LES CAHIERS DU CRASH

LEGAL OR HUMANITARIAN TESTIMONY?

HISTORY OF MSF'S INTERACTIONS WITH INVESTIGATIONS AND JUDICIAL PROCEEDINGS

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Introduction

Over the course of its history, MSF has revealed and denounced the misappropriation of humanitarian activity and serious acts of violence against the civilian populations benefiting from its relief operations. In so doing, the organisation has in some cases taken the initiative to call for national or international investigations, or has add its voice to such calls for investigation. This activity, in turn, has gradually led to MSF involvement in national and international judicial proceedings that seek to establish, not the political responsibility of the actors involved, but the criminal responsibility of the individual perpetrators of these crimes.

This document attempts to reconstruct the forms taken by these initiatives and the reasons why they were undertaken, with the aim of identifying and clarifying the demarcation between humanitarian testimony and legal testimony.
It seems important to reconstruct the main unifying thread of these actions in order to adapt MSF practices to the changing international context of humanitarian action. This context has been transformed in particular by the recent creation of the International Criminal Court (ICC), a permanent international organ of criminal justice with extensive powers[1]. The creation of the ICC was the culmination of a broader wave of change characterised by a new conflict management policy within the international organisations. This policy is based on the integration and coordination of international diplomatic, military, humanitarian and judicial actions. It calls into question the independence of humanitarian activity with respect to other forms of political and military action, and blurs the difference between human rights organisations and certain humanitarian organisations.

In this document, the phrase "investigations and judicial proceedings" covers the various forms of proceedings with which MSF has been involved in regard to situations of serious violence against civilians: the parliamentary investigative commissions of national

1. The creation of the ICC is merely one characteristic feature of the changes in the context of humanitarian action. Other factors also affect MSF's activity of public testimony, such as the development of propaganda and disinformation specifically concerned with violence against civilians in current conflicts, as well as the radicalisation and further polarisation of the international context in connection with the expansion of the war on terrorism.

governments, investigations by international institutions, and national and international criminal courts having a mandate to prosecute war crimes, crimes against humanity and genocide.

In some cases, MSF took the initiative in instigating these proceedings; in others, MSF was obliged to decide whether it should co-operate with existing proceedings.

The creation of *ad hoc* international tribunals in 1993 and 1994, followed in 1998 by that of a permanent international tribunal (the ICC), have had a considerable impact on MSF practice regarding "testimony". Indeed, the emergence of international judicial proceedings marked a turning point between the goal of establishing "historical or political truth" and that of establishing "judicial truth".

The characterisation of situation no longer occurs on the ground, the very time of events and with the aim of influencing their course. It comes years later, following a long judicial process of checking and cross-checking witnesses' testimony and other evidence.

In this context, MSF was obliged to reconsider the status of its testimony. Testimony was no longer a matter of free choice demonstrating the organisation's independence with regard to the perpetrators of violence; rather, it became a legal obligation that undermined the independence of relief organisations and required them to submit to the requirements of the judicial process.

This document endeavours to retrace all of these actions and interactions through the history of MSF's participation in investigations and proceedings aimed at establishing political, historical or judicial facts.

The first part describes the forms of these actions, their objectives and the issues that provided the grounds for them and determined the procedures used. The framework provided makes no claim to be exhaustive; rather, it describes the main actions of this type taken by MSF[2].

The second part offers an analysis of this practice to determine the criteria for and the forms of future MSF actions concerning mass crimes[3].

2. In the case of Ethiopia, the actions described were undertaken by the French section of MSF, over the objections of the Belgian section among others. In most of the other cases, the actions were initiated and led by a country section but supported by the entire MSF movement. Since 1995, there has been an international policy for the MSF movement concerning relations with international tribunals. There is no such international policy document on participation in investigations, but the various initiatives taken in this regard have not given rise to internal polemics between sections. The present document will therefore not refer to differences between the sections of MSF.

3 The author of this article has been head of the legal department of MSF France since 1991, working regularly for the International Bureau of MSF in conjunction with all sections of the MSF movement. The author has thus been directly involved in most of these activities, but particularly those undertaken by MSF France. The document is therefore not an external, arm's-length analysis but a descriptive summary of MSF practices that explains the reasoning behind them and marks out an overall policy framework.

PARTIE 1
MSF's interactions with investigations and judicial proceedings

A- ETHIOPIA: 1985

In October and November 1985, the French section of MSF publicly accused the Ethiopian government of using humanitarian aid and logistics to carry out forced displacement of the population in inhuman conditions that caused a high rate of mortality. In its capacity as both a witness of the violence against civilians and the unwilling accessory to this violence, MSF denounced the government for diverting humanitarian organisations' resources from their objective and purpose and using them to harm the people concerned[4]. This misappropriation of the equipment of humanitarian organisations to commit criminal acts had created a situation in which these organisations became passive accomplices. Thus, the action taken by MSF was based not solely on the defence of its principles but also on a direct accusation of criminal co-responsibility on the part of the humanitarian organisations. This accusation led to the expulsion of the French section of MSF by the Ethiopian government in December 1985[5].

At the time, only a few organisations joined in condemning these practices of forced displacement and recognised that they constituted a crime. In the absence of a competent international court, no international judicial proceedings whatsoever were undertaken at the time of the events concerned.

In 1992, however, after the fall of the Ethiopian regime, a major trial was organised in Ethiopia to try the "crimes against humanity" committed against civilians by the previous regime. Rony Brauman, then President of MSF, and Brigitte Vasset, Director of Operations, received a letter inviting them to testify for the procecution against the alleged culprits. They refused to participate[6] in what they considered to be a political trial that was not based on a democratic tradition of justice.

This first experience shows that the question of whether MSF would co-operate with legal proceedings is a rather recent concern as it was first raised in the early 1990s. Moreover, it first arose in the context of trials at country level; not until later in the same decade would it be posed in relation to the proceedings of international *ad hoc* and, later on, permanent tribunals. This experience also shows that MSF drew from the outset a distinction between its public testimony and judicial testimony.

4. See Laurence Binet, *Famine et transferts forcés de populations en Ethiopie*, 2005, in the series "MSF speaking out".
5. François Jean, "Du bon usage de la famine", MSF report, October 1986. See Laurence Binet, *Famine et transferts forcés de populations en Ethiopie*, in the series "MSF speaking out", p. 12.
6. No trace of these two letters has been found in the MSF archives or in the personal archives of Rony Brauman and Brigitte Vasset.

The purpose of publicly denouncing the crimes of the Ethiopian government was to discharge MSF from the situation of being an accomplice to these acts, as much as to influence the actual course of events in the field. MSF's refusal to testify in court, several years later, was motivated by the political nature of the trial and its lack of operational connection to the fate of the population, ten years after the fact.

B - SOMALIA: 1992

In December 1992, the UN Security Council decided on a military intervention to protect the flow of relief supplies[7]. The civil war that had ravaged the country for two years was preventing distribution of food and assistance to the victims of the famine. The first mandate given to the international armed forced was to ensure security for the transport of food aid.

The aims of the military intervention were subsequently changed, however, to weakening the military powers of the warlords, particularly the most powerful one.

With this decision, the international armed forces lost the neutral status that they claimed on the basis of their humanitarian mission, and became directly involved in the conflict.

In the course of their actions, for example, the US forces bombed the local headquarters of MSF and Action International contre la Faim (AICF; known today as Action contre la Faim, or ACF), in addition to bombing and prohibiting access to a hospital where MSF was working[8].

MSF immediately denounced these acts of violence committed in the name of humanitarian relief, by soldiers acting under a UN mandate, against humanitarian organisations and civilians. The violence was all the more intolerable because the UN had authorised the use of force by the international coalition precisely in order to protect humanitarian aid.

MSF then tried to find out who had the responsibility to authorise or sanction such actions, either within the United Nations or within the national military contingents participating in the operation.

In view of the complexity of the legal, political and military apparatus of peacekeeping operations, MSF filed a complaint with the UN Security Council on the grounds that the armed forces acting under its authority had failed to comply with international humanitarian law[9].

As there was no tribunal having jurisdiction over this question, MSF sent the complaint simultaneously to the UN Secretary-General, to the Security Council, and to the ministries of defence of the countries that had contributed troops to the Somalian operation.

The complaint had a twofold purpose[10]:

First, to force recognition of the unacceptable nature of such military practices, in a context where, on the pretext that their mission was humanitarian, no limits were set to the use of force by the international troops under UN mandate.

7. See among others Virginie Raisson and Serge Manoncourt, "MSF-France en Somalie : janvier 1991 – mai 1993", internal assessment report, February 1994; and "Somalie", in *Face aux crises*, ed. François Jean, Hachette, 1992.
8. These attacks killed one, seriously wounded one and slightly wounded seven members of the local MSF staff.
9. See the moral review for 1993 by Rony Brauman, President of MSF France.
10. MSF document dated 20 July 1993.

Second, to clarify the various chains of responsibility involving the troops' countries of origin and the UN itself, and to identify possible mechanisms for complaints and appeals in case of violence against civilians or humanitarian organisations by an international military force under mandate from the Security Council.

