

# MSF AND INTERNATIONAL CRIMINAL JUSTICE

MSF's relation with the International Criminal Justice started with the setting up of the International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993 and for Rwanda (ICTR) in 1994, as well as the first steps of the International Criminal Court (ICC) in 1998.

MSF was also involved in parliamentary investigations in France and Belgium, from 1997, on the genocide of the Rwandan Tutsis, then in the Netherlands and France, from 1999, on the Srebrenica massacre in Bosnia.

 **Minutes** from the MSF Belgium Board meeting, 10 October 1997 (in French).

## Extract:

9.a. International Criminal Tribunal: Michael Verhaege informs us that an international coalition of NGOs has formed to formally set down experiences. MSF is already taking part as an NGO (following motion 16 of the 1997 GA). The planning committee for the diplomatic conference which should make a decision regarding the creation of the ICC [International Criminal Court], in Rome in June 1998, will meet in December in New York within the framework of the United Nations. The Board recommends being an active participant and collaborating fully with the interested parties. Lobbying opportunities at governmental level will also be studied. The IC [International Council] has already been informally notified. It is, however, a matter of importance to notify Doris Schopper, International President, of this development.

 **Minutes** from the MSF France Board meeting, 27 March 1998 (in French).

## Extract:

Call to set up a France–Rwanda 1990–94 parliamentary investigative committee (Cyril Locci)

MSF, with a group of researchers, individuals and associations, initiated the request for a parliamentary investigative committee on Rwanda... Ahead of everybody else, Paul Quilès pushed through the creation of a 'parliamentary information mission on the military operations led by France, other countries and the UN in Rwanda from 1990 to 1994'. The French national assembly's defence and foreign affairs committees are equally involved. NGOs have reacted vehemently as this solution does not suit them. There is a huge difference between the power to compel and the guarantee of independence and impartiality of an investigative committee, and an information mission. [...] It has been decided that members of MSF (undoubtedly Jean-Hervé Bradol) will be heard by the information mission.

 **Minutes** from the MSF France Board meeting, 19 June 1998 (in French).

## Extract:

The International Criminal Court [...]

MSF has been following the negotiations for three years, and has joined the international coalition of 800 NGOs. There are differences, but the common message is that the court is independent and free to operate. MSF insists on the accessibility of the court to victims and witnesses and that prosecutions can be initiated on the basis of their testimony.


 **Minutes** from the MSF France Board meeting, 26 March 1999 (in French).

## Extract:

Srebrenica: investigative committee

Françoise Saulnier presented a request from the Citizens' Collective for Bosnia to the Board. This Collective is calling for a parliamentary investigative committee (modelled on the one set up for Rwanda) to be created to shed light on the administration of the enclave of Srebrenica by the political-governmental bodies. To support this claim, the Collective is asking for MSF's help and participation. Françoise Saulnier believes that, on principle and above all for the future (and not just as a memorial to), MSF should get behind this request. Moreover, she reminded everyone that MSF has already spoken out before the ICC (International Criminal Court) and Dutch commission. [...]

Decision: the Board agreed to support the Citizens' Collective for Bosnia regarding its request to open a parliamentary committee on Srebrenica.

 *The direct encounter of the teams in the field with ethnic cleansing in the former Yugoslavia and the genocide in Rwanda also reignited humanitarian dilemmas and the role of MSF speaking out to denounce crimes. With the creation of the two international ad hoc tribunals for Former-yugoslavia in 1993 and Rwanda in 1994, the MSF's 'témoignage', traditionally founded on 'political' denunciation, acquired a legal dimension. The MSF denunciation of mass crime raised the new issue of MSF contribution to international criminal proceeding in front of such Tribunals. It was clear from a legal perspective that such participation will affect the independence and neutrality of MSF as well as its operational presence and security at field level. However usual MSF emotional and political trends with regard to bearing witness were complex to reverse internally. Externally it was also necessary to build a legal and operational argumentation to avoid MSF being forced by judges to disclose information and to appear to court and to negotiate a humanitarian status of exemption based on the criteria accepted by the judges of the 2 ad hoc tribunal with regard to ICRC delegate and reporter of war. This was later adapted for the relations with the ICC.*


Françoise Bouchet-Saulnier, MSF Legal Advisor then Director from 1991 (in French)

The International Criminal Court began to function in 2003. In order to safeguard its independence and preserve its capacity to operate, MSF set up a policy on the modalities of its cooperation with the ICC.

