



ICRC

ICRC Briefing Note

The prohibition to assist, encourage or induce prohibited activities under the Treaty on the Prohibition of Nuclear Weapons

1. Introduction

The 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) sets out a comprehensive list of activities prohibited to States Parties. This includes a prohibition to assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Treaty, as stipulated in Article 1(1)(e).

This prohibition is important as it *inter alia* sets limits on the activities that a State party to the TPNW can lawfully undertake with or in relation to States possessing nuclear weapons.

This paper outlines the ICRC's views on the interpretation and scope of Article 1(1)(e) of the TPNW, and some of the implications of this provision for States Parties.

Article 1 Prohibitions

1. Each State Party undertakes **never under any circumstances to:**

- (a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
- (b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
- (c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;
- (d) Use or threaten to use nuclear weapons or other nuclear explosive devices;
- (e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;**
- (f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;
- (g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.

2. Scope of the prohibition

The TPNW itself does not define or further clarify the meaning of the terms “assist”, “encourage” and “induce”, nor are these concepts clearly defined in international law.¹ However, statements made during the negotiation of the TPNW can provide insight into States’ understanding of these terms. In addition, the interpretation of identical or almost identical language found in other weapons treaties can also shed light on how States interpret and apply them. Lastly, with regard to the concept of “assistance”, the law of State responsibility can also facilitate the understanding of its scope and limits.²

¹ See Wiebe, Lanord and Smyth, 'Art.1 General Obligations and Scope of Application', in G. Nystuen and S. Casey-Maslen (eds.), *The Convention on Cluster Munitions: A Commentary* (2010), at 127.

² See Article 16 of the International Law Commission's (ILC) *Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)*, 2001: “A State which aids or assists another State in the commission of an internationally wrongful act by the

2.1 Ordinary meaning

Customary international law rules on the interpretation of treaties³ provide that the starting point is the “ordinary meaning” of the TPNW’s terms in their context and in the light of the Treaty’s object and purpose, which is to ensure that nuclear weapons are never again used under any circumstances and are completely eliminated.⁴

In its ordinary sense, to “**assist**” means “to help, aid or support a person, action, process or result”.⁵ In the context of Article 1(1)(e), “assist” can thus be understood as engaging in an activity that helps or aids anyone to engage in one of the prohibited acts or supports such engagement.

Likewise, to “**encourage**” is generally understood to mean to “persuade (someone) to do or continue to do something by giving support and advice”, whereas to “**induce**” signifies to “succeed in persuading or leading (someone) to do something”.⁶

The text of Article 1(1)(e) stipulates that it is prohibited to assist, encourage or induce, “in any way, anyone” to engage in a prohibited activity. The term “**in any way**” indicates that the material scope of “assisting”, “encouraging” and “inducing” should be construed broadly, to include conduct by action and by omission, while the term “**anyone**” indicates that the prohibition is not limited to State-to-State conduct, but also encompasses conduct vis-à-vis non-State actors (individuals or groups).

The prohibition of assisting, encouraging or inducing someone to engage in a prohibited activity may be violated irrespective of whether the prohibited activity actually took place. This is because the TPNW stipulates the prohibition to assist, encourage or induce as a stand-alone obligation; responsibility for the breach of Article 1(1)(e) thus arises independently from the occurrence of the (assisted, encouraged or induced) prohibited activity.

This textual interpretation helps outline the general contours of the provision. However, it does not, by itself, allow a full determination of the prohibition’s scope. A number of issues remain unclear, in particular:

- the **material scope**, notably in terms of what types of conduct would constitute “assisting, encouraging or inducing”
- and, crucially, the **requisite mental element**, meaning the level of intent or knowledge required for conduct to amount to a violation of Article 1(1)(e).

These issues will be addressed in the remainder of this paper. Except when otherwise stated, the analysis and conclusion will apply to all three prohibited actions under Article 1(1)(e) (i.e. assisting, encouraging and inducing), bearing in mind that State practice and doctrine has focused predominantly on the prohibition of assistance.

Among other sources, the analysis relies on the records of the diplomatic conference that negotiated and adopted the TPNW in order to gain insight into States’ understanding of Article 1(1)(e), in accordance with the rules of treaty interpretation which allow for recourse to a treaty’s preparatory work (*travaux préparatoires*) when the terms of the treaty are unclear.⁷

latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”

³ Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are generally recognized as codifying these customary principles.

