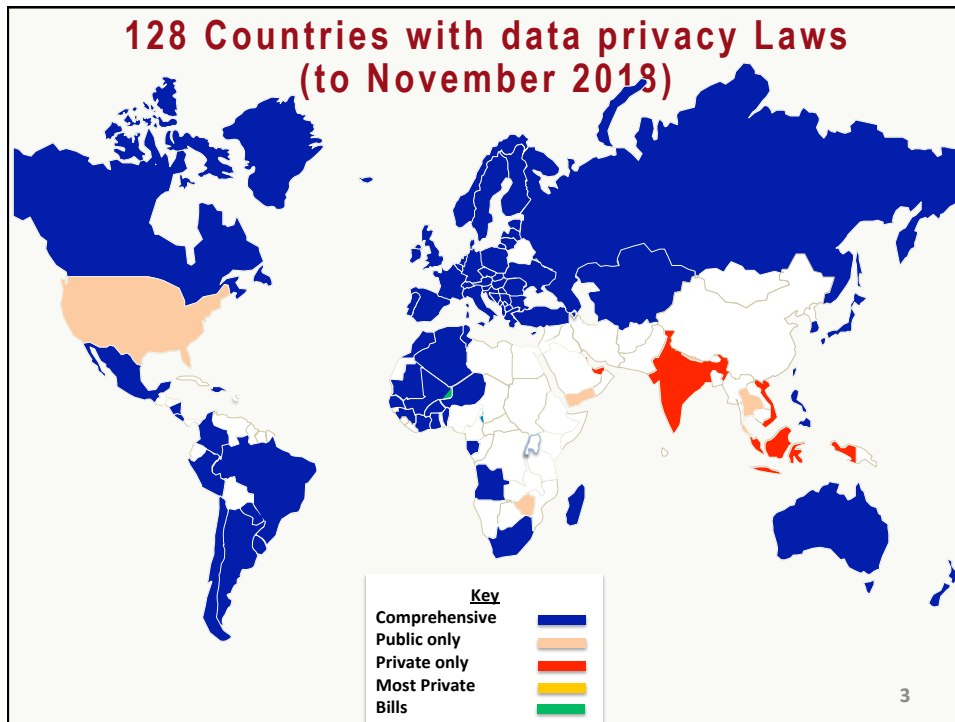
*Foro México Y El Convenio 108 del Consejo
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The Global Context of Convention 108