Endorsed by the ExCom in April 2004, this policy stated that: *'MSF will consider forms of collaboration with the court in the provision of evidence or testimony only where MSF's is unique and essential for the investigation and prosecution of massive crimes.'*

In 2005, an investigation launched by the ICC of crimes committed in Darfur led to media features on collaboration between NGOs and the ICC. It appeared that in this context the MSF policy was not clear enough. It was updated to state: *'MSF will cooperate with the court on the basis of a principle of subsidiarity (only when the information we possess is relevant, significant and cannot be obtained or distributed via other channels). Cooperation in each case will be the result of a case-by-case decision on the basis of this principle and taking into account other factors, such as the impact on the neutral image of the organisation, the present and future security of teams in the field, and the personal motivation of individual volunteers. Where an individual feels strongly that they wish to testify on their own behalf, MSF will try to ensure that their decision to testify is in line with these factors.'*

This policy was transmitted to the MSF staff and authorities of countries where investigations were under process: DRC, Uganda and Sudan.

 **Minutes** from the MSF Executive Committee Meeting, 13 July 2005 (in English, edited).

#### Extract:

##### b. Relationship to International Criminal Court (ICC).

The movement needs to better describe its relationship to the ICC publicly. There are articles in the press that imply a possible collaboration between NGOs and the ICC, implicitly connecting MSF to the rumours. To address this issue, the DirOps have written a letter explaining that MSF does not collaborate with the ICC. They distributed this letter to the Ministry of Foreign Affairs and the Ministry of Justice in Sudan. Additionally, the DirOps wants to develop a generic communication campaign for host countries explaining MSF's position. Finally, the teams in the field need to be well informed that they are not to collaborate with, speak at or attend meetings that are related to the ICC on the field. They should also report to their headquarters if the ICC is attempting to contact them directly.

MSF's written policy regarding its relationship to the ICC is broad and leaves room for interpretation. It should not be distributed to field staff or to outsiders. MSF's strategy will be defined according to specific country situation.

Some confusion around MSF's collaboration with the ICC could be heightened by the fact that a former employee is testifying before the International Tribunal for the former Yugoslavia. However, the situation should not be too damaging for MSF because the former employee will be a witness for the defence

side and is no longer a member of MSF. Contrary to other NGOs, MSF staff do not sign a non-disclosure agreement upon hiring.



**Memo** on modalities of cooperation with the International Criminal Court, April 2004 updated in July 2005 (in English, edited).

#### Extract:

MSF position with regard to the International Criminal Court (RIOD, July 2005)

The ExCom approved MSF's policy towards the ICC in 2004. In that policy MSF will consider forms of collaboration with the court in the provision of evidence or testimony only where MSF's is unique and essential for the investigation and prosecution of massive crimes.

All sections agree that, at present, none of the current ICC investigations (northern Uganda, eastern DRC and Darfur) meet these criteria. As a result, there should be no collaboration or provision of evidence by any MSF staff to the ICC or participation in any ICC joint meetings or presentations.

All sections should inform their missions in these areas of the decision. MSF has agreed with the ICC representatives in the Hague that ICC representatives and investigators will only approach MSF at HQ level and never in the field. MSF field missions should inform their DOs if ICC representatives or investigators seek to contact MSF staff in the field in violation of this agreement.

In order to better explain MSF's position towards the court in the countries where we work, Kenny will draft a short generic explanation, based on our response to the Sudan Tribune article which implies that MSF did collaborate with the ICC in Darfur.