⁴ See TPNW, preambular paragraph 2.

⁵ Oxford English Dictionary, Oxford University Press, CD-ROM Version 3.1, 2004.

⁶ Ibid.

⁷ Article 32(a) VCLT.

2.2 Material scope

The “material scope” refers to the types of acts (or omissions) that would qualify as “assisting, encouraging or inducing”. In the context of the TPNW and of weapons treaties containing a prohibition similar to Article 1(1)(e) of the Treaty, States have indicated the specific conduct or activities they believe are covered by the prohibition. It is also understood that there must be a causal link (or nexus) between the conduct that amounts to assisting, encouraging or inducing, and the (primary) prohibited activity.

2.2.1 Material scope in the context of the TPNW

During the negotiation of the TPNW, there was a sense among many States that the terms “assist, encourage or induce” should be understood as encompassing a broad range of conduct. For example, Bangladesh stated that “the issue of assistance ... is captured in a broad sense especially by the phrase ‘in any way’”.⁸

This interpretation was also reflected in the types of specific activity that a number of States indicated would be covered by the prohibition. For example, a number of States were of the view that the transit of nuclear weapons or the financing of nuclear-weapon-related activities would not require a specific prohibition, as this conduct would already be covered by Article 1(1)(e).⁹ It should be stressed that, in the ICRC’s analysis, such types of activity would be prohibited under Article 1(1)(e) only to the extent that they are captured by the definition of “assist”, “encourage” or “induce” (cited in section 2.1 above), that they have a causal link (even indirect) with the (primary) prohibited act (as explained in section 2.2.3 below), **and** that they fulfil the requisite mental element (section 2.3).

During the negotiations, some States stressed that the scope of the prohibition was not unlimited. For example, Switzerland outlined a range of activities that, in its view, would not be prohibited by Article 1(1)(e). These include “the inalienable right of all States to develop research, production and use of nuclear energy for peaceful purposes; the right of all States to participate in exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy; the legitimate security interest of all States regarding the conduct of research and development of CBRN protection including cooperation with States not party; and last but not least military cooperation with States not party to the treaty, that is cooperation and operations with States which might engage for their part, in activities prohibited to a State Party”.¹⁰ Likewise, after the adoption of the TPNW, Austria declared that “[t]he mere fact of belonging to a military alliance together with nuclear weapons states or of participating in military manoeuvres with such states, without actively assisting in, encouraging

⁸ Statement of Bangladesh, 16 Jun 2017 (14th meeting) United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Toward their Total Elimination (UN Conference). See Webcast (English), <https://link.brightcove.com/services/player/bcpid1722935254001/?bctid=5474686560001&autoStart=false&secureConnections=true&width=480&height=270>, starting at 2:28:07.

⁹ See for example the statements made by Austria (Ibid, starting at 1:36:35), Mozambique (Ibid, starting at 2:12:56), Mexico (Ibid, starting at 2:32:31), South Africa (UN Conference, 19 Jun 2017 (15th meeting), starting at 0:14:47), New Zealand (Ibid, starting at 0:23:31), Austria (Ibid, starting at 0:41:38). Upon its ratification of the TPNW on 20 September 2017, Cuba declared that the “transit of nuclear weapons and other nuclear explosive devices through territory under the jurisdiction of the States Parties” and the “financing of any activity prohibited to a State Party” under the Treaty are prohibited activities under Article 1(1)(e).

¹⁰ Statement made by Switzerland on 16 Jun 2017, note 8 above, starting at 2:03:12. A similar view was expressed by Sweden, which proposed to include a new subparagraph to Article 1(1), which would have read: “Nothing in this Article shall impede the possibility of State parties to engage, individually or in cooperation with other States, in peaceful nuclear activities, including for the purpose of detection, protection, non-proliferation or civilian nuclear activities, subject to the obligation under the subparagraphs a), b), c), etc.” (Statement made by Sweden on 16 Jun 2017, note 8 above, starting at 1:53:25).

or inducing the deployment of nuclear weapons, does not fall under the prohibition of Article 1(1)(e) of the Treaty”.¹¹

In the ICRC’s view, assuming that the “nexus” and “mental element” criteria (explained in sections 2.2.3 and 2.3 below) have not been met, these interpretations are correct and are consistent with how States Parties to other weapons treaties have interpreted similar prohibitions. The same applies to the export of “dual-use material”, where, moreover, export-control regimes are in place which either prohibit or impose conditions on the transfer of nuclear-related material, or allow a State not to export certain material if it believes that the material will be used for nuclear-weapon-related activities.

