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# UKRAINE SETTLEMENT PROJECT



## **UKRAINE SETTLEMENT OPTIONS:** **Weapons of Mass Destruction** By Grant Dawson

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# UKRAINE SETTLEMENT OPTIONS PAPER: WEAPONS OF MASS DESTRUCTION

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## *Preface*

*The Russian Federation has alleged that Ukraine was developing nuclear, biological and chemical weapons before the invasion. It has accordingly demanded that further steps be taken to ensure that no such activities take place in the future. Ukraine has flatly denied these claims. International agencies have confirmed that there is no evidence pointing in the direction of a weapons of mass destruction programme being pursued by Ukraine. Nevertheless, a settlement, if there is to be one, might address this issue.*

*Marc Weller*

## INTRODUCTION

### *Definition of the Issue Covered in this Option Paper*

On 24 February 2022, the Russian Federation declared that it was initiating a “special military operation” in Ukraine.<sup>1</sup> On 27 February 2022, the United Nations Security Council noted that a lack of unanimity of its permanent members prevented it from exercising its primary responsibility for the maintenance of international peace and security and decided to call an emergency session of the United Nations General Assembly to examine the situation.<sup>2</sup> On 2 March 2022, the United Nations General Assembly condemned the “special military operation” by the Russian Federation, deplored in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the United Nations Charter,<sup>3</sup> and urged the immediate peaceful resolution of the conflict through political dialogue, negotiations, mediation, and other peaceful means.<sup>4</sup> On 16 March 2022, the International Court of Justice issued a provisional measures order directing the Russian Federation to immediately suspend the military operations that it had commenced on 24 February on the territory of Ukraine.<sup>5</sup>

This paper seeks to identify and analyse the international law that is applicable to the obligations of the Russian Federation and Ukraine in respect of the disarmament and non-proliferation of weapons of mass destruction. It then offers options for how the issue of weapons of mass destruction may be dealt with in any peace agreement reached between the parties to end hostilities.

### *The Role of this Issue in Negotiations*

The Russian Federation has made several statements in various fora that Ukraine is attempting to obtain weapons of mass destruction (chemical, biological, nuclear)<sup>6</sup> to be used against the Russian Federation and others.<sup>7</sup> These allegations may be an aspect of the current negotiations between the Russian Federation and Ukraine that must be addressed to the satisfaction of both parties.

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<sup>1</sup> Russian Federation, Address by the President of the Russian Federation, 24 February 2022, page 7.

<sup>2</sup> United Nations Security Council, S/RES/2623, 27 February 2022.

<sup>3</sup> United Nations Charter, Article 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

<sup>4</sup> United Nations General Assembly, Aggression Against Ukraine, A/RES/ES-11/1, 2 March 2022, preambular paragraph 10 and operative paragraphs 2, 14.

<sup>5</sup> International Court of Justice, Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*), Provisional Measures Order, 16 March 2022, pages 17–19.

<sup>6</sup> Radiological weapons are designed to distribute radioactive material without the accompanying use of a nuclear explosive device. Since there is currently no multi-lateral international instrument banning radiological weapons and the parties are focusing primarily (although not exclusively) on chemical, biological, and nuclear weapons, this issue is not dealt with herein. However, should the Russian Federation and Ukraine wish to include radiological weapons as part of a comprehensive agreement to end hostilities, this could be achieved through a voluntary commitment to renounce such weapons and submit to mutual inspections of each other’s potential arsenals and relevant facilities.

<sup>7</sup> E.g., North Atlantic Treaty Organisation, Press Conference by NATO Secretary General Jens Stoltenberg Following the Extraordinary Summit of NATO Heads of State and Government, 24 March 2022, page 4; Council of the European Union, G7 Leaders’ Statement, 24 March 2022, page 1; Russian Federation, Address by the President of the Russian Federation, 24 February 2022, page 6 (alleging that “far-right nationalists and neo-Nazis in Ukraine” have “aspire[d] to acquire nuclear weapons”).

There have been statements along the lines that the Russian Federation’s allegations are a “disinformation campaign”, the intention of which is to lay the groundwork for a “false flag” for when the Russian Federation decides to itself use weapons of mass destruction in the conflict and then blames Ukrainian forces.<sup>8</sup> However, for the purposes of this options paper, the allegations made by the Russian Federation against Ukraine will not be assessed for their veracity, but rather will be considered as an issue to be negotiated and settled in any agreement between the parties, in accordance with applicable international legal standards and/or voluntary cooperation.