The complaint filed by MSF led the UN to initiate an internal investigation, which ultimately concluded that the operations conducted by the US soldiers could be termed "acts of vengeance". The investigation found that these acts were not justified by military necessity and were not in the nature of licit and measured reprisals. Such acts of vengeance were prohibited by humanitarian law.
Those involved argued in their own defence, however, that humanitarian law could not be applied to UN military operations because the UN was not a signatory to the Geneva Conventions. They also invoked the fact that the UN could not be considered a belligerent and that these peacekeeping actions were international police actions that did not come under the law on armed conflict.
Following this event, and to put an end to this legal polemic, the UN Department of Peacekeeping Operations decided to include the obligation to respect the principles of humanitarian law in all deployment agreements for the UN Blue Helmets[11]. All such agreements now oblige peacekeeping operations and the countries that contribute troops to comply with humanitarian law.
In this specific case, MSF acted on the basis of its twofold status as both victim and witness of the events. MSF was a direct victim, since the attacks were directed at its buildings and humanitarian personnel. MSF also acted as a witness, denouncing the violence against civilians and denial of the victims' right to humanitarian relief.

MSF did not seek financial compensation for the harm sustained or demand the conviction of any specific individual; rather, it tried to strengthen the framework of collective responsibility for the use of force. MSF therefore refused to accept the compensation offered by the military commission for war damage.
This complaint contributed to MSF's later position on the independence of humanitarian activity in operations comprising both military and humanitarian aspects, and on considering these armed forces as belligerents and thus bound to comply with the law on conflicts.

C - FORMER YUGOSLAVIA: 1991-2005

In the former Yugoslavia, a year later, MSF once again found itself facing the ambiguities and dangers of a humanitarian action militarised by the international community. By invoking humanitarian law, MSF was able to re-establish separate areas of responsibility

11. Known as "status of forces agreements" or SOFAs. In addition, Article 2.2 of the Convention on the Security of UN and Associated Personnel, which was adopted by the UN General Assembly on 9 December 1994, and came into force on 15 January 1999, confirmed that humanitarian law did indeed apply to military interventions initiated on the basis of Chapter VII of the UN Charter. The UN General Secretariat also issued a circular in 1999 on compliance with international humanitarian law by United Nations forces. This document came into force on 12 August 1999.

between military and humanitarian actors. However, the emphasis given to these different areas of responsibility in turn raised questions about the nature of the responsibility of humanitarian organisations and the limits to the legitimacy of their actions.
MSF was asked a number of questions:
Should MSF document violence against civilians in order to have a better understanding of such acts? In order to expose them publicly? In order to show that the war would continue under the cover of the peacekeeping operation?
Should whistle-blowing be limited to revealing the facts in the hope of limiting such crimes? Or should it include a call for international military intervention to put an end to the violence against civilians? Or a call for bringing the criminals to justice?

1- Humanitarian action as an international response to mass crimes

Over the course of 1992, MSF observed that terror against civilians was not a secondary effect of the conflict in the former Yugoslavia, but was employed deliberately as a method of war. This observation was based on a number of tragic events, such as the massacre of patients at the hospital in Vukovar, forced displacement of the population under the effect of terror policies, camps in which civilians were forcibly confined, summary executions, sexual violence and systematic use of ostensibly uncontrolled paramilitary groups to "do the dirty work".

In the fall of 1991, in Vukovar, MSF had denounced the attack on a convoy evacuating patients from the hospital[12]. MSF then informed the international community that the patients who had remained in the hospital were massacred when the town fell, on 19 November 1991. However, it took several years before any investigation of this "alleged" massacre took place. MSF also denounced the fact that, for more than two years, the site of the "alleged" mass grave was neither protected nor investigated at all by the UN forces on the ground[13].

In 1992, MSF made public a report describing and denouncing ethnic cleansing in eastern Croatia[14]. The report showed that violence against the civilian population was part of an organised, systematic strategy of using terror tactics against civilians in order to make them flee their home. It also showed that humanitarian organisations could neither moderate nor humanise this criminal policy, and could even make it easier to implement since they provided assistance to the displaced population.

Throughout this period, the public positions taken by MSF were intended[15] to force recognition of the existence of a criminal policy that the European countries were trying to deny or minimise and that compromised, in the view of MSF, the usefulness and effective-

12. On 20 October 1991, when Vukovar had been besieged for three months by the Serb forces, an MSF team, after three days of negotiations with the belligerents, tried to evacuate hundreds of sick and wounded from the hospital. As the first convoy left the city with 200 patients and advanced through the suburbs, an antitank mine was set off by an unidentified man: two MSF nurses (Ghislaine Jacquien and Fabienne Schmidt) were seriously wounded and were evacuated by military convoy to Belgrade. The convoy reached Zagreb some ten hours later. As a result of this attack, the second convoy, which was to have evacuated the rest of the sick and wounded, was cancelled. These patients were concealed from the ICRC representative and murdered when the town was taken by the federal army and Serb militias. They were buried in a mass grave near the city.
13. As from 1993, the mass grave was at last guarded by UN troops. The ICTY exhumed the bodies only at a very late stage in its investigation of the massacre.
14. "Le processus de purification ethnique dans la région de Kozarac (Bosnie-Herzégovine), investigation auprès de 60 ex-détenus ▶

ness of the humanitarian effort. It was against this background that MSF denounced the "humanitarian alibi" used by governments, which deployed militarised relief operations but refused to consider other forms of action against the massacres of civilians[16].

When the UN Human Rights Commission had appointed him special rapporteur for the former Yugoslavia, Tadeusz Mazowiecki gathered information from many sources[17] on the war crimes and crimes against humanity committed by the belligerents. He also criticised the UN's inappropriate response to these crimes. He ultimately resigned after the Srebrenica massacre[18] in order publicly to disavow this policy on the part of the international community.

Until the tragedy of Srebrenica in July 1995, and despite several changes in the mandate of the UN troops authorising the use of force to protect people in danger, the international military contingent distinguished itself mainly by its passivity with regard to crimes against civilians.
In the meanwhile, the Security Council decided in 1993 to establish a court to try the crimes committed in this war. This step was probably taken in response to the indignation of European public opinion, but it also showed a desire to add a complementary element to the UN's military and humanitarian resources in managing conflict and war crimes.

2- The International Criminal Tribunal for the former Yugoslavia (ICTY): judicial management of the crisis

The creation of the ICTY was an event that had not been seen in the history of international relations since the establishment of the Nuremberg and Tokyo military tribunals in 1945. The tribunal was given the authority to try crimes committed throughout the territory of the former Yugoslavia after 1 January 1991, which the Security Council regarded as the date of the outbreak of hostilities. No time limit was set on jurisdiction of the ICTY, as it was created when the conflict was still in progress.
This decision reflected a number of concerns. First, it was intended to step up the pressure on the belligerents and make up for the inadequacies of the international military force[19]. The threat of judicial action was supposed to discourage the belligerents' criminal policies and could have served as a bargaining chip in the peace negotiations.

The Security Council resolution that created the *ad hoc* tribunal thus gave the latter a two-pronged mission: to facilitate efforts to restore the peace and to try the perpetrators of crimes.

The member states took a year and a half to appoint the Prosecutor of the ICTY (Richard Goldstone); several years passed before sufficient resources were allocated to the court to allow it to work effectively.

bosniaques et de leurs familles accueillis en France (Saint-Etienne)", 7 December 1992.

15. Rony Brauman: "Génocide, information et bons sentiments", *Population en danger* 1995, La Découverte, pp. 85-91.
16. "Ex-Yougoslavie, la fuite dans l'humanitaire", Population en danger 1992, Hachette interventions.
17. MSF sent several documents to the special rapporteur, who had the possibility of using them confidentially and of checking and supplementing the information provided by referring to other sources.
18. See below, subsection 3, "MSF, the ICTY and Srebrenica", p. 10.
19. The weaknesses of this force are clearly illustrated by its impotence with regard to the violence against civilians. They were also evident in the vulnerability of the Blue Helmets themselves: in April 1994 and May 1995, following the UN's decision to use force against the Serb forces, a number of attacks were carried out against the Blue Helmets.

The appearance of an international criminal tribunal was a wholly new element in the international system of conflict management. It raised questions about some of the practices of humanitarian organisations in general, and MSF in particular, since making accusations of serious crimes now involved not only the political responsibility of the belligerents, but the criminal liability of individuals.
In order to maintain its presence in the field, MSF wanted to preserve its independence with respect to an international tribunal that was perceived as a major venue for political confrontation between states.

In addition, it would have been somewhat dangerous to have the ICTY rely on evidence provided by the humanitarian organisations. On the one hand, this increased the risks to the safety of their field personnel and limited relief operations. On the other, the information available from NGOs was sufficient to demonstrate the existence of victims and in some case the existence of crimes, but not to prove the identity and guilt of the culprits. Thus, the participation of NGOs might have been not only ineffective but counterproductive. Indeed, their participation in such proceedings might primarily have served to mask countries' reluctance to co-operate with the ICTY as regards providing information, judicial co-operation and protection of victims and witnesses[20].

To avert these risks and preserve its decision-making autonomy in its relations with the court, MSF resorted to invoking a provision of the ICTY's Rules of Procedure and Evidence (article 70) that allowed it to hand over documents only to facilitate investigations, but not to build cases for prosecution[21]. All MSF would do was to inform the investigators of the events, where they took place and whether there were other witnesses (international witnesses in particular). This provision absolved MSF of any obligation to participate in the judicial proceedings proper. It also limited the judges' powers to require that witnesses or other documents be produced.