2.2.2 Material scope in the context of other weapons treaties

The Chemical Weapons Convention (CWC) and the Anti-Personnel Mine Ban Convention (APMBC), which establish comprehensive prohibitions, also prohibit to “assist, encourage or induce” in terms identical to those of Article 1(1)(e) of the TPNW. State practice under these instruments supports the above observations on the material scope of “assist”, “encourage” and “induce” as derived from their ordinary meanings and from TPNW preparatory work.¹²

A broad understanding of the scope of the prohibition to “assist” in Article 1(1)(e) of the TPNW is consistent with the approach taken in the CWC. A widely accepted commentary to the Convention specifies that “assistance ... can be given not only by means of material or intellectual support ... but also through financial resources, technological-scientific know-how, or provision of specialized personnel, military instructors, etc. ... or by supporting the concealment of such activities”.¹³

Likewise, in the context of the APMBC, most States Parties have indicated that the APMBC prohibition on assistance must be interpreted broadly,¹⁴ although some APMBC States Parties have expressed a different view.¹⁵ In the ICRC’s view, the broader interpretation is to be preferred based on the ordinary meaning of Article 1(1)(c) of the APMBC which, like the TPNW, explicitly prohibits assistance “in any way”, and in light of the APMBC’s object and purpose, which is “to put an end to the suffering and casualties caused by anti-personnel mines”.¹⁶

The view that the concept of assistance encompasses a broad range of actions also finds support in the law of State responsibility. In its comment on Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which prohibits aiding or assisting another State in the commission of such act, the International Law Commission (ILC) did not place any content-based

¹¹ Email of Ambassador Thomas Hajnoczi, Head, Disarmament Department, Austrian Ministry of Foreign Affairs, 1 May 2018.

¹² While using an almost similar formulation, the prohibition to assist, encourage or induce under Article 1(1)(c) of the Convention on Cluster Munitions differs in that it does not include the additional qualifier “in any way” and is to be interpreted in light of Article 21 on interoperability.

¹³ Krutzsch, 'Part Three Articles of the Chemical Weapons Convention, Art. I General Obligations', in W. Krutzsch et al. (eds.), *The Chemical Weapons Convention: A Commentary* (2014) 60, at 67.

¹⁴ Brazil, for example, has stated that “[a]ll States Parties should commit strictly to observe the provisions of Article 1, which would include giving the term “assist” as broad an interpretation as possible”: statement by Brazil on Article 1 in the Standing Committee on the General Status and Operations of the Convention, 01.02.2002 available online at http://www.apminebanconvention.org/fileadmin/APMBC/IWP/SC_jan02/speeches_gs/Brazil_article_1.pdf The United Kingdom has also indicated that it “has a broad interpretation of assistance under the terms of Article 1”: United Kingdom Intervention on Article 1, Standing Committee on the General Status and Operations of the Convention, 16 May 2003, available online at http://www.apminebanconvention.org/fileadmin/APMBC/IWP/SC_may03/speeches_gs/UK_Art_1.pdf

¹⁵ Upon ratifying the APMBC, Australia submitted a formal declaration of its understanding of the meaning of “assistance”, indicating that it “will interpret the word ‘assist’ to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities”: Declaration by Australia, 14.01.1999. Zimbabwe also made a statement setting out a restrictive interpretation of the provision: “We therefore in our view, believe that the term assist [...] should not be applied liberally or given too wide a definition [...]”: Zimbabwe’s Intervention on the Standing Committee on the General Status and Operations of the Convention: Article 1,” Geneva, 31 May 2002.

