

# From a Covid-19 pandemic to war?

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## FROM A COVID-19 PANDEMIC TO WAR?

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*Reflections on Access to medicines and the Russian Invasion of Ukraine: Legal and Further Issues:* My aim here is to address two current critical concerns arising in the first quarter of 2022: 1, to clarify whether and how countries can take advantage of WTO trade regulations on access to medicines to produce Covid vaccines for their citizens and 2, to analyse issues arising from Russia's invasion of Ukraine in a world recovering from a pandemic. Below are key notes from the seminar:

### A. COVID-19 and Access to Medicines

#### 1. Is the international system on trade and public health balanced?

Listening to conversations on social media about how poor countries were being denied medicines and vaccines in the thick of the global pandemic, one would imagine the WTO was an evil empire which allowed rich countries to develop and hoard life-saving medication. [This is not the case given the WTO response to the Coronavirus pandemic](#). While some countries - Canada, EU, Japan, China, Norway, Switzerland, UK, USA, are signed up to the WTO sectoral *Agreement on Trade in Pharmaceutical Products* which applies only to these signatories, the WTO under its *Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)* provides for both patent protection and for compulsory licensing for domestic production and exports of pharmaceuticals including vaccines. TRIPS applies to all WTO Member countries. What this means is that countries which cannot get consent from the patent holder and who have need, can produce the drug or in this case a vaccine, for its domestic use. Such production can also be for export. Whether countries have or are developing a local capacity for medicines, investing in R&D and incentivising health company activities is crucial to any benefit to be gained from compulsory licencing provisions.

#### 2. Should medicines be globally accessible and outside the scope of trade regulations?

While health is a common human concern and we all want to have access to health care and medicines, it is not governments who produce medicines, but companies. Companies produce medicines for sale not for charity, at least not primarily. The better option and which we have seen in the global response to the pandemic, is for co-operative action between leading actors such as the World Health Organisation (WHO), the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO) [to co-ordinate a public health response to trade in medicines](#) .

#### 3. Is a pandemic an exception to the international regulations on Intellectual Property?

Not really. The WTO TRIPS Agreement has had a number of amendments including allowing for compulsory licencing for exports, but Article 31 of the agreement does not insist on a pandemic before compulsory licencing. [It is up to countries to determine whether to grant compulsory license if there is a national emergency, circumstances of extreme urgency or, to combat anti-competitive practices, or for government use](#). In essence, a country has options if it wishes to exercise them, not only to develop patentable medical inventions including vaccines and to develop a robust IP protection regime, but also to grant compulsory licenses for local production or export, within the rules.

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4. Should richer countries remove restrictions on access to medicines voluntarily or compulsorily?

The need for alliance on global health issues is also one that Covid-19 with its impact on trade, travel, and the economy has shown. Nevertheless, there is a commercial element to public health that we cannot ignore. Corporate interests align with government needs, for money. Countries cannot force companies to produce medicines, not in a free society. Therefore, it must be part of every country's strategy, to invest in health and medicines and not rely on voluntary donations and aid or even expect that corporations must be forced to produce medicines for global use. Developing local capacity for inventions and for production of medicines cannot be a footnote in domestic health policy.

## B. Russia v Ukraine

1. Is Ukraine a sovereign independent State with a *de jure* (legally recognised) government and defined borders?

An unequivocal yes. Ukraine has a long history of existence which contrary to the impression created on social media today, did not just start in 2014 with the Russian occupation of Crimea. Even a cursory flick through the internet will confirm this. In satisfaction of the criteria set out under the 1933 [Montevideo Convention](#), Ukraine has defined borders, a government, a permanent population, and relations with other States. It is recognised as a sovereign independent State and has been so since its withdrawal from the Soviet Union in 1991.