#### POLICY: Modalities of cooperation between MSF and the ICC

##### General principles:

MSF will cooperate with the court on the basis of a principle of subsidiarity (only when the information we possess is relevant, significant and cannot be obtained or distributed via other channels). Cooperation in each case will be the result of a case-by-case decision on the basis of this principle and taking into account other factors such as the impact on the neutral image of the organisation, the present and future security of teams in the field, and the personal motivation of individual volunteers. Where an individual feels strongly that they wish to testify on their own behalf, MSF will try to ensure that their decision to testify is in line with these factors.

Any MSF evidence will be based on our own first-hand experience. We are happier testifying about facts based on our medical work than about the acts of individual perpetrators or groups.

MSF will apply the same principles in deciding whether to cooperate with requests from either the prosecution or the defence.



*This policy was created to clarify an important point, which is MSF's relationship to 'témoignage'. There was a confusion that had arisen between MSF style 'témoignage' and 'témoignage' before an international court.*

*Some thought that a new age was opening up for humanitarian action, that of collaboration with international justice that would*

*make humanitarian testimony obsolete. But for a humanitarian organisation, such an approach poses the security dilemma: 'Can we be present in the field and transmit prosecution cases to the ICC prosecutor?'*

*This is what had to be understood within MSF in order to be able to take a common and coherent institutional position with regard to the ICC. And this position had to be taken because cooperation with the courts is not just an option open to MSF, it is a legal obligation decided by national and international judges and from which MSF cannot escape.*

*Technically, the content of the policy adopted by MSF is a non-cooperation framework saying that it is MSF that will decide whether or not to cooperate. It is based on the judges' recognition that judicial testimony is incompatible for a humanitarian organisation and recognises that this position can only be reconsidered on an ad hoc basis in situations where MSF is the only holder of crucial information to prove guilt or innocence about a serious crime.*


*I therefore negotiated with the ICC prosecutor to recognise that judicial testimony was incompatible with our mission.*

*In 1996-97, I also wrote a document in which I described in concrete terms the various cases in which MSF had been confronted with international criminal proceedings in order to foster an internal understanding of the realities and challenges of humanitarian and judicial testimony.*

Françoise Bouchet-Saulnier, MSF Legal Advisor then Director from 1991 (in French)


**In 2006, the La Mancha Agreement reasserted the general principles of the MSF policy on collaboration with ICC.**

**In April 2007, the MSF legal team published a background study on MSF's interactions with investigations and judicial proceedings throughout its history.**

 **La Mancha agreement**, 25 June 2006 (in English, in French).

**Extract:**

1.12. Although justice is essential, MSF differs from justice organisations by not taking on the responsibility for the development of international justice and does not gather evidence for the specific purpose of international courts or tribunals.

 'Legal or humanitarian testimony? History of MFS's interactions with investigations and judicial proceedings', Françoise Bouchet-Saulnier & Fabien Dubuet, April 2007 (in English, in French).

**Extract:**

Conclusion

Throughout its history, MSF has refused to fall into the trap of remaining silent when faced with mass crime, reserving the right to speak out in public and to suspend its activity in certain situations.

For MSF, this activity is part of an ongoing effort to define the specific content and precise limits of the responsibility of relief organisations and to view this responsibility in relation to and in interaction with other spheres of political responsibility.<sup>1</sup>


The public statements and accusations of MSF are made on the basis of its responsibility as an actor rather than any obligation as a witness. To justify its participation in judicial investigations and proceedings, MSF has grounded its arguments on its status as a witness but also, and more important, that of an interested party and a direct or indirect victim: it was MSF's status as a victim that allowed the organisation to demand that the truth of certain matters be recognised, and it was as an actor involved in conducting relief operations that it called for a clear division of national and international political responsibilities.<sup>2</sup>

The changing international context has led MSF to adapt its policy on 'testimony' to the new constraints and opportunities arising from the creation of international criminal courts. This adaptation should not be seen as a renunciation of its testimony, even though in seemingly paradoxical fashion it leads MSF to take precautions where judicial proceedings are concerned.