¹⁶ APMBC, preambular paragraph 1.

limitations on the form of aid or assistance that may be provided. The notions of “aid or assistance” as used in this context are “generally accepted as covering a broad range of activity”.¹⁷

Under the APMBC, a number of States have expressed their views on the specific activities that would, or would not, constitute assisting in, encouraging or inducing the commission of prohibited acts. For example, the United Kingdom has stated that the activities it deems unacceptable under the Article 1(1)(c) prohibition to “assist” include “planning with others for the use of anti-personnel mines (APM); training others for the use of APM; agreeing Rules of Engagement permitting the use of APM; agreeing operational plans permitting the use of APM in combined operations; requests to non-States Parties to use APM; and providing security or transport for APM”.¹⁸

Upon joining the APMBC, several States made declarations of their interpretation of Article 1(1)(c) in the following terms:

[T]he mere participation in the planning or execution of operations, exercises or other military activities by the Armed Forces [of the State Party], or individual [State Party’s] nationals, conducted in combination with the armed forces of States not party to the [APMBC], which engage in activities prohibited under the Convention, is not, by itself, assistance, encouragement or inducement for the purposes of Article 1, paragraph (1), subparagraph (c) of the Convention.¹⁹

2.2.3 Nexus required between conduct and prohibited act

While the types of conduct that may amount to assisting, encouraging or inducing within the meaning of Article 1(1)(e) of the TPNW are numerous and varied, a **nexus must exist between the conduct in question and the (primary) prohibited act** (i.e. nuclear weapons development, testing, production, possession, transfer, etc.) in order for the conduct to constitute assisting, encouraging or inducing. The nexus between the conduct and the prohibited act must be such that the conduct in question does, or would, in the normal course of events, contribute significantly to the commission of the prohibited act.

While the need for such a causal link was not expressly discussed during the TPNW negotiations, the above-mentioned declaration made by a number of States upon their ratification of the APMBC in relation to its equivalent provision (Article 1(1)(c)) conveys the understanding that activities which do not have a causal link to prohibited activities are not *per se* prohibited.²⁰

In the context of the law of State responsibility, the ILC Commentary clearly states that under Article 16 of the ARSIWA, a causal link is necessary between the conduct that constitutes assistance and the internationally wrongful act committed.²¹ Most authorities further interpret this causal link as requiring that the conduct in question **contributed significantly** to the internationally wrongful act, even if it was not essential to its occurrence (i.e. even if the internationally wrongful act could have

¹⁷ Harriet Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, Research Paper, Chatham House, November 2016, p. 8.

¹⁸ United Kingdom Intervention on Article 1, Standing Committee on the General Status and Operations of the Convention, 16 May 2003, available online at http://www.apminebanconvention.org/fileadmin/APMBC/IWP/SC_may03/speeches_gs/UK_Art_1.pdf

¹⁹ See statements and declarations of Australia, Canada, Czech Republic, Norway and United Kingdom as reproduced Casey-Maslen, ‘Commentary, Art. 1 General Obligations’, in *The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* 2nd ed. (2005), at 100-101, footnotes 129-131 and 133.

²⁰ *Ibid.*

²¹ See *State Responsibility, General Commentary* (ARSIWA Commentary), 2(2) ILC Yearbook (2001) 31, p. 66: “the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself”.

been committed without assistance).²² In the view of the ICRC, a nexus (causal link) in the form of a “significant contribution” test can be reasonably inferred from the prohibition to assist, encourage or induce under Article 1(1)(e) of the TPNW as well.

As mentioned above, a causal link exists when conduct contributes significantly to the (primary) prohibited activity (assistance) or renders the commission of the prohibited activity significantly more attractive from the perspective of the actor engaging in it (encouragement or inducement). The conduct does not have to be essential for the occurrence of the prohibited activity, nor does it have to directly contribute to it. However, remote or minimal contributions would not constitute assisting, encouraging or inducing. Whether such a nexus exists is a factual determination, which must be assessed on a case-by-case basis.

2.3 The requisite mental element

Together with the nexus requirement (outlined above), the requisite mental element of the prohibition to assist, encourage or induce limits the scope of the prohibition to exclude remote or incidental contributions.

