

## Interview with Ambassador Kirsten Biering on positive complementarity



### **H.E. Kirsten Biering, Ambassador of Denmark to the Netherlands**

Before we get into the details of *positive complementarity*, first a few general remarks. South Africa and Denmark have been designated as focal points for complementarity as regards the stocktaking exercise at the Review Conference. As far as positive complementarity goes, this is still work in progress. How precisely we define the concept, or even end up calling it, will depend on the discussions that we will have over the coming months.

*Could you explain the concept of positive complementarity?*

Positive complementarity has many different aspects. Fundamentally it is about ensuring that national jurisdictions have all the necessary tools to investigate and prosecute Rome Statute crimes. Under the Statute, all States Parties have the obligation to do this and have committed to protecting their populations from genocide, crimes against humanity and war crimes.

Many countries could, for a variety of reasons, experience difficulties in meeting these obligations and commitments. It is important that we examine ways in which we can help each other with building national administrative systems to shoulder those commitments. This can be done by exchanging best practices and providing assistance and technical expertise in a variety of fields, including legislation, witness protection, forensics, enforcement of sentences and training of the judiciary.

Some are already providing parts of such assistance through rule-of-law development programs. More could be done in exploring synergies between the Statute and these programs. The same goes for the activities of a number of international organizations.

The Court plays a vital role in ensuring lasting respect for international criminal law and bringing to justice those bearing the greatest responsibility for the most serious crimes. However, it is of equal importance to ensure that States follow the lead of the Court to avoid impunity gaps and to preserve the integrity of the entire Rome Statute system of criminal justice.

*What is the main objective of focusing on positive complementarity?*

Positive complementarity will contribute to closing any impunity gaps and will enable national jurisdictions to deal with the most serious crimes. This in turn should enhance the preventive effect of the Rome Statute.

If we are to be successful in the fight against impunity, this fight must be carried out at all levels and against all perpetrators. We cannot leave it to the Court alone to ensure success. The primary objective rests with us, the States Parties.

Political agreement on enhanced activity in the framework of positive complementarity will be an effective way of sending a strong signal of support for the Court – and for the Rome Statute system of international criminal justice. The Review Conference should not only take stock of developments within international criminal law, but also look to the future and address ways in which we can do things better.

*What would be the possible role of the Court under positive complementarity?*

I think the role of the Court would be to some extent limited, both by judicial and financial constraints. The Court is first and foremost a judicial institution, not a development cooperation agency.

However, the Court can contribute in various important ways, bearing in mind the need to guarantee its judicial and prosecutorial independence.

In situation countries where the Court has conducted investigations and prosecutions, it can assist national authorities in prosecuting lesser perpetrators and also contribute to reconciliation processes as well as the documentation of events by sharing evidence collected. Furthermore, sharing expertise and advice can also help national authorities.

In the broader context, the Court has already, during its relative short existence, accumulated a wealth of expertise, knowledge and experience. This can, in various ways, in cooperation with international organizations and donors, be utilized to enhance the capacity of national jurisdictions of all State Parties. I would like to think of the Court as being a facilitator or broker of cooperation between State Parties themselves and between States and international organizations in furthering the fight against impunity.

*How would States Parties to the Rome Statute be able to contribute to the effectiveness of positive complementarity?*

The bulk of the work would be carried out by State Parties together with relevant international organizations, civil society and other implementing partners.

In general, the aim is to consolidate the capacity of domestic jurisdictions. One instrument would be development cooperation programmes and other forms of development assistance. Many countries already operate extensive rule-of-law programmes. The scope goes beyond the commitments under the Rome Statute, but these could systematically be taken into account and synergies explored.

A range of international organizations active in the fields of international law and justice and/or development cooperation within the judicial sector could also make further important contributions, as well as civil society.

Furthermore, States often have special expertise within certain areas, which could be of interest to others, such as witness protection or forensics. For instance, Denmark has a

dedicated State Prosecutor for international crimes whose experiences may be useful to other countries. Such technical expertise could also be shared with a wider circle of interested States.

Elements to enhance the fight against impunity through positive complementarity already exist to a large extent. What is needed is greater awareness of the Rome Statute system, what can be done to assist and a consequent adjustment and alignment of existing activities. If we can put these pieces together, I believe that we can do a lot of good for international criminal justice, the fight against impunity and the International Criminal Court itself.

*How does positive complementarity fit within the Rome Statute system?*

Under the Rome Statute, the Court is a court of last resort. It only intervenes when States themselves are unable or unwilling to conduct genuine proceedings, based on a judicial decision by the judges. As such, the Statute attaches priority to genuine national proceedings and, by implication, the ability of national jurisdictions to be able to do so.

As such, positive complementarity, by assisting national jurisdictions in building capacity and meeting their obligations and commitments, fits perfectly with the object and purpose of the Rome Statute.

The Statute does not make explicit provisions for positive complementarity, but the need for additional measures to combat impunity at the national level is highlighted in the preamble. On numerous occasions and in different fora, for instance at the United Nations World Summit in 2005, States have stressed the need for and commitment to protecting civilian populations from genocide, war crimes, ethnic cleansing and crimes against humanity, not only in their own jurisdictions but by helping each other to afford such protection, including investigation and prosecution when such crimes have been committed.

The Rome Statute system is a two-pillar system with the States and the Court complementing each other. All States Parties are obliged to cooperate with the Court, but we should also look at ways of combating impunity by cooperating ourselves.

*What would be the possible challenges and complications in introducing positive complementarity?*

As I have tried to describe it here, positive complementarity is in essence not a new idea. The challenge for us will be to add value without duplicating existing structures and activities, and at the same time maintaining and enhancing the Court's judicial and prosecutorial independence and integrity. Many activities are already underway in the area of positive complementarity but probably under a different heading. How best to exploit existing structures and increase "output" is of the essence. It may not be easy but this should not deter us from trying to bridge the impunity gaps with the means at our disposal.

*Are there any programme budget implications due to the introduction of positive complementarity?*

This will be for States Parties to decide. It also depends on the approach that would eventually be taken. Budget implications need not be vast. You could imagine tasking a small dedicated unit or person within the Court with working on this issue and acting as a facilitator or broker.

I would not personally see many new activities undertaken by the Court in addition to what is already being done. The main task is now for States Parties, international organizations and civil society to get their act together.

*What are the future steps to further discuss positive complementarity in the lead up to the Review Conference stocktaking exercise?*

We are currently, together with South Africa, in the process of preparing background documents on the substance as well as on possible outcomes of the Review Conference in terms of stocktaking and complementarity. We will, at the earliest possible stage, submit these proposals for consideration by the working groups of the Bureau. Based on the progress made in the working groups, we hope we would be able to agree on these issues at the resumed session of the Assembly in March, with a view to ensuring a successful outcome of the Review Conference as far as this issue is concerned.

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