These policy concerns and the desire to take advantage of the various legal possibilities available guided MSF in the development of its policy on co-operation with *ad hoc* international criminal tribunals, which was adopted in November 1995 and applied to the entire MSF movement[22]. This policy was based on the following points:
- MSF would continue to make public its reports on the events it witnessed. These documents would thus be accessible to the court.
- MSF would limit its obligation to co-operate via the procedures established for this purpose in the Statute of the tribunal, particularly as regards the procedure for confidential provision of documents[23].
- For field volunteer workers who did not wish to testify in person, MSF would try to obviate their obligation to testify before the court.

20. See Une justice internationale pour l'ex-Yugoslavie: mode d'emploi du tribunal pénal international de La Haye, Françoise Bouchet-Saulnier (with CEDIN and the International Federation of Human Rights), L'Harmattan, 1994.
21. The Prosecutor undertakes not to use the information provided as evidence in a case. This provision thus allows those who provide the information not to participate in the trials, and in particular not to be subject to cross-examination by the accused or to reveal the identity of the sources of their information.
22. "MSF et les procédures judiciaires", Françoise Bouchet-Saulnier, internal MSF document, November 1995.
23. MSF uses a provision of the ICTY's Rules of Procedure and Evidence (article 70) that allows it to provide documents that will serve only to help in the investigations but not to build prosecution cases. Thus, it was a matter of informing the investigators of the events, where they took place and whether there were other witnesses. The Prosecutor undertakes not to use the information provided as evidence. This provision makes it possible to avoid any obligation to participate in the trial proper. It also limits the judges' powers to

This policy did not imply a value judgement on the workings of the tribunal; rather, it reflected MSF's desire to preserve its freedom of action with respect to international legal proceedings.

It led to the provision of documents relating to the crimes committed at Vukovar, various MSF reports on mass violence produced between 1992 and 1996[24], several reports relating to the fall of the Srebrenica enclave[25].

This policy did not provide for all contingencies that might arise, particularly the case in which MSF's decision differed from that of one of its members. This eventuality was envisaged and a decision taken later on the basis of the following principle: MSF would not forbid one of its members to testify in legal proceedings in an individual capacity, but in that case, MSF could request that neither its name nor its internal documents be used. In addition, MSF decided to offer legal support to volunteers who decided to testify without compromising the organisation's need for discretion[26].

3- MSF, the ICTY and Srebrenica

The ICTY's investigations of the Srebrenica massacre began as soon as the enclave had fallen, but the investigators had great difficulty in entering the enclave and obtaining information, particularly from the governments involved in the peacekeeping operations. In August 1993, one of the court's investigators contacted MSF to ask whether the latter possessed any documents other than those which had been made public. MSF then sent the investigator, under cover of confidentiality, a copy of the list of the sick and wounded and the MSF staff members who disappeared when the enclave was evacuated, as well as a copy of the report of the debriefing of its expatriate staff, which was produced after the events and had already been sent to the Dutch government (which then carried out an internal investigation into the behaviour of its contingent of Blue Helmets in Srebrenica – see below).

The reason given by the investigator for his request for information was the need to foster and test the cooperation of the various countries involved.

The chief ICTY investigator of the massacres in the "safe area" contacted MSF in November 1996 to inform us that he had found the body of one of our employees[27]. In December 1998, some ICTY investigators requested the testimony of an expatriate volunteer who had been present in the field at the time. The MSF officers responsible for this matter contacted the volunteer in question, who did not wish to testify unless it was absolutely necessary. After consultations between MSF and the ICTY Prosecutor's office, it was agreed that this person would not be forced to testify in court. The tribunal accepted this compromise, without applying pressure to MSF or to the volunteer. Instead of appearing before the court, the volunteer answered written questions sent by the Prosecutor's office, and this was followed by an informal interview[28], in January 1999, with the investigators of the ICTY.

require that witnesses or other documents be produced.

24. At the request of the office of the Prosecutor of the ICTY, MSF's reports on ethnic cleansing were sent again on 2 October 2001.
25. See below, sub-section 3, "MSF, the ICTY and Srebrenica", p. 10.
26. These points were added during the drafting of MSF's international policy with respect to the International Criminal Court, adopted in 2004. See below.
27. It was the body of Meho Bosnjakovic.
28. An "interview" is an informal procedure that entails no legal obligations for the witness, notably the obligation to submit to cross-examination in court by the Prosecutor, the judges or the defendant's lawyer.

The question of MSF's testimony before the ICTY took a new turn in 2004. At that time, a former MSF official decided to testify for the defence in a trial[29]. He gave the defendant's attorney the names of former MSF volunteers who had been present in Srebrenica from 1993 to 1995, along with a number of internal MSF documents. Several of these volunteers, contacted directly by the defendant's attorney, asked MSF's legal department for clarification of the organisation's position.
After a number of internal discussions, MSF concluded that it did not wish to be associated with or to support the former employee's decision.
Among the points discussed was the fact that this was the first time MSF's testimony had been requested by the attorney of a defendant. In addition, the indictment related to deeds committed at a time when MSF was not operational in the place in question.

Had MSF acceded to the attorney's request, it would have created a precedent difficult to reverse in the future. In this specific case, MSF could not justify testifying on the grounds that the organisation or its members were in possession of crucial and conclusive information about a crime. By agreeing to testify under these circumstances, MSF would have acknowledged that this type of testimony was not conflicting with its mission of providing emergency relief in a conflict situation.

However, MSF's decision not to participate gave rise to a controversy over the confusion between the organisation's policy decisions and personal decisions taken by individuals.
In the event that the organisation and a volunteer disagree on whether legal testimony involving the organisation is necessary and appropriate, it is always possible for the volunteer to testify on his/her own account, without mentioning the name of the organisation or its members and without using its internal documents.

The statutes of international tribunals provide for such protective measures, but in order to benefit from them the witness must request this of the court[30]. In the case at hand, the witness preferred not to request protection, considering that it was legitimate to reveal the name of MSF. In addition, the controversy within the organisation had temporarily put a halt to all requests for protection made directly by MSF to the judges.
Curiously, it was the international judge who, of his own motion, expressed concern during the hearing that the witness was placing MSF and its members at risk by naming names, apparently without taking any precautions and without consulting MSF[31].

The publication of this hearing on the Tribunal's website in July 2005 brought MSF to a realisation of what was happening. Its requests made to the attorney were initially refused, then finally granted after MSF applied directly to the judge. As a result, on 10 October 2005, the names of MSF and its members were officially stricken from the record of the 11 July 2005 hearing[32].

29. The trial of Naser Oric, former head of the Bosnian forces in Srebrenica, held before the ICTY in 2004-2005. Initial indictment, 28 March 2003. Modified indictment, 23 July 2003. Second modified indictment, 4 October 2004. Third modified indictment, 30 June 2005. Decision by the Registry of the Tribunal, 15 March 2004. Decision by the first Trial Chamber, 25 April 2003. Decision on second modified indictment, 4 October 2004. Decision on interlocutory appeal concerning the application of article 70 of the Rules of Procedure and Evidence, Appeals Chamber, 24 March 2004.
30. In principle, the witness or his/her attorney can request the application of these measures to protect anonymity from either the victim assistance division?, the Prosecutor or the judge. This first option pre-supposes that an agreement is reached between MSF and the witness. However, in the event that MSF wanted to benefit from such protection against the wishes of a witness, it may make a direct request to the judge, who is also authorised to take such decisions on an exceptional basis.
31. See the transcript of the initial hearing ▶

4- MSF and non-judicial investigations on Srebrenica

For two years, from 1993 to 1995, MSF provided medical and logistical support to the besieged population in the "safe area" of Srebrenica, which was officially under the protection of the UN's Blue Helmets. The UN force protecting the Srebrenica enclave when the Serb forces attacked in 1995 was a Dutch battalion. In July 1995, the fall of Srebrenica was followed by the expulsion of 40,000 people and, according to generally accepted estimates, the execution of some 7,000 others[33]. In addition, dozens of sick and wounded under the care of MSF, evacuated from the enclave by the Bosnian Serb forces, were pulled out of the buses transporting them and executed by paramilitary squads. At least three nurses on the local staff of MSF, who were accompanying these patients, met the same fate and remained "missing". Other members of MSF's local staff and other patients were also executed[34].
The MSF team in the enclave were eyewitnesses of the behaviour of the UN Blue Helmets during the attack. After the fall of the enclave, the team also witnessed the sorting of the population, including the sick and wounded, the separation of men and women, and the departure of the resulting groups in convoys to unknown destinations.

Apart from its public statements on the events at Srebrenica made at the time, MSF initiated and/or participated in several non-judicial proceedings undertaken between 1995 and 2000 to establish the facts and the responsibility of the various actors for the abandonment of the "safe area" and the massacres that ensued.

After the fall of the enclave and deportation of the population, MSF immediately carried out an internal debriefing of its volunteers on the ground. Two reports were produced, in August 1995 and February 1996[35], describing the circumstances under which the enclave fell. These reports were based on the debriefing of expatriate staff and on transcripts of messages between the field teams in Srebrenica and the co-ordinating teams in Belgrade over the entire period of the military offensive against the enclave, including its fall and the deportation of the civilian population and the sick.
MSF made these documents available in response to requests for information that it received as part of the investigations conducted in the Netherlands as from 1995 – investigations that would subsequently spread to France, to the International *ad hoc* Criminal Tribunal for Former Yugoslavia[36] and to the United Nations.
At the international level, it took years to establish clearly what had happened to the people of Srebrenica and the scale of the massacres. During this period of uncertainty, everyone wondered what had really happened to the thousands of persons declared missing at Srebrenica. Only the opening of the mass graves and the progress of the ICTY's investigation made it possible to end the controversy over the nature of these crimes and whether they had actually been committed. During this waiting period, MSF worked to preserve the evidence and testimony in its possession and to bring pressure publicly for

of Eric Dachy at the ICTY, dated 11 July 2005, and the comments of Judge Agius, pp. 9461-9462.