It also should be mentioned that key components to many of the disarmament initiatives and instruments contained herein (except nuclear) are the principles of equality and reciprocity. The options set forth below therefore treat both parties equally (in most cases), rather than singling out Ukraine for any binding undertakings. The options in this paper are not mutually exclusive and can be combined.

## **KEY POINTS ARISING IN CONNECTION WITH THIS ISSUE**

With respect to the allegations by the Russian Federation against Ukraine, namely, that Ukraine is seeking to develop weapons of mass destruction and use them against the Russian Federation and others, the question arises whether the peace negotiations can take this issue into account by including assurances that Ukraine will not develop and/or use such weapons. The first step is to identify the legal obligations that already apply to Ukraine in respect of chemical, biological, and nuclear weapons via international disarmament and non-proliferation instruments. Where such obligations exist, they may be recalled or reinforced in any peace agreement. Where obligations do not exist, new obligations can be contemplated and memorialised in the peace agreement. Relevant international organisations can play a role in verification and confidence-building measures.

### **1. Chemical Weapons**

The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925 Protocol) was opened for signature in 1925 and entered into force in 1928. There are 146 parties to the 1925 Protocol, including the Russian Federation and Ukraine. The 1925 Protocol bans “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”. However, the 1925 Protocol only bans the use of chemical weapons in times of war and does not prohibit states from developing and stockpiling them.

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<sup>8</sup> E.g., Organisation for the Prohibition of Chemical Weapons, Statement [by 49 States Parties] on Russia’s CW-related Allegations Towards Ukraine, March 2022 (“We find it particularly intolerable that Russia, as part of the propaganda that prepared this attack, made the unsubstantiated claim that Ukraine was preparing aggressive action in the Donbas region which would have been contrary to its obligations under the Chemical Weapons Convention. I refer to a statement by Russian Defense Minister Shoigu of 21 December in which he claimed that ‘for the purpose of carrying out acts of provocation, reserves of an unidentified chemical component have been delivered’ to eastern Ukraine. Repetitions of this false allegation and further insinuations about chemical weapons in Ukraine have been made in Russian state media and by Russian-backed separatists. ... We strongly condemn Russia’s behaviour. We consider it unacceptable to levy such false accusations against Ukraine, a State Party in good standing.”); see also Benjamin Wakefield and Patricia Lewis, *Ukraine: Is a Chemical or Biological Attack Likely?*, CHATHAM HOUSE, 30 April 2022, pages 4–5, 7.

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) was opened for signature in 1993 and entered into force in 1997. There are 193 parties to the Chemical Weapons Convention, including the Russian Federation and Ukraine. The cornerstone obligations of the Chemical Weapons Convention are contained within Article I, which provides that a state party shall never, *under any circumstances*: (a) develop, produce, otherwise acquire, stockpile, or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) use chemical weapons; (c) engage in any military preparations to use chemical weapons; or (d) assist, encourage, or induce, in any way, anyone to engage in any activity prohibited by the Convention. The language “under any circumstances” means that a state that is attacked or threatened with chemical weapons may not retaliate in-kind with such weapons. This interpretation was reinforced by the states parties to the Chemical Weapons Convention in the Ieper Declaration, which was adopted on the 100-year anniversary of the first large-scale use of chemical weapons in World War I.<sup>9</sup>

The Chemical Weapons Convention provides a comprehensive definition of chemical weapons in Article II(1): (a) toxic chemicals and their precursors, except where intended for purposes not prohibited under the Convention and as long as the types and quantities are consistent with such purposes (otherwise known as the “general purpose criterion”); (b) munitions and devices that are specifically designed to cause death or other harm through the toxic properties of those chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; or (c) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b). These three disjunctive components can constitute a chemical weapon either together or separately. Article II(2) provides the definition for “toxic chemical” as follows: “Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.” Article II(3) clarifies that “precursor” means the following: “Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.”

Article VII of the Chemical Weapons Convention obliges states parties to adopt national legislation to prohibit natural and legal persons, anywhere on their territory or in any other place under their jurisdiction, from undertaking any activity prohibited under the Convention. Such activity would include the development and use of chemical weapons. Article IX provides detailed procedures for states parties to follow in situations where there is doubt about compliance with the Convention. The procedures include consultation, cooperation, fact-finding, and detailed challenge inspections conducted by the Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons (OPCW)—the treaty body created by the Chemical Weapons Convention.

Based on the foregoing, both parties are subject to a complete ban on the development and/or use of chemical weapons under any circumstances. There are several options for how the Russian Federation and Ukraine could approach the issue of chemical weapons during their peace negotiations.