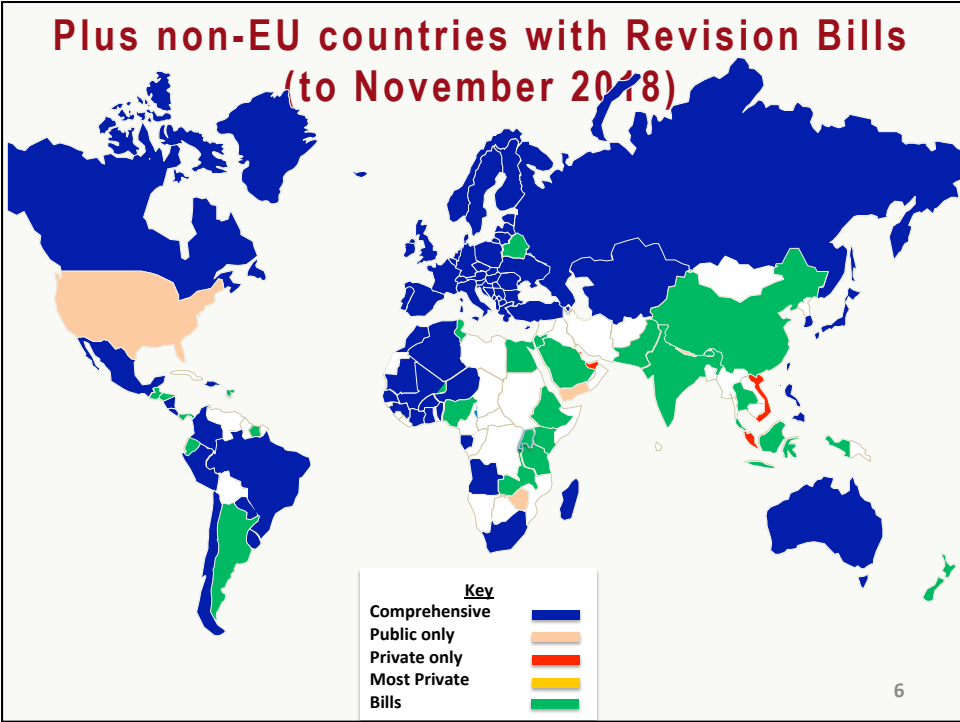
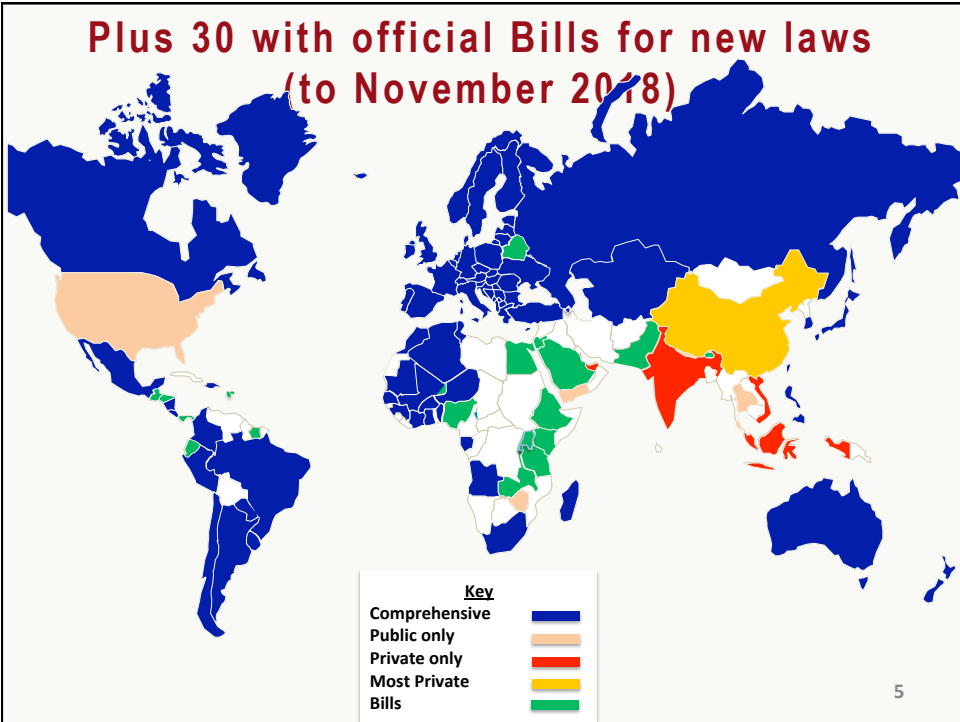
- How many countries now have a data privacy law?
 - Answer: **128** (as at November 2018)
 - 2017 Tables and articles on my SSRN pages: 120
 - 8 more since then, Cayman Islands, Mauritania, Niger, Guinea (Conarky), Brazil, Algeria, St. Kitts & Nevis, & Bahrain
- Since 2014 the majority of global privacy laws are from **outside Europe** (now 75/128)
- 90% have a **separate Data Protection Authority**
- 90% **comprehensive** laws (public + private sectors)

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What principles do the 128 laws enact?

- 1980s: OECD Guidelines & CoE Convention 108 had **9 common elements** which defined a 'data privacy law'
- The 1995 EU Directive contained **10 principles** not found in the 1980s standards – a '2nd generation'
- The 75 current laws outside Europe include, on average, at least 7/10 of these '2nd generation' principles
 - The 'Top 20 by GDP' countries outside Europe with a law include on average 6/10 of these 'European standards' (2017)
- Therefore, **the current 'global standard'** is more than half-way to the Directive's standards
- From 2018, laws around the globe influenced by the GDPR and Convention 108+ are rapidly **raising this standard**



Bills for new & revised laws

- About 30 more countries currently have **official Bills**
- Growth of **new** laws globally has **not slowed down**
 - Annual average of 2.4 countries with new laws since 1970
 - This decade, the annual average is **5 new laws**
- Many stronger **revised** laws
 - Many **already enacted since 2012**, for example in Asia-Pacific: Korea, Hong Kong, Taiwan, Japan, Australia
 - Now many **post-GDPR revision Bills/Laws**: Tunisia; India; Argentina; Indonesia; Thailand; New Zealand; Canada
- Some significant e-commerce/consumer privacy laws
 - eg China's laws may soon become a full data privacy law