Judicial handling of crimes committed during armed conflict cannot replace the vital functions – filled by humanitarian organisations in general and by MSF in particular – of sounding the alert and demanding accountability while the events are happening. These roles are precisely what need to be redefined today, in both their content and their form, in the light of recent changes in the context. The prospect of judicial sanction may, to be sure, help to make armed groups behave more responsibly regarding the negative consequences of their acts, by posing a threat of sanction in the future. However, the international judicial process comes into play many years after the events, and in conjunction with other modes of political crisis management that will lead courts to select certain crimes and certain criminals, while brushing others under the rug.

The judicial process opens up new possibilities of action for victims. As a provider of medical care, MSF can in some cases provide medical certification that certain crimes and acts of violence have occurred. The reason is that certification of the facts helps to establish individuals' status as victims, while leaving to these individuals the choice as to whether to seek legal redress at a later time. The implications of this capability go beyond the fight against impunity, since the recently created judicial bodies have new procedures for compensation or indemnification of victims. In this context, medical certification and documentation of acts of violence allow MSF to offset its lack of direct participation in judicial proceedings.

In so doing, MSF remains faithful to the spirit of humanitarian law and to a certain philosophy of humanitarian action that claims to do more than the direct substitution that normally constitutes humanitarian relief, to try to preserve or re-establish the responsibility of the various parties involved for the fate of people in danger, and that accepts a measure of concrete, public confrontation with situations of violence, criminal or otherwise, so as to reveal their mechanisms and their human cost.

 *A pedagogical basis was needed, because MSF is neither a conceptual nor a legal organisation. It was necessary to*

*propose a number of concrete examples showing that cooperation with international justice was not necessarily the best thing. It had to be shown that, in order to avoid being put under pressure, MSF had to clearly announce that it would not participate in these procedures except in exceptional cases. It was this 'except in exceptional cases' that had to be defined, which was a matter for both MSF's free will and the decisions of the courts.*

Françoise Bouchet-Saulnier, MSF Legal Advisor then Director from 1991 (in French)

**In order to protect its image, MSF did not strongly publicise its policy of non-collaboration with the ICC. However, in 2009, when the International Criminal Court indicted Omar el-Bechir the President of Sudan, MSF was accused by the Sudanese government of having shared information with the ICC.**

**The international council Board then raised again the issue of MSF's will to promote its policy or not. An inter-OCs group of legal advisors was tasked to update the existing internal policy.**



**Minutes** from the MSF International Council Board Meeting, 23 April 2009 (in English, edited).

#### **Extract:**

##### Position MSF towards ICC

The ICB was provided with MSF internal policy, external communication and a Q&A briefing document: all regarding MSF position towards the ICC.

Some of the ICB members had not previously been informed that such documents existed, and on reading them they expressed their confusion regarding internal and external MSF positions towards the ICC.

After Françoise Saulnier presented the history of MSF relationship with the ICC since its inception, it became clear to the ICB that MSF should continue to work on the briefing documents and share them within the movement.

##### Key elements:

Since the creation of International Criminal Tribunal (1993) MSF started questioning if MSF should collaborate with this sort of judicial institution or not. In 1994, MSF internal policy stated – MSF should refrain from any cooperation with such institutions. MSF can do public 'témoignage' awareness campaigns, but shall not be giving any testimonies in judicial hearings.

Following the creation of the ICC, MSF reinitiated the debate. The main questions to answer were:

1. Do we want to cooperate or to avoid it?
2. Can we be forced to cooperate and how to avoid it?
3. What about individual choice? Can we forbid the individual to cooperate?

The answer to question 1 was straightforward: if we cooperate, it will be the end of humanitarian action. To have access to the

victims of a conflict in order to provide independent, impartial humanitarian assistance, MSF has to maintain a dialogue with all conflicting bodies, even if they are perpetrators. Therefore, MSF cannot have dialogue with them and at the same time denounce them in front of the ICC or in front of national courts.

Therefore, at the MSF institutional level, the position was clear: we want to avoid the cooperation as much as possible because of the conflict of interest if we are perceived as collectors of evidence with people with whom we are negotiating.

Real incompatibility between: victims, perpetrators and tribunal.