32. Email dated 29 August 2005 from MSF to the attorney, requesting him to take protective measures so as to prevent the name of MSF from appearing in the documents and testimony that he would present at the trial. Email dated 29 August 2005 from the attorney to MSF, declaring that he did not recognise that MSF had any right to restrict the way he intended to mount his client's defence. Letter of 15 September 2005 from MSF to the judge, requesting that the latter take measures to protect the name of MSF in the trial documents and hearings. Email dated 26 September 2005 from the attorney to MSF, agreeing to take steps himself to protect the name of MSF, if MSF would withdraw its request that the judge do so. Email dated 10 October 2005 between MSF and the attorney stating that the references to MSF had been removed from the hearing documents, and ensuing letter from MSF to the judge to close the subject.
33. These figures are put forward by, among others, the ICRC, the HCR and the ICTY.
34. Of les 13 membres of MSF's local staff, one was declared? missing (his body

national and international investigation of the facts of the fall of Srebrenica and of who was responsible.

The investigative work of the ICTY covered only part of the various areas of responsibility for the Srebrenica tragedy. The international tribunal has a mandate to establish the individual criminal responsibility of those who committed war crimes, crimes against humanity and genocide in the former Yugoslavia. It repeatedly confirmed that its main role was to try crimes committed by the parties to the conflict. Thus, its investigators did not try to find out why the combined UNPROFOR/NATO military force took no action when the Srebrenica massacres occurred, nor to obtain penal sanctions for its failure to act.

Identifying the extent to which the Western countries bore the political and military responsibility for the paralysis of the UN and NATO forces was not within the purview of the ICTY. Nevertheless, their responsibility could not be left unmentioned, because it arose in the context of an international policy of UN military intervention, one essential purpose of which was to protect civilians.

Thus, it was to highlight the deficiencies and inadequacies of the international forces that were supposed to protect civilians during peacekeeping missions that MSF made repeated requests, over a number of years[37], for this aspect of the tragedy to be investigated by the UN and by the parliaments of the main states involved.

4.1 The Dutch investigations of the Srebrenica tragedy

From 1995 to 2003, a number of investigative processes were conducted in the Netherlands.

In the days after the fall of Srebrenica, when information on the massacre of civilians began to spread, the pressure and accusations in the media focused on the failure of the Dutch contingent of Blue Helmets in the enclave to take any action.

Starting in September 1995, the Dutch ministry of defence conducted an internal investigation and debriefed its soldiers to establish who was responsible for what, between the contingent on the ground and their political and military superiors in both the national and UN chains of command.

The Dutch ministry of defence requested the testimony of MSF expatriates present on the ground alongside the Dutch troops. In view of the polemical atmosphere, and the wish of the expatriates not to appear in person in this process, MSF decided to refuse requests for direct hearings but agreed to contribute to the investigation in a carefully controlled manner. The Dutch investigators therefore sent written questions to MSF, to which the volunteers replied, also in writing, making use of the debriefing documents produced earlier on by MSF.

The investigation of the Dutch ministry of defence was marred from the outset by a scandal involving the "accidental" destruction of film rolls containing pictures taken by certain Blue Helmets at the fall of Srebrenica. The ministry's report was not published until

was officially identified in 1996, and of the 128 members of the hospital staff, 21 are missing.

35. See "Les testimony bosniaques sur la fin de Srebrenica", MSF report, August 1995, and "Srebrenica Hospital Personnel and Local Staff. Eyewitness accounts of the evacuation from Srebrenica and the fate of missing colleagues", MSF report, February 1996.
36. At the time, the ICTY was experiencing great difficulty in investigating the circumstances of the fall of Srebrenica. For example, its investigators were not allowed access to the area for many months.
37. In 1995, the number of UN peacekeeping and military operations reached a record level. After the failures in Somalia, Rwanda and Bosnia, however, there was a pause in UN peacekeeping operations. Since 1999 and NATO's war in Kosovo, crisis management operations have been experiencing a revival, especially since several regional organisations (the EU, NATO, the African Union etc.) are now deploying an increasing number of soldiers alongside the UN.

November 1998, after repeated pressure from the press, public opinion and some political figures. It concluded that an independent investigation in greater depth would be needed, particularly investigation of the evidence implicating the entire Dutch and UN chains of command.

In 1996, to avoid having to establish a parliamentary investigative commission, the Dutch government commissioned a more detailed investigation of the same events from the Dutch institute for war documentation, NIOD[38]. It thus delayed the creation of the investigative commission, pending the conclusions of NIOD[39]. The investigation initiated by the UN in December 1999 and that of the French parliament in the fall of 2000 generated new synergies. The NIOD investigators relied on documents already provided or made public by MSF-France in the context of the Dutch ministry of defence's investigation and the French parliamentary hearings. They called no witnesses and requested no additional documents from MSF (see below).

Six days after the publication of NIOD's report (10 April 2002), the entire cabinet of Prime Minister Wim Kok and the army chief of staff resigned. A month later, in June 2002, the Dutch parliament decided to form an investigative commission, which submitted its report on 27 January 2003.

4.2 The UN investigation of the fall of Srebrenica

In Resolution 53/35 of 30 November 1998, the United Nations General Assembly called for "a full report including an evaluation of the events that have occurred since the creation of the safe area in Srebrenica, on 16 April 1993, as well as in other safe areas…". In contrast to the investigation on Rwanda launched by the UN Secretary-General, published in the same year, it was a diplomatic initiative of the government of Bosnia, supported in the General Assembly by other countries, that made it possible to investigate this tragedy. In response to this request, the General Secretariat carried out an internal investigation leading to the publication of the report on the fall of Srebrenica on 15 November 1999[40].

MSF took no active steps to contact the team of investigators, nor did the latter try to approach the various MSF sections or the volunteers present at Srebrenica. The UN investigators of course had access to the two public reports published by MSF in 1995 and 1996. However, MSF did take advantage of the process set in motion by the publication of the UN report[41] and on the Secretary-General's desire to clarify the doctrine concerning UN military intervention in situations of mass crimes, to initiate and to lead the public calls for a parliamentary investigation in France.

4.3 The French parliamentary hearings on Srebrenica

In 2000, five years after the fact, and despite the results of the UN-Dutch investigation, a number of questions remained unanswered, concerning the reasons why the international community had abandoned the people living in the "safe area" officially protected by the Blue Helmets and by NATO.

38. NIOD: historical organisation that conducts research on the second world war.
39. One of its goals was probably to gain time, in order to let the emotion raised by the tragedy die down. However, the publication of the report of the UN investigation on the fall of Srebrenica in November 1999 and the launch of the French parliamentary hearings in the fall of 2000 refocused the attention and questions of the media on the reasons why the "safe area" had been abandoned.
40. See "Report of the Secretary-General pursuant to General Assembly Resolution 53/35. The fall of Srebrenica", 15 November 1999.
41. And by the UN report on the genocide in Rwanda published the same year.

The sequence of events was already more or less established, but the accounts provided by the UN, the Netherlands and France clearly diverged on several crucial points.

MSF's repeated demands for a parliamentary investigation in France to shed light on this "dark side" of the Srebrenica tragedy ultimately led to the creation of the parliamentary investigative commission on Srebrenica in November 2000[42].

France was a key country in the UN presence, since the commander of the UN forces throughout the former Yugoslavia was General Janvier, a French officer. It was also at the initiative of France that the concept of a "safe area" was first used in Bosnia, as a result of a proposal by General Morillon. Despite its key role in managing the Bosnian conflict, France at the time had not undertaken any investigation whatsoever of the Srebrenica tragedy; moreover, there was a good deal of information, from various sources, connecting the fall of Srebrenica to secret negotiations in which the French authorities were allegedly involved[43].

In France, a number of advocacy groups considered bringing charges against General Janvier before the French courts for complicity of crimes against humanity, but MSF refused to join this initiative.

In the view of MSF, it was not a matter of finding or creating a scapegoat, nor establishing any individual criminal responsibility. The main objective was to clarify the various levels of responsibility, both political and military, that led to the tragedy. This required study of the various links in the decision-making chain exercising an international mandate to protect the civilian population, as well as their reasoning, the constraints they faced and their dysfunctions.

The opinion column published in *Le Monde*, 13 July 2000, by the new President of MSF, Jean-Hervé Bradol, was thus part of an overall context characterised by calls for transparency and analysis of peacekeeping operations[44].

On 23 November 2000, the defence and foreign affairs committees of the National Assembly voted to create a parliamentary investigative commission. The commission was established in December and, from then until June 2001, heard the testimony of some twenty people, including French and Dutch political figures and military officers, an ICTY investigator and representatives of civil society (including three members of MSF). Its report was published on 22 November 2001.

MSF engaged in an internal debate over whether the organisation should content itself with requesting the creation of the investigative commission, or whether it should also be involved in the operations of that commission on a daily basis, to evaluate and improve the quality of its work and to be able, if necessary, to disavow it publicly[45].

Based on its previous experience with the parliamentary hearings on Rwanda[46], MSF decided to engage in a sustained critical support to the commission.

