Applying International Law to the GeoNames Provisions of the Applicant Guidebook

I agree with those who have already suggested that it does not make sense to try to categorise and treat differently different types of geographic names (city, country, region, local, landmark, etc), because international law does not make that distinction. References have been made in other posts to international law, and some members have dismissed these comments. I urge us to treat international law seriously in terms of what the law currently is, how it is formed, and how it affects our policy-making. My comments rely heavily on my doctoral thesis, completed in 2012 at the University of Berne, Switzerland, on the question of whether the Applicant Guidebook provisions on geographic names are consistent with international law. My research has been published (https://lrus.wolterskluwer.com/store/product/protection-of-geographic-names-in-international-law-and-domain-name-system-second-edition/) and reviewed internationally. I mention this not in an underhanded attempt to sell books, but rather to acknowledge the impossible task of summarising 4+ years and 400+ pages and 1000+ footnotes in this post, and to provide a link to the full set of data and analysis that sits behind this post.

1. The critical difference between domestic and international law, and why it matters

Having examined Swiss law in my thesis as an example of national law dealing with geographic names, I noted the references to 29 Civil Code (and other national laws) in the thread on city names. The Swiss Civil Code applies only in Switzerland's borders, so the right of challenge exists only against those those persons and companies within Swiss jurisdiction. A national law that limits the use of a name (any name, geographic or otherwise) applies in that jurisdiction only. A Swiss law cannot restrict a party in, for example, Indonesia. This is the case unless, under widely accepted fundamentals of international law, the law is classified as a "general principle of international law", meaning that it is universally adopted in most countries' national laws. Determining this is a difficult and time-consuming process, usually undertaken to identify procedural (how an outcome is achieved) rather than substantive (attributing a right or responsibility) legal rules. Even apart from the fact that the question of legal rights in geographic names is a substantive matter rather than procedural one (and thus not the sort of rule traditionally constituting a "general principle of international law"), my research uncovered no such universality or consistency across the laws of the many countries of the world such that the principle of 29 Swiss Civil Code or similar could be characterised as a general principle of international law. When a country has such a law, it is enforceable only against those within that country's jurisdiction. It has been said by many on this list that "**Domain names are unique, and global resources".** This is precisely why we cannot base the policy for those global resources on national laws unless those laws are shared by all or at least most countries.

2. International law does not explicitly recognise a right of governments to approve/reject a new gTLD application

This is the principal conclusion of my doctoral thesis, albeit distilled into its most concise wording without any of the supporting law or explanation. I have worded this here very carefully, so as to offer a statement of fact, not opinion, because I am aware that some will dismiss it by saying: "Well, this is just your *opinion*'. After exhaustive research in a range of fields of international law (including state theory and the principles of what makes a country a country in the eyes of the international community plus trade law, IP law, historical custom, and others), both historical and current, and their explanatory notes, texts and drafts, I can state unequivocally that I found no explicit recognition of a government right to a geographic

name in any area or source of international law. As a critical next step, I considered whether such a right is implicitly recognised. Some countries have tried, at different points in recent time, to amend the Paris Convention for the Protection of Industrial Property to explicitly recognise government rights in geographic names. These attempts have not - as yet - reached the full agreement of the many countries party to the convention (currently 177); this agreement is necessary for a rule to be international law. The fact that agreement cannot be reached on this point indicates that - at least right now - there is also no implicit international law recognising legal rights of government in geographic names. This conclusion is based on the state of the law today. It is not a prediction of nor an evaluation of future law. This is not my personal judgment on what the law *should or could* be.

3. Why we should not ignore international law in WT5, and why ICANN policy effectively creating or circumventing it compromises ICANN

In the CWG-Use of Country and Territory Names, as well as in WT5, it has been said that the fact that there is no international law recognising an exclusive right of governments to geographic names does not matter because a) the fact that international law does not contain such a right does not stop ICANN policy from doing so and b) there is more to the issue than just international law.

First, b), there is more to the issue than just international law. Just because one thing is affected by numerous factors affecting different stakeholders does not mean that any single factor can be ignored. Dare I say it, there is more to WHOIS data than just privacy or law enforcement (or any number of other factors). I have yet to hear anyone suggest that we ignore privacy in the next-generation WHOIS. Or law enforcement. etc.