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<sup>9</sup> Organisation for the Prohibition of Chemical Weapons, Declaration on the Occasion of the Centennial Commemoration of the First Large-Scale Use of Chemical Weapons at Ieper (Ieper Declaration), 21 April 2015.

### *Option 1*

In the text of any agreement entered into by the Russian Federation and Ukraine, the parties could recall their international obligations, under the 1925 Protocol and the Chemical Weapons Convention, to never develop, produce, otherwise acquire, stockpile, or retain chemical weapons, nor to transfer, directly or indirectly, chemical weapons to anyone. They could also recall their legal obligations to never use chemical weapons; to never engage in any military preparations to use chemical weapons; and to never assist, encourage, or induce, in any way, anyone to engage in any activity prohibited by the Chemical Weapons Convention.

### *Option 2*

If additional assurances were desired, the Russian Federation and Ukraine could add to the agreement an undertaking that they will, pursuant to Article VII, reinforce their national legislation that implements their obligations under the Chemical Weapons Convention, especially in respect of criminalising the use of chemical weapons by any natural or legal persons on the territory or under their jurisdiction. They could also undertake to fully cooperate under the consultation provisions of Article IX, should a doubt about compliance arise. Finally, they could clearly express the intention to cooperate with the OPCW Technical Secretariat, in the event that either party called for a challenge inspection on the other's territory.

### *Option 3*

Every year, states parties, pursuant to Article VI of the Chemical Weapons Convention, are subject to inspections by the OPCW Technical Secretariat of their commercial chemical production facilities in order to verify that the activities conducted therein are in accordance with the Convention. The Russian Federation and Ukraine could invite each other to identify facilities in each other's territories, which would then be subject to inspection by the OPCW Technical Secretariat—either in addition to or in lieu of the regularly planned inspections. The parties could agree that the reports of these additional inspections will be released to all states parties for purposes of transparency.

A further avenue to explore could be language in the agreement that the Russian Federation and Ukraine will endeavour to negotiate and enter into an agreement, in which each party undertakes additional obligations to allow the other party to conduct inspections of relevant facilities on their territories. These additional confidence-building measures would provide detailed procedures to be followed and could be set forth in a formal, bilateral agreement or in a more informal document, such as a memorandum of understanding. Such an agreement could include the OPCW Technical Secretariat as a party to the (then) trilateral agreement or simply call upon the Secretariat to assist the parties in the additional inspections.

## **2. Biological Weapons**

The 1925 Protocol (also discussed above in respect of chemical weapons) bans “the use of bacteriological methods of warfare”. The 1925 Protocol was opened for signature in 1925 and entered into force in 1928. There are 146 parties to the 1925 Protocol, including the Russian Federation and Ukraine. However, the 1925 Protocol only bans the use of biological weapons in times of war and does not prohibit states from developing and stockpiling them.

The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention) was opened for signature in 1972 and entered into force in 1975. There are 183 states parties to the Biological Weapons Convention, including the Russian Federation and Ukraine. In the Preamble of the Convention, states parties declare that they are “[d]etermined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons”. In Article I, states parties undertake never, *in any circumstances*, to develop, produce, stockpile, or otherwise acquire or retain (a) microbial or other biological agents or toxins in types and quantities that have no justification for prophylactic, protective, or other peaceful purposes or (b) weapons, equipment, or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict. At the seventh review conference of the Biological Weapons Convention, states parties stated that the use of biological weapons—*in any way and under any circumstances*—is effectively prohibited under and a violation of Article I of the Convention.<sup>10</sup> In Article III, states parties are prohibited from (a) transferring, directly or indirectly, biological weapons to anyone or (b) assisting, encouraging, or inducing anyone to manufacture or otherwise acquire biological weapons. In Article IV, states parties must take the domestic measure that are necessary to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment, and means of delivery of biological weapons within their territory and places under their jurisdiction or control. In Article V, states parties undertake to consult each other and to cooperate in solving any problems that arise in relation to biological weapons. Under Article VI, states parties may lodge a complaint with the United Nations Security Council to investigate an alleged breach of the Biological Weapons Convention, and states parties agree to cooperate with that investigation.