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Early effects of the GDPR

Survey of **over 30 countries outside Europe**, shows these 'GDPR principles' enacted by **at least 10 countries**:

- *DPA's enabled to make binding decisions and issue administrative sanctions including fines;*
- *Right to object to processing based on controller or public interests;*
- *Data breach notification to DPA & to data subjects (+ US);*
- *Stronger consent requirements;*
- *'Sensitive data' to include biometrics and/or genetic data;*
- *Mandatory Data Protection Officers (DPOs) for some processing.*

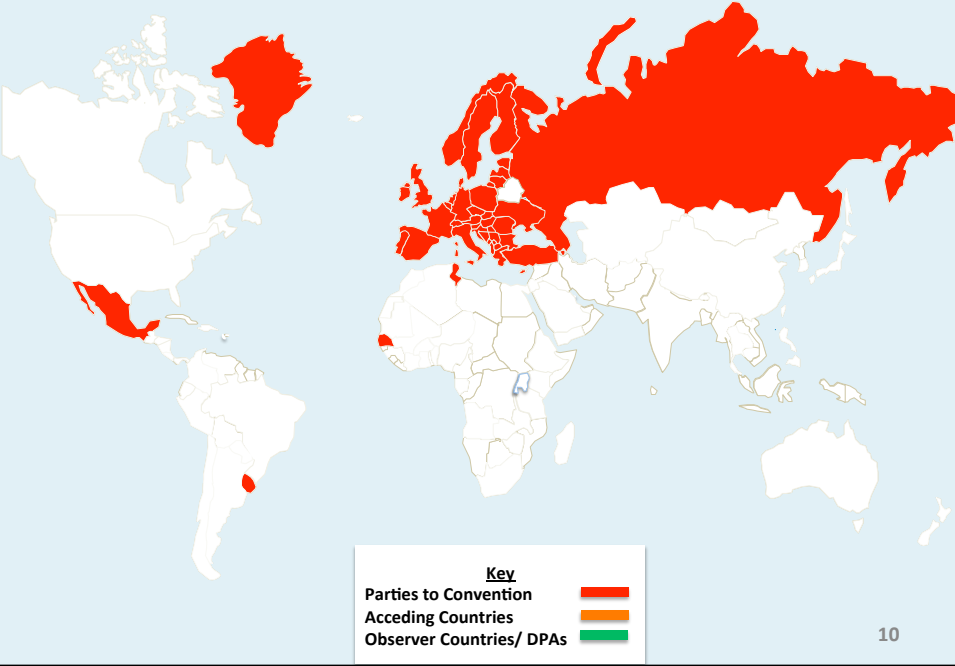
All other new GDPR principles were adopted by 1-9 countries

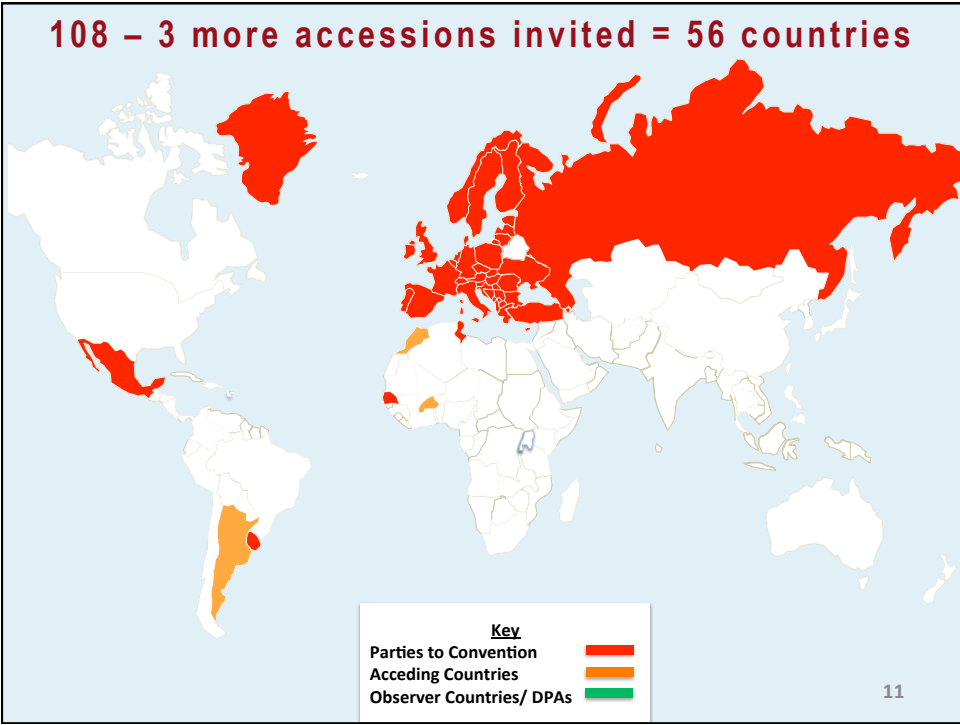
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Global data protection Convention 108/108+