To this end, MSF published the verbatim transcripts of the hearings each week on its website, noting the gaps, contradictions, errors and inaccuracies in the statements of the

42. See among other works the opinion column by Françoise Bouchet-Saulnier and Pierre Salignon, "Srebrenica, questions de lâchetés", *La Croix*, 20 July 1996; the preface by Pierre Salignon and Renaud Tockert, in *Srebrenica. Histoire d'un crime international*, Laurence de Barros-Duchêne, L'Harmattan, 1996; and MSF's support for the call for investigation issued by the Collectif des citoyens et citoyennes pour la Bosnie (Citizens' Group for Bosnia), approved by the MSF board of directors on 19 November 1999; and the opinion column by Jean Hervé Bradol in *Le Monde*, 13 July 2000.

43. An agreement was reportedly reached between French officials and Bosnian Serb forces in May 1995, tying the release of the Blue Helmets who had been taken hostage to the cessation of NATO air strikes. Another scenario implicated the French authorities and the other member countries of the "contact group" that was responsible for negotiating peace agreements. This group is alleged to have tied the peace agreement to the "abandonment" of the enclaves in eastern Bosnia, and hence to a commitment not to have them defended by the international armed forces.

witnesses heard, and maintaining working relationships with the MPs and a small group of journalists covering the investigation[47]. This approach was intended to allow MSF to maintain a long-term capacity for mobilisation concerning the work of the commission, which covered several months. MSF thus decided to post on its website important information – from the report of the UN investigation, confidential UN documents, press articles and documents stemming from investigations in other countries – that contradicted or supplemented the statements of the French officials. MSF made repeated public requests to the ministries of defence and foreign affairs to provide the commission with certain documents that were known to exist but that were classified as secret by these ministries. These requests were not granted.

MSF was heard twice by the commission. MSF proposed Pierre Salignon, programme coordinator at the time of the fall of the enclave, to testify at the hearing. The commission, for its part, wished to hear two MSF volunteers who had been present in the enclave, as they had been eyewitnesses of the events.

Salignon's deposition at the hearing did not constitute legal testimony, because it not only described what had happened but offered an analysis focused on the fate of the victims. Salignon testified more as an MSF spokesperson than as a witness in the traditional meaning of the term. His deposition put specific questions to the MPs to which MSF wished to draw their attention[48] and highlighted the contradictions in the information that was available at the time.

In contrast to this prepared approach, the hearing of the two MSF eyewitnesses of the fall of Srebrenica was subject to political manoeuvring regarding the choice of questions and the interpretation of the answers. For example, the two volunteers were asked whether the fall of the enclave was foreseeable or unforeseeable. They replied that, in their view, the fall of the enclave was not foreseeable, as they could not conceive that the United Nations forces in the enclave would remain inactive and would not manage to prevent a tragedy. Their answer was interpreted as proving that, if even the people on the ground were unable at the time to foresee the conquest of the enclave by the Bosnian Serb forces and the ensuing massacres, the political and military authorities, who were not present on the ground, were still less in a position to do so. Their crucial contribution as eyewitnesses was to confirm that a military team providing ground guidance for NATO aircraft had been present in the enclave on the day it fell. However, none of the MPs paid attention to this piece of information, which contradicted the official position of the French authorities, who claimed that the absence of such a team explained why there had been no NATO air strikes to protect the enclave from the Bosnian Serb offensive.

The day before the publication of the commission's report, MSF issued a document to the press that summarised the essential questions and facts needed to interpret the MPs' report[49]. This document drew on contradictory, scattered items of information available in

44. The UN reports on the genocide in Rwanda and on the fall of Srebrenica, as well as the audit report on the functioning of peace-keeping operations (the "Brahimi report"), were published in 1999 and 2000, receiving extensive media coverage. The OAU report on the genocide in Rwanda was published on 7 July 2000. In France, MSF also benefited from the "cohabitation" period (i.e. the French president on the one hand and the prime minister and parliament on the other were from different, and rival, political parties), which somewhat reduced the peculiarly French situation in which a single person, i.e. the president, decides whether to send soldiers abroad. Moreover, the chairman of the National Defence and Armed Forces Committee in the National Assembly, Paul Quilès, undertook to strengthen parliamentary control over the government's foreign operations. The French parliament's 1998 investigation on Rwanda, which constituted a first step towards broader parliamentary control over the government's foreign policy, was conducted under his authority.

45. As soon as the membership of the commission was ▶

the various investigation reports published by the governments and international organisations involved in managing the crisis in Yugoslavia.
The aim was to recapitulate certain problems and facts that would enable journalists to quickly put into perspective the three-volume report that would be handed to them at the press conference of the commission. Otherwise, the procedure employed by the commission would have obliged journalists to report the "official summary", without having time to read the thousands of pages making up the report. MSF was thus trying to avoid a repetition of the spin doctoring that had accompanied the publication of the report of the parliamentary commission on Rwanda. In the latter case, the journalists mostly reported the official message given at the press conference, "France need not be ashamed for what happened in Rwanda", which passed over a number of specific questions that remained unanswered.
The challenge was not to limit the role and responsibility of MSF to that of a passive witness, but to take an active role in establishing the truth concerning a massacre of civilians who were supposed to be protected by a complex international force.

D- KOSOVO: 1999

NATO's military intervention in Kosovo against Serbia in the spring of 1999 was initiated following the massacre at Raçak. The first investigators on site were not those of the ICTY, but those of an investigative mission of the OSCE, headed by the US diplomat William Walker. The conclusions of this mission led to NATO's decision to use force to put an end to the violence committed by the Serb army[50]. This intervention, undertaken without the UN's authorisation, nevertheless came under the jurisdiction of the ICTY.

1- The attack on Kosovo by Serb forces and the NATO bombardments

From the outset of the military intervention, MSF tried to formulate an independent assessment of the situation and the level of violence against civilians, without accepting the propaganda issued both by the NATO coalition and by the authorities in Belgrade.
To this end, MSF conducted a detailed investigation, interviewing refugees in Albania, Montenegro and Macedonia. This investigation led to the conclusion that the Serb troops were conducting a policy of forcible expulsion of civilians; the findings were published in a report that was in turn reported in the media[51].
The MSF report was one of many documents and information sources used by the ICTY Prosecutor's office in its examination of the situation. At this stage, it did not give rise to an obligation to co-operate with or testify in the future trials relating to Kosovo.
Questions were subsequently asked within MSF as to whether it had been useful and

made public, MSF publicly criticised the choice of François Léotard, who had been defence minister during the war in Bosnia, as rapporteur of the parliamentary proceedings. MSF's position was sharply criticised by François Loncle, chairman of the Foreign Affairs Committee and of the parliamentary investigative commission. Loncle told the two MSF members who were monitoring the proceedings of the commission on a day-to-day basis (Françoise Bouchet-Saulnier and Fabien Dubuet) that MSF had "crossed the red line". In the end, Léotard was not appointed rapporteur. Similarly, when the chairman of the commission declared that the hearings of French officers were being held behind closed doors at the request of the ICTY, MSF checked with the ICTY to see whether this was the case. The ICTY immediately issued an official statement denying that it had requested closed hearings.

46. See pp. 18 et seq.
47. Those who covered the hearings of the parliamentary mission assiduously, namely the journalists from *Le Monde, Libération, the AFP, Le Figaro*, and several Dutch news organisations (*Noos, Elsevier,* ▶

appropriate to make this report public, especially since it seemed to echo NATO propaganda at the time when it was published[52].

The publication of the report was justified by the fact that, in a highly propagandised context, the MSF report gave the stamp of objectivity to certain facts relating to violence against civilians.
In a highly legalised context, this investigation also enabled MSF to identify which of the groups had been victims or eyewitnesses of serious crimes and so remained in danger within the territory of the Yugoslav Federation. The work ,performed by MSF allowed these people to request special protection from the HCR, which evacuated them to Macedonia and Albania as a safety measure, in accordance with the agreements between the tribunal and the HCR[53].

2- The return of the population to Kosovo

In the early summer of 1999, humanitarian organisations entered Kosovo, along with the local population and NATO troops.

2.1 Preservation of evidence

In the areas covered by MSF operations, a number of emergency measures had to be taken. In particular, it was necessary to remove the corpses, human or animal, that had been thrown into wells and, working with the local population, to collect and bury the bodies. Care needed to be taken, however, not to destroy evidence of crimes and to allow later identification of the bodies by families and the ICRC[54]. Photographs were taken of the locations and the corpses, and a report was drawn up to allow identification of the bodies before they were buried. These reports were forwarded to the ICTY Prosecutor's office in The Hague, which served as the clearinghouse for criminal charges and searches for family members.
This was done in accordance with a protocol established in consultation with and with the consent of the local population and authorities, the ICTY Prosecutor's office and the ICRC.