There has already been discussion at the United Nations of the Russian Federation’s allegations against Ukraine in respect of biological weapons.<sup>11</sup> In response, the United Nations Office of Disarmament Affairs (UNODA) addressed the United Nations Security Council and stated that UNODA was not aware of the existence of a biological weapons programme in Ukraine—or anywhere else.<sup>12</sup>

Based on the foregoing, both parties are subject to a complete ban on the development and/or use of biological weapons under any circumstances. There are several options set forth below

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<sup>10</sup> Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Final Document of the Seventh Review Conference, Final Declaration (Part II), BWC/CONF.VII/7, 13 January 2012, preambular paragraph vi, Article I(3). For purposes of treaty interpretation under Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, decisions of conferences of states parties “may be indirectly relevant for the identification of subsequent agreements and subsequent practice as authentic means of interpretation if they reflect or trigger such subsequent agreements and practice of the parties themselves.” International Law Commission, Report of Its Seventieth Session (30 April–1 June and 2 July–10 August 2018), A/73/10, page 85 (Chapter IV, Conclusion 11, paragraphs 10–11); cf. International Law Commission, Report of Its Sixty-fifth Session (6 May–7 June and 8 July–9 August), A/68/10, page 23 (Chapter IV, Conclusion 2, paragraph 10).

<sup>11</sup> According to Benjamin Wakefield and Patricia Lewis, the Russian Federation on 11 March 2022 “asked for a meeting of the United Nations Security Council to discuss unfounded allegations of military biological activities in Ukraine in relation to public health laboratories, and the Russian [Federation] recently accused the [United States] of developing biological weapons in Ukraine.” Benjamin Wakefield and Patricia Lewis, *Ukraine: Is a Chemical or Biological Attack Likely?*, CHATHAM HOUSE, 30 April 2022, page 6.

<sup>12</sup> United Nations Office of Disarmament Affairs, High Representative’s Briefing to the Security Council on Threats to International Peace and Security, Statement by Ms Izumi Nakamitsu High Representative for Disarmament Affairs, 11 March 2022, page 1.

for how the Russian Federation and Ukraine could approach the issue of biological weapons during their peace negotiations.

### ***Option 1***

In the text of any agreement entered into by the Russian Federation and Ukraine, the parties could recall their international obligations, under the 1925 Protocol and the Biological Weapons Convention, to never, under any circumstances, (a) use biological weapons; (b) develop, produce, stockpile, or otherwise acquire or retain biological weapons; (c) transfer, directly or indirectly, biological weapons to anyone; or (d) assist, encourage, or induce anyone to manufacture or otherwise acquire biological weapons.

### ***Option 2***

If additional assurances were desired, the Russian Federation and Ukraine could add to the agreement that they will both, pursuant to Article IV of the Biological Weapons Convention, reinforce their national legislation that implements their obligations under the Convention to prevent anyone on their territory or under their jurisdiction or control from developing and using biological weapons.

The parties could also undertake in any peace agreement to fully cooperate under the consultation provisions of Article V of the Biological Weapons Convention in order to seek assurances that neither party is attempting to develop a biological weapon capability. In the context of Article V, states parties, including the Russian Federation and Ukraine, annually declare—as a confidence-building measure—information regarding research centres, laboratories, and activities of relevance to the ban on biological weapons. These reports are accessible by all states parties to the Biological Weapons Convention. There are also processes that have been developed, under the auspices of Article V, that can be used to clarify ambiguous situations *vis-à-vis* potential biological weapon activity in a state party; these processes include the ability to convene a formal consultative meeting under the Convention. In this regard, the Implementation Support Unit of the Biological Weapons Convention may be able to provide assistance to the parties, if necessary.<sup>13</sup>

The parties could also recall in any peace agreement that either state that is unsatisfied with the foregoing consultation process has the right, under Article VI of the Biological Weapons Convention, to make a complaint to the United Nations Security Council to investigate the situation and that both parties are obliged to cooperate with that investigation.

### ***Option 3***

The Russian Federation and Ukraine could consider stating in the peace agreement that they will endeavour to negotiate and enter into a separate, bilateral agreement to allow for each of them to conduct inspections of relevant facilities on their territories. Especially due to the fact that the Biological Weapons Convention lacks an international verification mechanism, such an agreement and resulting inspections could build confidence that neither party is developing a biological weapon capacity. The detailed procedures to be followed in the course of such

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<sup>13</sup> At the sixth review conference of the Biological Weapons Convention in 2006, states parties created the Implementation Support Unit, which is located in the Geneva Branch of the United Nations Office for Disarmament Affairs. The Unit *inter alia* facilitates the circulation of confidence-building measures to all states parties.



inspections could alternatively be set forth in a more informal document, such as a memorandum of understanding.