2. Is Russia breaching international law provisions? Does international criminal liability arise in this conflict?

There are those who argue that the Russian President has a right to grieve threats to Russia with Ukraine's intentions to join NATO and the EU. This is beside the point. The fact here is that no sovereign state has jurisdiction over another. *I'll spare you the Latin that encapsulates this position<sup>2</sup>, but this is a principle of customary international law.* What has happened in Ukraine since 24 February 2022 is not a special military operation but an invasion, an act of aggression prohibited under international law (UNGA Res 3314 (1974)) and [which has now targeted civilians according to reports](#). In this war, [International Humanitarian Law](#), equally applies. Any breaches of the Geneva Conventions and other related provisions will incur liability. While Russia is not a signatory to the International Criminal Court (ICC), the court does have jurisdiction over individuals who are brought before it to face charges on war crimes and crimes against humanity. Where there is evidence of such crimes, there is every scope that criminal liability will arise even from this Russian-Ukraine war and liability can extend to co-belligerents.

3. Can NATO, the EU, the USA, legitimately offer 'humanitarian intervention' in the conflict? Do sanctions help?

Well, under Art 51 of the UN Charter, there is a right to self-defence and collective self-defence as a legal response to war. The UN Security Council can also mandate a humanitarian response but with Russia as a member of the Security Council (and China also a member, and not a foe to Russia, let's just say that will not happen.) The situation does lend weight to the calls for a rejigging of the Security Council to include non-warring nations at the least. Be that as it may, there is a long history of conflict

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<sup>2</sup> The missing phrase is: *Par in parem non habet imperium*.

between these countries. The threat of nuclear war or even a protracted war and until the invasion by Russia, a reliance on diplomacy as a means of settling Russian agitations have meant a hesitant response to the events of 24 February 2022. But no more. Sanctions are helping. Where countries cannot act collectively by directly fighting Russia, they, those countries that comprise the [EU](#) or NATO, have acted in concert, swamping Russia with an [unprecedented raft of sanctions that will hurt badly](#) .

4. What means of dispute resolution will bring lasting peace and security to the conflict?

It is difficult not to prophesy doom in the immediate future. Ukraine has already suffered in this war, and it is still early days. The key issue is what President Putin wants. What one suspects he wants, is what he will not be given willingly – the opportunity to resurrect a Russian empire that consists of the former Soviet territories. Putin’s objective therefore will mean a shifting of the goal posts in every effort to resolve this dispute. Whether China and other countries who cannot or will not condemn this war will change their positions and if so when, will also determine how peace can reign. Ukraine’s [previous](#) and [current](#) efforts to initiate proceedings against Russia at the ICJ are more of a record-keeping of events than final settlement of President Putin’s grievances.

What may result in the medium term is a continued Ukrainian resistance, an insurgency not dissimilar to Afghanistan if Russian occupation is protracted. Yet, one can also see a dissent in Russia, where, as more people begin to feel the bites of sanctions and the crippling of the Russian economy, those who do not care for the realities of hardship may overcome their reticence or double their efforts, in challenging the Russian Putin regime. This will mostly be the young with their access to social media and their engagement with the rest of the world.

5. What can we expect going forward?

Whether one sees this as World War III or as Cold War II, there is no doubt that [things have changed and changed quickly](#) . Where the EU was not prepared to build an army, it is now determined to ramp up its military deterrence. [The long call to European countries to increase military spending in NATO may even see greater response in the light of this war](#) ; even Germany unwilling to tie itself to military conflicts in view of its role in WWII, has strategized to advance military deterrence spending alongside its support for Ukraine. There is clarity now on the impact of mono-dependency on one energy supplier (Russia); [the EU understands this is risky business](#) . Fast-tracking a move to renewables as a way of diverging from gas seems like a savvy socio-economic move. There is room for other energy producers to scoop more business with Russia out of the way and with a rise in oil prices – can the likes of Nigeria, Brazil, India, with oil and gas reserves capitalise on the situation? Yet prices will increase for the consumer not only for energy but perhaps even for bread with Russia and Ukraine limited in their erstwhile control of the wheat market. The international refugee/migrant crisis has only deepened - this time it's within Europe. Will there be new political alliances? One thinks so. There are no permanent friends in international politics. Interests in this new war will certainly coalesce to [new alliances](#) .