2.2 The search for the missing

Once the population had returned, the search for missing persons and the return of prisoners became matters of the first importance. During the conflict, thousands of people had been arrested by the Serbian forces, sent to Serbia and detained there. Others disappeared. The ICRC handled the repatriation of the detainees to Kosovo, with the intention of estimating how many people were missing and what had happened to them.
On the return of these prisoners, the ICRC interviewed the former detainees and MSF gave them a medical check-up and provided care for those who had been subject to violence and

NRC etc.).
48. See "Les questions de MSF", a document posted on MSF's special website dedicated to the parliamentary commission on Srebrenica: www.msf.fr/srebrenica.
49. See "Mission d'enquête parlementaire sur Srebrenica: argumentation, lacunes et contradictions des auditions", MSF briefing document, November 2001, www.msf.fr/srebrenica.
50. The ICTY was paralysed because Milosevic had prohibited its investigators and its Prosecutor, Louise Arbour, from entering the region. In January 1999, Louise Arbour was physically turned away by the Yugoslav authorities when she tried to enter the region to investigate.
51. "Kosovo. Histoire d'une déportation", MSF report, April 1999; Libération, 30 April 1999.
52. See Laurence Binet, *Violences contre les kosovars albanais, intervention de l'OTAN 1998-1999*, 2006, in the series "Prises de parole publiques de MSF".
53. Initially, the HCR was very reluctant to evacuate them to Albania and Macedonia, since by exfiltrating these families to neighbouring countries it would itself be creating refugees. Only after repeated calls from MSF to the Geneva

torture while detained, offering to provide those who wished with an individual medical certificate. MSF also agreed to pass on (at the victims' request) these medical certificates and some X-rays of abused former detainees to the ICTY. The tribunal could thus authenticate the certificates presented by the victims without having to insist on MSF's co-operation[55]. MSF did the same for the victims of rape and of mines.
This activity created no obligation for MSF doctors to testify or to authenticate the certificates before the tribunal, since MSF had given the certificates directly to the investigators at the victims' request.

In France, as part of the exploratory mission undertaken in June 1999, in a refugee accommodation centre in Bourges, MSF also provided many Kosovar families with ICTY forms. When the MSF team visited the centre, many families declared that they wished to testify or provide information to the ICTY[56].

Thus, at the various stages of the crisis, MSF's activity in Kosovo was based on four main principles:
- Maintaining MSF's capacity to describe the situation, independently of the belligerents.
- Preserving and protecting evidence on the ground during relief actions.
- Issuance of medical certificates so that victims could assert their rights.
- Maintaining MSF's independence with regard to the functioning of the international criminal tribunal.

E- RWANDA

The genocide: from the UN Commission on Human Rights to the *ad hoc* International Criminal Tribunal for Rwanda[57]

On 24 May 1994, during the extraordinary session of the UN Commission on Human Rights on Rwanda, held in Geneva, the coordinator of the mission from MSF Belgium presented, on behalf of MSF, his testimony as an eyewitness of the acts of genocide committed in the city of Butare, and in the hospital where the MSF team was working.
During the month of May, MSF France initiated an internal investigation to determine the fate of its local employees, many of whom had been murdered.
Systematic, standardised collection of the testimony of volunteers from all MSF sections concerning the criminal acts they had witnessed in various parts of Rwanda in April, May and June 1994 was also initiated as early as April. These accounts were brought together in a report presenting the events, region by region. This internal document systematically reported the nature of the crimes committed, the date and place, and gave the names of the witnesses, the victims and the perpetrators. A version from which the names of victims and

headquarters of the HCR were the evacuations organised.
54. See "Le point sur les cadavres dans la région de Peç", Fabien Dubuet, internal memo, 9 July 1999.
55. These documents were transmitted in February and June 2000, in confidence and using article 70 of the ICTY's Rules of Procedure and Evidence.
56. The French authorities had not provided refugees with the tribunal's form, despite the fact that national and international legal provisions obliged France to co-operate in the search for testimony and evidence. The Deputy Prosecutor of the ICTY had also asked the French Ministry of Foreign Affairs, by letter dated 9 April 1999, to make the ICTY form available to refugees evacuated by France.
57. For a complete and detailed presentation of MSF's public declarations during the genocide, see Laurence Binet, Génocide of rwandans tutsis 1994, 2003, in the series "MSF speaking out". Internal MSF documents.

witnesses had been expurgated was released to the press. In June 1994, the version containing these names was transmitted to the Special Rapporteur appointed by the UN Commission on Human Rights to investigate the nature of the acts committed and determine whether the killings in Rwanda could be termed genocide.
In September 1994, this version was provided to the UN Experts Group responsible for investigating whether acts of genocide had been committed in Rwanda[58]. In November 1994, it was sent to the *ad hoc* International Criminal Tribunal for Rwanda, which had just been created.
- The purpose of the report was three-fold:
- To compel recognition that genocide had occurred, in a context where the existence and recognition of this crime were matters for foot-dragging, disputes or denial among states.
- To preserve the evidence and eyewitness accounts available with MSF.
- To prompt an appropriate international response to the genocide in the field.

During this entire period, MSF's public statements stressed the need to arrest and bring to trial the perpetrators of the genocide, who had taken refuge in neighbouring countries (Tanzania and Zaire) and who were using humanitarian aid supplies in the refugee camps to re-establish their power and continue their criminal activities[59].
The *ad hoc* International Criminal Tribunal for Rwanda was created by the United Nations Security Council on 8 November 1994. Its mandate was the result of a difficult political compromise among the Member States of the Security Council concerning recognition of the genocide. In the end, it was decided that the mandate would cover the year 1994 in its entirety, from 1 January to 31 December. It would thus apply to the acts of genocide committed from April to July 1994, but also to war crimes and crimes against humanity committed on Rwanda's territory, in principle including those committed by the army of the Rwandan Patriotic Front, which had taken power in July 1994[60].
The work of the ICTR began with examination of the facts constituting grounds for legal characterisation of the massacres in Rwanda as genocide. The tribunal thus elected to hear a number of "expert witnesses" who were witnesses neither for the prosecution nor the defence in a given trial, but who were supposed to shed light on certain aspects of the context and the manner in which the genocide occurred. It was in this context that the tribunal requested that MSF provide testimony in its inaugural session. Rony Zacharias, MSF coordinator in Butare at the time of the genocide, thus testified as a background witness[61], before the tribunal began to examine the first case files.

MSF had the option before the ICTR, as it had before the ICTY, of providing information on a confidential basis, as stipulated in a special provision of the Rules of Procedure and Evidence of the ICTR, similar to that of the Hague tribunal[62]. This enabled MSF to preserve its independence with respect to the subsequent proceedings of the tribunal and to ensure that neither the organisation nor the volunteers would be obliged to testify or to provide

58. Rony Zacharias witnessed murders targeting the medical staff of the Butare hospital during which the killers asserted that their goal was to exterminate the Tutsi ethnic group. These circumstances made it possible for him to speak of genocide without waiting for the specific intentions of the killers to be proved by other facts brought to light by the investigation.
59. See the report "Breaking the cycle", dated 10 November 1994, drafted on the basis of the information collected by each MSF section as from 10 August 1994, at the request of MSF's international legal counsel.
60. Resolution 955 of the UN Security Council, dated 8 November 1994.
61. Hearing on 23 April 2001 before the ICTR of Rony Zacharias, physician, as a background witness.
62. Article 70 of the Rules of Procedure and Evidence of the ICTR, adopted in June 1995.

documents. It was thus on this basis that the documents were provided and that the practical decisions concerning the testimony of Rony Zacharias were taken by the Board of Directors of the Belgian section of MSF.

It was decided that Rony Zacharias would testify in his own name, but with practical support from MSF. For this decision to be coherent with MSF policy, it was necessary that he not be under a field contract with MSF at the time of his testimony before the tribunal. MSF undertook to provide its volunteer with a lawyer, to accompany, prepare and support him in the cross-examination procedure in force before international tribunals[63]. Thus, in this case Rony Zacharias testified on a personal basis, but his testimony was fully accepted and supported by MSF, as the MSF attorney would requested no special protective measures on behalf of the organisation during the hearing.

In the case of the Arusha tribunal, there were in any case several factors making it possible to limit the consequences of this legal testimony for the image and security of MSF volunteers and missions, as well as for their ability to gain access to the victims of violence:

- The exceptional nature of the genocide gave MSF grounds for making an exception to normal humanitarian practice.
- The *ad hoc* nature of the International Tribunal for Rwanda limited the impact of this testimony to the case at hand and created no precedent that could be applied generally to all conflict zones. At the time, in the absence of a permanent international tribunal having universal jurisdiction, impunity was still the rule and convictions the exception. The testimony of MSF remained on an *ad hoc* and exceptional basis.
- The nature of this testimony also made it possible to limit the potential consequences. In this case, it was not testimony for the prosecution or the defence in a specific trial of one or more defendants. The purpose of the expert witness mechanism was to provide general information on the context in Rwanda.

As the mandate of the ICTR covered the entire year 1994, the tribunal also had jurisdiction in theory to investigate crimes committed by the Rwandan Patriotic Front (RPF) during its military take-over of the country and the overthrow of the government responsible for the genocide. At that time, MSF had at least one confidential internal document on the violence committed in the areas "liberated" by the RPF army in May and June 1994. For reasons of security, this document was not given to the ICTR, but it became known outside of MSF that such a document existed. It was therefore eventually, in 1999, submitted to the ICTR, on a confidential basis so as to control the conditions under which it might be used[64]. The purpose of transmitting the document to the tribunal under the confidentiality clause was to establish the internal and confidential nature of the document and to ensure that it could not be used by the various parties involved to oblige MSF or the volunteer concerned to give official testimony. However, owing in particular to the opposition of the Rwandan government, the ICTR did not complete its investigations of the crimes committed by the troops of the RPF[65].