Convention 108 – 53 Parties as at November 2018





Relationship between 108 and 108+

- ‘Modernised’ Convention 108 – now ‘108+’ and ‘Global’
- Finalised 18/05/2018 and open for signature 10/10/2018
- Any of 53 Parties to 108 may sign 108+ and ratify once they comply with it
- Any new accessions must be to 108+ *now it is open for signature* (36(2))
 - Except 3 states already invited to accede to 108 may also sign & ratify it
- When will Convention 108+ will be in force?:
 - When all existing Parties have ratified it; OR
 - In 5 years (Oct. 2023), if 38 Parties have ratified it (but only between them)
 - 21 Parties (17 EU, 3 Council of Europe, plus Uruguay) have *signed* already.
 - GDPR means 28 EU states can *ratify* soon; 10 more ratifications needed
- Until in force, ratifying Parties may declare Interim in-force status only between themselves (reciprocal)

Result: 108 is still the current Convention; in a few years 108+ will take over

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Potential for accession to Convention 108+	From 128 countries with data privacy laws	No.
Not eligible to accede	Not a State (18); Not a democracy (2); Not comprehensive (10); No DPA in law (8)	39
Not yet eligible – DPA not yet appointed	Angola, Nicaragua, Seychelles, Niger, Guinea-Conarky, Mauritania, Algeria, St Kitts and Nevis, Brazil	9
Possibly eligible – Lower GDP	São Tomé and Príncipe, Costa Rica, Gabon, Ghana, Lesotho, Malawi, Benin, Mali, Cote d’Ivoire, Bahamas, Antigua & Barbuda, Cayman Islands, St Lucia, Trinidad & Tobago	14
Possibly eligible – Higher GDP	Korea, South Africa, Japan, Australia, Peru, Philippines, Colombia	7
Probably eligible – EU Directive ‘adequate’	Canada, Israel, New Zealand	3
Conv 108 – invited to accede to 108	Burkina Faso, Morocco, Argentina	3
Conv 108 Parties (non-European)	Senegal, Mauritius, Uruguay, Tunisia, Cape Verde, Mexico	6
Conv 108 Parties (European)	All Council of Europe Member States (47)	47
Total number of countries	Of 128, 36 more (ttl. 89) could be eligible to accede to Conv. 108+ by meeting its standards	128 <small>14</small>

New 108+ requirements cover most new EU GDPR requirements

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**.

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Convention 108+ standards	Laws outside Europe (Minimum – 30/69 assessed)	No.
<i>DPAs 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, Brazil	20
<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, Brazil	17
<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, Brazil	11
<i>'Sensitive data' to include biometrics and/or genetic data</i>	Mauritius, South Africa, Ghana, Benin, Gabon, Chad, Guinea-Bissau, Ivory Coast, Madagascar, Mauritania, Brazil	11
<i>Mandatory DPOs for sensitive or large scale processing</i>	Korea; South Africa, Ghana, Niger, Benin, Guinea, Israel, Mexico, Philippines, Brazil	10
<i>Direct liability for processors as well as controllers</i>	Canada, India, Korea, Philippines, Taiwan, Mauritius, Ghana, Benin, Brazil	9
<i>DPAs must cooperate in international complaints</i>	Japan, Mauritius, Ghana, Philippines	4
<i>Demonstrable accountability</i>	Mauritius, South Africa, Mexico	3
<i>Mandatory DPIAs if high risk</i>	Mauritius, Benin, Mexico, Brazil	4
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But 108+ does not explicitly include some GDPR innovations – it is ‘GDPR Lite’

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 **finances based on global annual turnover**;
9. requirement to **cooperate** in resolving complaints with international elements, with any other DPA (as distinct from 108+ members).