On a), the fact that international law does not contain a right of governments to geographic names does not stop ICANN policy from doing so. It is not simply the case that there is no law; the many countries of the world have tried but cannot agree on this issue. Argument a) sees ICANN making a decision it is not empowered to make, in the face of those bodies that are empowered to make this decision but have not found the agreement necessary to do so. ICANN has in its bylaws committed to "carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law." Is a policy that gives governments a right of priority or exclusivity in geographic names "in conformity with relevant principles of ... applicable local law"? Conformity would depend country-by-country, each country having different local laws, only achievable if all countries agreed. If agreement isn't there, this is not a workable foundation for a rule that applies to all; some will inherently be violators from the outset. Each country has a sovereign right to choose how to name a place or to impose restrictions on using names within its own borders. We cannot pick the law of one or some countries and impose it on all countries, because this violates basic principles of sovereignty. A country trying to impose national law outside of its own borders can at its most extreme be interpreted as an intrusion into national sovereignty, and thus an act of war. Think of any country in the world other than the one you live in or represent, and then imagine that country insisting that its laws apply in your home country. This is clearly not an environment that ICANN should create or encourage, and why we need to rely on international law, which by definition is law agreed upon by a large proportion of the world's nations.

Is a policy that gives governments a right of priority or exclusivity in geographic names "in conformity with relevant principles of international law"? No, because not all countries agree that such rights exist. I believe that ICANN oversteps its mandate and legitimacy when it implements a policy that recognises a right that not only is not explicitly recognised in international law, but where we have clear record of not being able to reach agreement. To

the outside world, this suggests that ICANN is being used to circumvent the agreement threshold needed to form international law in the bodies where that happens. ICANN's rules are strengthened by, and earn their legitimacy from, their origin in and recognition by legitimate law-making bodies. International law experts do not recognise ICANN - at least at this time - as a body the agreed decisions of which constitute international law. If it is desired and agreed that international law should change or evolve, this action must be taken through those legitimate law-making bodies. Lobbying for new international law has no place in WT5; this needs to be directed at the government representatives who participate in these recognised international law-making bodies. Once such a law is made in those fora, we would ignore it at our peril in ICANN policy-making.

4. An absolute consent/non-objection process that prioritises one party's rights or interests over others is not supported by international law

A rule that gives any stakeholder - public or private - an absolute exclusive or priority right in a geographic name in the DNS (in other words, the right to tell all others they cannot use the name in the DNS, or place restrictions on its use in the DNS) is not supported by international law. No one has absolute or priority rights under international law such that they have the power to decide how or whether others use a geographic name. Again, it is precisely because the DNS is a global resource that we should not presume to prioritise one party over another. This, for better or worse, is how we ended up with auctions to resolve competing applications. I am NOT suggesting that auctions are appropriate here, but simply noting that we ended up with auctions in the AGB because the ICANN community felt it was not possible or appropriate to have to decide whether one applicant's application was more worthy or deserving or stronger etc than another.

5. We need policy that respects national sovereignty and the rights recognised in international law by not giving any one stakeholder priority over others, enables all those with rights or interests in a name to identify their right/interest and risks to those, and resolves applications to avoid those risks.

Rather than aim in WT5 to create (and argue about) a single, one-size-fits-all rule, I believe that we should be aiming to develop predictable steps for equitably and transparently dealing with applications for geographic names, where all interested parties have the opportunity to clearly identify their particular right or interest and test the application against those rights/interests. If I were to propose a change to the flow charts we saw today, it would be a streamlined process, fairer for all. As a strawman I suggest something like the involvement of the Independent Objector in the 2012 applications, whereby the global public interest in a given string was explicitly identified and evaluated against each challenged application, on a case-by-case basis. An individualised resolution to each case can be reached where all interests are evaluated for possible harm, possible alternatives or remediating solutions are identified, all by an independent party, but without the cost or burden or time of litigation. These are global resources, so this cannot be a policy about "protection". Rather, a policy for global resources should be about finding ways to make sure they are used fairly, transparently, in accordance with and not in place of international law. Many comments have been made in this thread along these lines, so I'm hopeful that we're conceptually all closer together than it appears.

With best wishes, and thanks to the co-leads for encouraging a broad range of views to be expressed,

Heather Forrest