During the TPNW negotiations, some States touched upon the mental element required under Article 1(1)(e). On the call for the inclusion of a stand-alone prohibition to allow transit of nuclear weapons, Brazil had proposed to specify that what would be prohibited is “knowingly to allow transit”.²³ In rejecting the inclusion of such a separate prohibition (*inter alia* on the grounds that it would already be covered by the prohibition of assistance), Austria suggested that the requisite mental element of Article 1(1)(e) is one of “knowledge”.²⁴ Yet after the Treaty’s adoption, Austria declared that “‘assisting, encouraging or inducing’ is to be understood as referring to measures taken by States Parties with the object and purpose of actively supporting” prohibited activities.²⁵

During the negotiations, South Africa elaborated on this issue in positioning itself against a specific prohibition on financing prohibited activities, stating that “financing is implicitly covered in the sub-articles and any State that **knowingly** engages in such activities would be in contravention of its obligations under this treaty”.²⁶

Sweden attempted to introduce a specific mental element into Article 1(1)(e) by proposing that the word “intentionally” be inserted before “assist, encourage or induce”.²⁷ However, other States did not accept this amendment, and the negotiation conference adopted the text of Article 1(1)(e) without such a qualifier. This would seem to indicate that the majority did not wish to limit the mental element of Article 1(1)(e) merely to intent.

²² See indicatively Harriet Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, Research Paper, Chatham House, November 2016, p. 8.

²³ Statement made by Brazil on 19 June 2017 (15th meeting) UN Conference. See Webcast (English), <https://link.brightcove.com/services/player/bcpid1722935254001/?bctid=5478134100001&autoStart=false&secureConnections=true&width=480&height=270>, starting at 0:01:42.

²⁴ Austria asked the rhetorical question “what else is assistance, than *knowingly* to allow transit?” [emphasis added] Statement made by Austria on 19 June 2017 (15th meeting) UN Conference. See Webcast (English), <https://link.brightcove.com/services/player/bcpid1722935254001/?bctid=5478134100001&autoStart=false&secureConnections=true&width=480&height=270>, starting at 0:41:38).

²⁵ Email of Ambassador Thomas Hajnoczi, Head, Disarmament Department, Austrian Ministry of Foreign Affairs, 1 May 2018.

²⁶ Statement made by South Africa on 19 June 2017 (15th meeting) UN Conference. See Webcast (English), <https://link.brightcove.com/services/player/bcpid1722935254001/?bctid=5478134100001&autoStart=false&secureConnections=true&width=480&height=270>, starting at 0:14:47 [emphasis added].

²⁷ See, Compilation of amendments received from States on the revised draft submitted by the President dated 27 June 2017 (A/CONF.229/2017/CRP.1/Rev.1), received as of June 29, 10pm.

State practice in the context of other weapons treaties containing provisions similar to Article 1(1)(e) provides little guidance regarding the mental element.

Under the law of State responsibility, a violation of the prohibition to “assist” requires a “mental” or “subjective” element. It is undisputed that this mental element requirement is fulfilled when a State acts with the intent or purpose of assisting, encouraging or inducing someone to commit an internationally wrongful act. The view of most authorities is that the mental element requirement is also fulfilled if the State had knowledge that its conduct would have such result.²⁸ This view is informed notably by Article 16 of the ARSIWA, which essentially provides that State A is liable for assisting State B in the commission of an internationally wrongful act if State A does so “with knowledge of the circumstances of the internationally wrongful act”. While some argue, based on the ILC Commentary to the ARSIWA, that the assistance must be provided “with a view to facilitating the commission” (thus implying purpose), the Article is generally interpreted as requiring, at a minimum, a standard of “knowledge” (slightly broader than “intent”), reflected in the very terms of Article 16.²⁹

In sum, it is undisputed that the **mental element** required by the prohibition, under Article 1(1)(e), to assist, encourage or induce is fulfilled when the conduct is carried out with the **purpose (or intent)** of facilitating the commission of a prohibited act.

In addition, in the ICRC’s view, based on the above analysis and consistent with the TPNW’s object and purpose, the mental element requirement would also be fulfilled in a situation where a State Party had **knowledge** that its conduct would, in the ordinary course of events, assist, encourage or induce another State (or a non-State actor) to engage in a prohibited activity. For a State Party to have such knowledge, it would need to be aware, to a reasonable degree of certainty, that its conduct was capable of contributing significantly to the prohibited activity. The more reasonably foreseeable this causal link, the more difficult it will be for a State Party to credibly argue it did not have the requisite knowledge. Thus, where the causal link between a State Party’s conduct and a prohibited activity is particularly strong (e.g. the supply of enriched uranium) and there are reliable indicators that the recipient intends to engage in a prohibited activity (e.g. an active nuclear weapons programme), the mental element could be inferred from the facts – an inference which could nevertheless be overturned if the State Party could demonstrate the existence of circumstances precluding its knowledge.