MSF's wish not to cooperate with international and/or national judicial institutions at all times should be based on legal grounds, such as professional confidentiality; as per special provisions in legal/penal laws regarding the work of medical doctors, journalists and humanitarian workers. The International Tribunal accepted that humanitarian actors cannot be used as witnesses, except when the humanitarian organisations are the only witnesses of a major crime.

After 2004, the MSF legal expert group – made up of Françoise Saulnier, Kate Mackintosh and Liesbeth Schockaert – had two meetings with the ICC prosecutor to state the MSF position of non-cooperation, apart from exceptional circumstances.

##### Individual position:

Today MSF has no moral/legal grounds to forbid individuals from cooperating with the ICC (whether MSF employee/family is a victim or witness; and/or beneficiaries). Therefore, it was a need to clarify this situation and the MSF legal experts group prepared an internal policy.

Basically, any person willing to cooperate in such judicial proceedings must not use the name of MSF, nor use MSF internal documents (situation reports, medical data, etc.) and should inform MSF about his/her intentions.

This internal document was approved by the ExCom in 2004 and since then distributed in different head of mission training and briefing sessions. MSF used this policy not only towards the ICC and the International Criminal Tribunal, but also for national military and other courts.

Thus far, there have only been two cases involving MSF, when individuals decided to cooperate, and MSF managed not to give any names. As an institution, MSF has had no documents conveyed to the judicial institutions.

Back in 2004, MSF did not wish to communicate strongly about its position of non-cooperation with the ICC, as some felt that it would be damaging to MSF's image as not willing to cooperate with this justice court. Therefore, the decision was not to make any public communication.

It is known, that MSF shares its information with different UN and NGO organisations. How this information will be used by them is unknown and no guarantees exist. There is some possibility that MSF documents may end up on the table of judges/prosecutors.

We have to define how we share our own information and how other organisations use this information. This complementary



work needs to be reconsidered and we need to have real guarantees from them.

In July 2008, the International Office (IO) took this opportunity to make clarifications (South Africa, Uganda, DRC and Sudan) regarding the position of MSF towards the ICC.

Today we are confronted with accusations of cooperation with the ICC, as per the Sudanese government. What do we really want to assume as accusation? What evidence do they put to MSF?


MSF external communication is very poor and/or oversimplified and many may not understand it. It will be important to clarify our position towards the ICC and make a clear separation from judicial justice process and humanitarian assistance.

MSF legal expert group shall look into the protection part of MSF employees and MSF as an organisation, one option could be a clause of confidentiality.

With regard to the position of MSF towards the ICC, the ICB makes the following recommendations to strengthen the current external version of our policy:

- Reaffirm the incompatibility between humanitarian activity and judicial testimony.
- This does not contradict our fundamental commitment towards public 'témoignage'.
- Strongly request the MSF workers not to testify on issues linked to MSF activities, in front of the ICC.
- Ask the expert group on ICC to explore the risks around the transmission of MSF information to other organisations that could potentially cooperate with the ICC.
- Ask the executive to urgently propose an external version of this position, which will be not too defensive.


The ICB requests the expert group on ICC to update the existing internal policy in the light of recent events and come back to the IC/ICB

 **Minutes** from the MSF Executive Committee Meeting, 28 April 2009 (in English).

**Extract:**

ICC and MSF positioning on ICC

- The ICB has requested that the ICC expert group (Françoise Bouchet-Saulnier, Kate Mackintosh, Liesbeth Shockaert) review, clarify and strengthen MSF's current external and internal positions and policies on the ICC.
- Kris to follow up with the expert group to discuss timeline and to ask that the group point out disagreements and difference of opinions, if any, in order to have the Excom and ICB make decisions on the external and internal policies and documents.

 *My colleagues at OCA and OCB and I were asked to take up this policy again. A technical debate was held among lawyers to ensure that this position became truly common*

*and that its logic was taken on board by representatives of each of the operational centres so that it could then be applied to it.*

Françoise Bouchet-Saulnier, MSF Legal Advisor then Director from 1991 (in French)