Some of these 9 may be implied by 108+.

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

- GDPR **recital 105** says 108 accession will ‘in particular ... [be] taken into account’ in assessing GDPR adequacy
- **108+ includes most important GDPR innovations** (in less prescriptive form). Accession to 108+ will require that *most* of these are met.
- **But 108+ does not include all GDPR innovations.** Possible that GDPR ‘adequacy’ will not require any of these 9 extra elements (adequacy Decisions will clarify).
- ‘Adequate’ did not mean ‘identical’ under the Directive, and will not under GDPR (adequacy Decisions will clarify).

Result: *Uncertain but possible that 108+ compliance may in practice be adequate; if so, the ‘GDPR Lite’ 108+ standards may become the new global standard by 2023.*

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But 108+ accession can require higher standards than GDPR adequacy

- Example 1:
 - GDPR adequacy can be satisfied by provisions applying only to personal data coming from EU countries (US Privacy Shield; draft Japan decision)
 - Convention 108+ accession requires provisions which apply to **all personal data** within a country's jurisdiction (not only that coming from 108+ Parties)
- Example 2:
 - 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+.

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Attractions of CoE 108+ accession to non-European countries

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. assists in **accession** to law enforcement/criminal justice conventions;
12. mutual **assistance** in improving laws and enforcement;
13. **business benefits** with export and import facilitations;
14. **individuals benefit** from international standard protections;
15. **assists international organisations** in multi-country operations;

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Is 108+ the 'Goldilocks' standard?



Will 108+ become a global standard – 'adequate' for the EU, but not requiring radical changes to the existing/new data privacy laws of 128+ countries?

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A problem of compatibility?

- **Convention 108**
 - Transfers only allowed to non-Parties providing 'an *adequate* level of protection' (art. 12 + Add. Protocol 2001, art. 2)
 - Can be achieved by *adequate* safeguards (eg contracts)
- **Convention 108+ art. 14**
 - Transfers only allowed to non-Parties providing 'an *appropriate* level of protection' based on 108+
 - Can be secured by *appropriate* & enforceable safeguards
- **Mexico's Laws** comply with 108
 - arts. 36, 37 and regs. (Federal Law)
 - Art. 65 (General Law) by which recipient assumes all duties under the law
- **Can these laws comply with new Free Trade Agreements, as well as Convention 108?**
- **CPTPP FTA (new TPP) art. 14.11**
 - **In force 30/12/18**; Mexico and Canada have ratified, but US is not (yet) a party
 - Must allow data exports for business of a service provider of a Party
 - Exceptions must satisfy a 4-Step-Test: (i) legitimate objective; (ii) non-discriminatory; (iii) not a disguised restriction; & (iv) minimum necessary
 - A tougher test than GATS art. XIV
- **USMCA FTA (new NAFTA) art. 19.11**
 - Unknown when/if in force in USA
 - Prohibits restrictions on data exports by 'covered persons' of other parties
 - Exceptions must satisfy a 4-Step-Test at least as tough as CPTPP

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References to my papers on Convention 108

- '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>
- '[Renewing Convention 108: The CoE's 'GDPR Lite' initiatives](#)' (2016) 142 *PLBIR*, 14-17 <https://papers.ssrn.com/abstract_id=2892947>
- '[European data privacy standards in laws outside Europe](#)' (2017) 149 *PLBIR*, 21-23 <https://papers.ssrn.com/abstract_id=3096314>
- 'Balancing Globalisation's Benefits and Commitments: Accession to Data Protection Convention 108 by Countries Outside Europe' UNSW Law Research Paper No. 16-52. <https://ssrn.com/abstract=2801054>
- '[Data Protection Convention 108 Accession Eligibility: 80 Parties Now Possible](#)' (2017) 148 *PLBIR*, 12-16 <https://papers.ssrn.com/abstract_id=3062415>
- 'The UN Should Adopt Data Protection Convention 108 as a Global Treaty' (submission to UN bodies, April 2018) <https://ssrn.com/abstract=3159846>
- "Modernised" data protection Convention 108+ and the GDPR (2018) 154 *Privacy Laws & Business International Report* 12-13.
- 'Looming Free Trade Agreements Pose Threats to Privacy (2018) 152 *Privacy Laws & Business International Report*, 23-27; <https://ssrn.com/abstract=3199889>