3. Conclusion

The above analysis allows the following observations on the meaning and scope of Article 1(1)(e) of the TPNW, pursuant to which a State Party undertakes never under any circumstances to “assist, encourage or induce, in any way, anyone to engage in any activity” prohibited under the Treaty:

- 1) The wording of Article 1(1)(e), the object and purpose of the TPNW, its negotiation record, and the general understanding and practice of States in implementing a similar prohibition in the context of other weapons treaties, support the conclusion that the prohibition to “assist, encourage or induce” covers a broad range of acts and omissions (**material scope**).

²⁸ See H. Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011); M. Gibney, K. Tomasevski and J. Vedsted-Hansen, ‘Transnational State Responsibility for Violations of Human Rights’ (1999) 12 *HarvHumRtsJ*, p. 294; J. Quigley, ‘Complicity in International Law: A New Direction in the Law of State Responsibility’ (1986) 57(1) *BYBIL*, p. 113; K. Nahapetian, ‘Confronting State Complicity in International Law’ (2002) 52 *ICLQ*, p. 108; J. Howard, ‘Invoking State Responsibility for Aiding the Commission of International Crimes – Australia, the US and the Question of East Timor’ (2001) 2 *Melbourne Journal of International Law*, p. 46; G. Nolte and H. Aust, ‘Equivocal Helpers: Complicit States, Mixed Messages and International Law’ (2009) 58(1) *ICLQ*, p. 15-16.

²⁹ See indicatively Research Paper by Harriet Moynihan (Chatham House), November 2016, p. 11 ff, with further references.

- 2) For a particular form of conduct to fall foul of the prohibition to assist, encourage or induce under Article 1(1)(e), it must either **facilitate** the engagement in a prohibited activity (**assistance**) or render it more **attractive** from the perspective of the actor engaging in it (**encouragement or inducement**). In particular:
 - a. there must be a **causal link** between the conduct of the State Party and the (primary) prohibited activity, whereby the conduct contributes significantly to the activity or renders it more attractive (**nexus**), and
 - b. the State Party **must have acted with the purpose of (intent) or knowledge** that its conduct would, in the ordinary course of events, result in assisting, encouraging or inducing a prohibited activity (**mental element**).

- 3) **Provided that the “nexus” and “mental element” criteria are fulfilled**, the types of conduct that would constitute assisting, encouraging or inducing may include:
 - planning or training with others for the use of nuclear weapons
 - agreeing operational plans or instructions permitting the use of nuclear weapons in multinational operations
 - requesting another State to use or threaten to use nuclear weapons
 - providing security or transport for nuclear weapons
 - exporting or otherwise transferring nuclear material or technology to a recipient that will use such material or technology to develop nuclear weapons
 - financing prohibited activities such as the development, production or manufacture of nuclear weapons or other nuclear explosive devices.

- 4) Examples of the types of conduct that would **not per se** constitute prohibited assistance, encouragement or inducement include:
 - development, research, production and use of nuclear energy (i.e. for peaceful purposes)
 - transfer of nuclear equipment, materials and scientific and technological information for peaceful purposes
 - activity, research and development for protection against chemical, biological, radiological and nuclear attacks
 - participation in combined or multinational operations or other military cooperation involving activities that are not prohibited under the TPNW, with a State not party to the Treaty, even if that State engages, outside of such military cooperation, in activities prohibited by the Treaty.

- 5) The fact that an act or omission does not violate Article 1(1)(e) does not preclude potential violations of other provisions of the TPNW, notably of Article 5 (which requires each State Party to take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress prohibited activities undertaken by persons or on territory under its jurisdiction or control), or of the general obligation to implement the Treaty in good faith.

In the ICRC’s view, the prohibition to assist, encourage and induce poses no major technical impediments to States joining the TPNW. States should base their decision to join first and foremost on whether or not they agree with its object and purpose. As with any international agreement, a State can best shape the Treaty’s implementation by becoming a State Party.

More precise determinations will become clearer as States Parties declare how they interpret Article 1(1)(e), formulate practice at the national level, and share their views and practice with other States Parties including in the context of the meeting of States Parties.

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