63. Rony Zacharias counsel was Michael Verhaege, attorney-at-law and member of the Board of Directors of MSF Belgium. See interview with Michael Verhaeghe, *Being a Witness: MSF and International Courts*, coordinators' days 2003, MSF Holland, pp. 18-21.
64. A though confidential, this document contributed to the various MSF public denounciation, see Laurence Binet, *the violence of the new Rwandan regime*, in the series "MSF speaking out", p. 12.
65. All attempts to implicate the RPF were sharply criticised by the new Rwandan regime, which denounced them as "revisionism" putting the genocide on the same footing as the violence occurring during military operations whose objective was to stop the genocide. On the diplomatic front, the new Rwandan regime also invoked the UN's failure to act during the genocide as grounds for refusing any investigation of the methods used by the RPF in taking and exercising power.

The diplomatic pressure that prevented the International Tribunal for Rwanda from investigating the crimes committed by the army of the Rwandan Patriotic Front in 1994 continued to be exerted concerning crimes committed after 1994, which were not covered by the Statute of the ICTR. In 1995 and 1996, several large-scale massacres were committed by the army of the RPF, both in Rwanda (in the camps at Kibeho) and in the refugee camps in Zaire.

In Kibeho, where the camps were under the protection of UN soldiers on Rwandan territory, MSF and the United Nations forces were eyewitnesses to a large-scale massacre committed by the new government of Rwanda.

Despite the evidence of the massacre witnessed by the Blue Helmets, the UN directed its employees who had witnessed the massacres to remain silent. Motivated by a desire to calm ethnic tension and foster national reconciliation in Rwanda, the UN supported the creation of an "independent" investigative commission, which counted the Rwandan government among its members and which contributed to the national and international denial of these massacres.

MSF, for its part, collected testimony, published two reports and participated in other investigative processes to establish the number of victims and the various methods leading to the physical destruction of the population.

As a humanitarian organisation acting in a context of extreme politicisation of the violence, MSF thus helped to make public a reality that was crucial to the choice of relief strategies and helped to oppose the official denial of criminal acts that were greatly under-estimated by all parties present in the field[66]. This was an important issue for MSF, given the scale of the national and international political haggling over the death toll resulting from this violence.

Legal or political responsibility?

As in the case of the former Yugoslavia, the Statute of the ICTR was restricted to establishing individual criminal responsibility. This framework did not allow it to clarify the political and military responsibilities of the UN and the countries involved in managing the Rwandan crisis. However, parliamentary investigations in Belgium and France, an internal UN investigation and an investigation conducted by the OAU (now the African Union)[67] made it possible to address some of these responsibilities.

2- Belgian national proceedings on the genocide

Following the murder of ten Belgian Blue Helmets on 7 April 1994, Belgium withdrew its military contingent from the UNAMIR. In 1997, Belgium was the first country to initiate at national level a parliamentary investigation and a military investigation[68] of these events.

66. See, Laurence Binet, in the series "MSF speaking out", *Violence du nouveau régime rwandais*,1994-1995, and La traque des réfugiés rwandais au Zaire 1995-1996, .
67. See the OAU report "Le génocide évitable", 7 July 2000.
68. The military investigation, paradoxically, led to the conviction on disciplinary grounds of the Belgian commander of the Blue Helmets for having endangered his soldiers' lives by making them take excessive risks.

December 1997 saw the publication of a lengthy report on the investigation conducted by the Belgian Senate, which led the presentation of a formal apology to the people of Rwanda for having abandoned them at the time of the genocide.
Later on, the testimony of MSF was requested by the Belgian judge presiding over the trials of alleged perpetrators of the genocide who were present on Belgian soil. The head of mission present in Butare at the time of the genocide, who had already testified before the Arusha tribunal, once again provided his testimony in these two cases.

3-The French parliamentary hearings on Rwanda

In France, on 2 March 1998, a coalition of civil society organisations, including MSF, decided to use the process initiated in Belgium as a springboard for requesting parliamentary investigation of the role played by France in Rwanda from 1990 to 1994[69]. MSF justified its participation in this initiative on the grounds of its status as "victim" in the Rwandan crisis, as more than 200 members of the local MSF staff, for all MSF sections combined, had been massacred during the genocide. The next day, 3 March 1998, the chairman of the Defence Committee of the National Assembly, Paul Quilès, passed an emergency measure to create a commission "on the military operations conducted by France, other countries and the UN in Rwanda from 1990 to 1994". The Foreign Affairs Committee of the Assembly subsequently joined in this work.

MSF was heard in the context of this commission[70]. Jean-Hervé Bradol, former head of mission in Kigali, was heard as an eyewitness.
He stated, among other things, that in June-July 1993 he had seen French soldiers on the ground take part directly in certain police functions, including roadside checks and identity checks; his testimony thus contradicted the official version of the French authorities. He also provided grounds for the testimony of MSF on its status as a direct victim of the events by repeating that local MSF staff members had been massacred either because of their ethnicity, or because of their political opinions, or because of their activities to help the wounded. Jean-Hervé Bradol described the day-to-day reality of the relief operation at the time of the genocide and the interactions with the local and international armed forces.

He stressed the specific responsibility of France due to its close ties with the Rwandan government and criticised the fact that Operation Turquoise, launched by France with UN support, had acted as a neutral military force at a time of genocide[71]. The testimony given in this hearing was not factual testimony in the legal sense of the term. Rather, it presented an analysis of the situation and assertions concerning the responsibility of the various parties, including France, involved in the international response to the genocide at the humanitarian, political and military levels.

69. See the press release of 2 March 1998, entitled "Appel pour la création d'une commission d'enquête parlementaire sur le rôle de la France au Rwanda entre 1990 et 1994". The president of MSF, Philippe Biberson, was a signatory to this appeal, alongside notables from the International Federation of Human Rights, the French National Council for Scientific Research, the Ecole des Hautes Études en Sciences Sociales (EHESS), etc.
70. The hearing of Dr. Jean-Hervé Bradol, 2 June 1998, in "Enquête sur la tragédie rwandaise (1990-1994)", report of the joint commission of the Defence and Armed Forces Committee and the Foreign Affairs Committee on the military operations conducted by France, other countries and the UN in Rwanda from 1990 to 1994, 15 December 1998.
71. Among other things, he criticised the relevance, decency and legality, when confronted with genocide, of international intervention that provided only humanitarian assistance, whereas with the resources of an army other responses could and should have been made.

These national investigations of the Rwandan tragedy induced the UN to launch its own analysis of the failure of its intervention.

4- The UN investigation of the Rwandan tragedy

In March 1999, at the initiative of the new UN Secretary-General, Kofi Annan, who had been head of the Peacekeeping Operations Department at the time of the genocide, the United Nations initiated an internal investigation to analyse the causes of the failure of its political and military involvement in Rwanda in 1994. Another purpose of the initiative was to restore the UN's moral authority and its credibility as regards crisis management. The management of the Somalian, Yugoslav and Rwandan conflicts had seriously discredited its peacekeeping activities, which therefore had to be reformed[72].
The members of the UN investigative commission did not request the testimony of MSF representatives, nor did MSF request any meetings with the investigative team. MSF's analysis of the situation and positions had been the subject of several publications and were known to the UN and easily accessible to the investigators[73].
This investigation gave rise to report, published on 15 December 1999, in which the UN issued a mea culpa[74], noting a number of dysfunctions and making several recommendations. These recommendations led to an audit of peacekeeping operations, which in turn led to a major reform of the Peacekeeping Operations Department[75].

The creation of the *ad hoc* international tribunals for the former Yugoslavia and Rwanda brought a considerable change in the context not only of MSF's activity of humanitarian "testimony" but also of the framework of responsibility of humanitarian organisations in situations of mass crimes. Subsequently, this change was gradually confirmed and broadened to other contexts of crisis and conflict through the creation of "mixed" *ad hoc* tribunals followed by that of the International Criminal Court.

THE SPECIAL TRIBUNAL FOR EAST TIMOR

After the creation of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda ICT in 1993 and 1994, and the signing in 1998 of the Rome Treaty establishing the International Criminal Court (ICC), mechanisms for judicial sanction of serious violations of human rights and international humanitarian law continued to be developed in the contexts of humanitarian activity, notably in the form of mixed tribunals.

In response to the criticisms concerning the development of the international system of justice and the experience of the two *ad hoc* ICTs[76], the UN decided to create mixed *ad hoc*

72. The Secretary-General informed the UN Security Council of his initiative in a letter dated 18 March 1999 and received the go-ahead in a letter from the President of the Security Council dated 26 March of the same year.
73. Several volumes in the MSF series "Populations in Danger" had been published (in French and English), and some members of MSF had also published books and articles in the press and various journals.
74. "Rapport d'enquête indépendant sur l'action des Nations unies pendant le génocide au Rwanda", 15 December 1999.
75. "Rapport du groupe d'étude sur les opérations de paix de l'ONU", 21 August 2001.
76. The criticisms related in particular to the operating costs of the ICTs, the slowness of the investigations and trials, and the fact that the entire judicial process took place out of the country, which prevented the societies concerned from using the events of the trial to bind up their wounds and begin the process of reconciling different communities. It should also be noted that a number of chancelleries were beginning to be concerned over the growing authority and independence ▶

tribunals – half national, half international – on the basis of an agreement negotiated with the states concerned. The tribunals would be responsible for trying the crimes committed during armed conflicts, holding the trials in the countries concerned, as part of a process of political transition[77].

The option of a mixed tribunal, comprising national and international judges and staff, was taken for the first time in East Timor, after the violence that followed the referendum on self-determination organised by the UN, on 30 August 1999, and the intervention of an international military coalition headed by Australia in September 1999[78]. This experiment with a mixed tribunal was subsequently repeated by the UN in Sierra Leone and Cambodia.