### 3. Nuclear Weapons

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was opened for signature in 1968 and entered into force in 1970. There are 191 states parties to the NPT, including the Russian Federation and Ukraine. The Russian Federation is a nuclear-weapon state party to the NPT, and Ukraine is a non-nuclear-weapon state party.<sup>14</sup>

In Article I of the NPT, each nuclear-weapon state party undertakes not to *transfer* to any recipient nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices—directly or indirectly—nor in any way to assist, encourage, or induce any non-nuclear-weapon state to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices. In Article II, each non-nuclear-weapon state party undertakes not to *receive* from anyone the transfer of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices—directly or indirectly—nor to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices. In Article III, each non-nuclear-weapon state party undertakes to accept safeguards to verify that it is fulfilling its obligations not to receive or develop nuclear weapons. These safeguard agreements are to be negotiated and concluded with the International Atomic Energy Agency (IAEA).

On 3 March 2022, the IAEA Board of Governors adopted a resolution, (a) deploring the Russian Federation’s actions in Ukraine, including the seizure of nuclear facilities and other violent actions in connection with nuclear facilities; (b) expressing grave concern that the Russian Federation’s aggression is impeding the IAEA from conducting safeguards verification activities at Ukrainian nuclear facilities in accordance with the NPT, Ukraine’s safeguards agreement, and the IAEA Statute; and (c) calling upon the Russian Federation to immediately cease all actions against any nuclear facility in Ukraine so that the competent Ukrainian authorities may promptly regain full control over all nuclear facilities to ensure their safe and secure operations.<sup>15</sup>

Based on the foregoing, Ukraine is obliged, under Article II of the NPT, not to receive from anyone the transfer of nuclear weapons or manufacture or otherwise acquire nuclear weapons. Pursuant to Article III of the NPT, Ukraine must accept safeguards inspections of its nuclear facilities by the IAEA. There are several options set forth below for how the Russian Federation and Ukraine could approach the issue of nuclear weapons during their peace negotiations.

#### *Option 1*

In the text of any peace agreement entered into by the parties, the Russian Federation could recall its international obligations under Article I of the NPT to refrain from transferring nuclear weapons to another state. In turn, Ukraine could recall its international obligations

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<sup>14</sup> The Treaty on the Prohibition of Nuclear Weapons was opened for signature in 2017 and entered into force in 2021. However, since neither the Russian Federation nor Ukraine have signed or ratified the Treaty, it is not dealt with in the present discussion.

<sup>15</sup> International Atomic Energy Agency, Resolution on the Safety, Security and Safeguards Implications of the Situation in Ukraine, GOV/2022/17, 3 March 2022.

under Articles II and III of the NPT to refrain from receiving or manufacturing nuclear weapons and its obligation to accept IAEA safeguards inspections of its nuclear facilities.

### *Option 2*

If additional assurances were desired, the Russian Federation and Ukraine could add to the peace agreement that Ukraine will accept additional safeguards inspections by the IAEA of its nuclear facilities as a further confidence-building measure. Ukraine could also agree that the reports of the IAEA on these additional inspections will be released to all states parties to the NPT for purposes of transparency.

### *Option 3*

The Russian Federation and Ukraine could also consider including in the peace agreement an intention to negotiate and enter into a further agreement, in which Ukraine undertakes additional obligations to allow the Russian Federation to conduct inspections of relevant facilities on its territory. These additional measures would increase confidence through detailed procedures and could be set forth in a formal, bilateral agreement or in a more informal document, such as a memorandum of understanding. An agreement for additional inspections at Ukrainian nuclear facilities could include the IAEA Secretariat as a party to the (then) trilateral agreement or simply call upon the Secretariat to assist the parties in the inspections.

## **CONCLUSION**

The Russian Federation has accused Ukraine of developing and preparing to use weapons of mass destruction against the Russian Federation and others, an issue that may be relevant to the peace negotiations between the parties aimed at ending the hostilities. Since the necessary legal infrastructure is already in place, it may be enough for the parties to simply recall their pre-existing obligations in the text of any peace agreement. However, if additional assurances are desired, further confidence-building measures can be built into the agreement between the Russian Federation and Ukraine or set forth in separate formal bilateral or trilateral agreements or even in informal memoranda of understanding. Relevant international organisations, such as the Organisation for the Prohibition of Chemical Weapons and the International Atomic Energy Agency, can play a role in assisting the parties to reach agreement on the specific procedures for ensuring that they are fulfilling their international obligations not to develop or use weapons of mass destruction.