The MSF teams present on site, during and after the events, had documented some of the violence perpetrated by the Indonesian army and pro-government militias in East Timor, as well as in West Timor, where part of the East Timor population had been deported and taken hostage[79].
The aim of this documentation activity was first and foremost operational. It was a matter of understanding the context and adapting the relief effort to the needs of both refugees and returnees. This collection of testimony was also intended to alert the international community to the serious and ongoing violence in the camps in West Timor where the deported civilians were held prisoner. The information collected by MSF contained no names of witnesses or victims, in order not to endanger them, but it provided quantitative and qualitative details on the forms and nature of the violence against civilians.
MSF did not publish this information, owing to disagreement over the utility of making it public. In November 1999, however, it was sent in the form of a summary report[80] to the international investigative commission set up by the United Nations, and in March 2001 to the Attorney General of Indonesia and to the mixed judicial mechanisms established jointly by the new East Timor regime and the UN[81]. The prosecution of these crimes by the judicial authorities of East Timor and Indonesia was hampered by considerations of national reconciliation[82]. MSF received no requests for co-operation or participation in the investigations and the trials of the perpetrators.

THE SPECIAL COURT FOR SIERRA LEONE

From 1997 to 2002, MSF documented and testified to the violence sustained by civilians in the armed conflict in Sierra Leone. MSF called on the belligerents to comply with international humanitarian law[83]. Through its surgical unit in Connaught Hospital in Freetown, MSF was directly confronted with the violence perpetrated against civilians, particularly mutilations. The public declarations of MSF, made in a non-judicial context, were intended first and foremost to denounce the crimes committed against the population,

of the tribunals, considering that they might interfere with the diplomatic handling of crises. Carla del Ponte was in fact relieved of her post as Prosecutor of the ICTR, among other things because she wished to investigate the violence committed by the RPF during and after its take-over of power in Kigali.

77. This new mechanism was in keeping with the logic underlying the creation of the ICC: the latter cannot try crimes committed before the ICC Treaty came into force, on 1 July 2002, and it is also designed as a judicial mechanism that is complementary and subsidiary to national tribunals. It is clear, moreover, that the ICC must target those who bear the greatest responsibility for war crimes, crimes against humanity and genocide.

78. In addition to the establishment of the Special Court for Sierra Leone in 2003 (see below), the United Nations negotiated to have international participants sit on a special court formed by Cambodia in 2004 to try the crimes of the Khmer Rouge, and in 2005 it negotiated the creation of a special court for Burundi.

79. See "Mission Report for MSF Belgium, Holland and France", internal report by ▶

to document the mutilations and to initiate mechanisms to pinpoint the responsibility of and bring pressure on the various armed groups.

Simultaneously with this activity of documenting the events and informing the public, MSF provided medical certificates to a sizeable number of victims in order to make it easier for those who wished to seek some means of recourse (applications for refugee status or an alternative protected status, requests for compensation, etc.).

From 1991 to 1999, the UN had delegated management of the crisis to a regional organisation, namely the Economic Community of West African States (ECOWAS), which ran a "peacekeeping operation" (ECOMOG), supported on occasion by British troops. In October 1999, the United Nations was obliged to take over the initiative owing to the withdrawal of the West African troops due to the cost of the operation and to some military reverses[84]. The United Nations Security Council decided to deploy a major peacekeeping operation (the UNAMSIL), whose mission included protection of civilians. In May 2000, following the deployment of the international troops in the areas containing diamond deposits, the Revolutionary United Front (RUF) killed seven Blue Helmets and took nearly 500 hostage[85]. The international community then passed on to a new stage in the management of the conflict. Whereas in 1999 the United States and the United Kingdom advocated amnesty for war crimes, these two countries changed their positions on this question. Judicial means were to be employed to shore up a political strategy aimed at removing the RUF leader and promoting the emergence of alternative, more accommodating representatives of the rebel movement. Thus, on 14 August 2000, the Security Council requested that a special tribunal be created to try war crimes and certain crimes falling under the common law of Sierra Leone[86]. On 16 January 2002, the government of Sierra Leone and the UN signed an accord on the creation of a Special Court for Sierra Leone.

This court exhibited a number of differences from the *ad hoc* international tribunals created for the former Yugoslavia and Rwanda: it was to be made up of Sierra Leonean judges sitting alongside international judges; the staff of the court was also to be part Sierra Leonean, part international; and lastly, the court would sit in the country where the acts of violence had been committed – and were continuing, as were the relief operations of MSF. In February 2003, the Special Court contacted the MSF teams in the country to request information, documents and testimony to facilitate the investigation and trial processes[87]. Initially, the national MSF sections responded on a country-by-country basis to the court's requests. MSF reminded the investigators of its neutral, impartial status as a humanitarian organisation and of the potential danger that the mission of the Special Court represented for a relief organisation working in a conflict situation (a danger recognised by the jurisprudence of the two *ad hoc* ICTs).

In March 2003, the international working group set up to formulate MSF's policy on co-operation with the International Criminal Court was requested by the operations directors to formulate a common MSF response to the Special Court. In April 2003, MSF's policy on

Fabien Dubuet, 25 November 1999.

80. "Report on the deportation in East Timor and testimonies on the living conditions in camps in West Timor", internal document, November 1999.
81. Letter from MSF to the Chair of the UN investigative commission, dated 15 November 1999, and letter from MSF to the Office of the High Commissioner for Human Rights authorising the latter to pass on the information to the judicial authorities of Indonesia and East Timor, dated 23 March 2001.
82. Some military personnel who had initially been convicted of crimes against humanity by the Indonesian courts were later acquitted on appeal, under pressure from the political and military authorities in Jakarta. The new East Timor regime, for its part, gave priority to reconciliation with Indonesia and blocked the investigations of the judges of the Special Court whenever these investigations concerned senior officials. Thus, when the Special Court issued a warrant in May 2004 for the arrest of General Wiranto, who had been chief of staff of the Indonesian army at the time of the violence in East Timor, the ▶

co-operation with the Special Court was adopted by all MSF operational centres[88], and then negotiated with the Special Court:
- MSF considered that the judicial process in progress could have repercussions for the safety of its personnel working not only in Sierra Leone but also in several other countries in the region that were still in the throes of armed violence.
- Considering the role assigned to the court in supporting the peacekeeping and stabilisation process in Sierra Leone, MSF considered that the court would not be fully independent with respect to the Sierra Leonean government, the United States and the United Kingdom.
All of these factors led MSF to adopt a cautious policy concerning the provision of documents and a policy of refraining from presentation of witnesses.

Three reports that had previously been published were sent to the Special Court in confidence, on the basis of a provision in its rules of procedure that allowed MSF to protect this information and control its use by the office of the Prosecutor[89].
MSF refused to provide its internal information and the names of the authors of the public reports and internal documents, so that they could not be called on to testify against their will.
In this case, MSF did not wish to provide an expert witness or background witness[90] to present an overall analysis of the crimes committed by the various groups involved. In contrast to the case of Rwanda, where the recognition of the genocide was at stake, the fact that these crimes had been committed was not in dispute in the case of Sierra Leone. The court was to determine who had committed the most serious crimes among the various armed groups. MSF was in a singularly poor position to make such an evaluation or to give its backing to any evaluation submitted to its judgement.
It was therefore decided that MSF would not encourage the members of its teams to testify, though it would respect the wishes of those who wanted to do so in an individual capacity. In 2004, an MSF volunteer said that he wished to testify before the Special Court, and did so in May 2005 in two separate trials (one against the RUF, the other against the Armed Forces Revolutionary Council, or AFRC). MSF obtained the application, both for the expatriate and for the organisation as a whole, of the anonymity measures provided for in the Court's Rules of Procedure and Evidence.

In 2006, after the arrest of Charles Taylor, the investigators of the Special Court again contacted MSF to request information and testimony that would help establish that Taylor (then President of Liberia) actually controlled the rebel RUF forces operating in Sierra Leone. The request specifically concerned the pressure allegedly exerted by Taylor to obtain the liberation of MSF staff members taken hostage by the RUF. Evidence of such pressure and of its effectiveness would have enabled the court to prove Taylor's involvement in the RUF chain of command and thus to hold him criminally responsible for the acts committed by this armed group.

Attorney General and government of East Timor denounced the initiative. To date, the mixed court has convicted 41 individuals and indicted more than 300. Most of these individuals are in flight from justice in Indonesia.

83. See *inter alia* "Exactions contre des civils au Sierra Leone", MSF public report, May 1998; "Sierra Leone, mutilations: un mois d'activité à l'hôpital Connaught de Freetown, 26 avril au 23 mai 1999", MSF public report, June 1999. See also "Civilian casualties, Connaught Hospital, Freetown, Sierra Leone", MSF internal document, 25 February 1999, produced under the direction of Jean-Hervé Bradol, and "Analyse des données chirurgicales à l'hôpital Connaught, Sierra Leone, 1997-1999", internal report produced by Epicentre, dated March 2000.

84. The ECOMOG troops also committed crimes against the sick and wounded in Connaught Hospital. During the military offensive against the city, these troops killed sick and wounded people in the hospital, under the care of MSF, who were suspected of being RUF combattants. MSF did not denounce these acts publicly, but did inform the competent authori- ▶

After some internal discussion, and after having informed the volunteers concerned, MSF refrained from replying to this request, considering that to do so would render any future negotiations impossible between humanitarian organisations and armed groups in areas of conflict.
The court accepted MSF's decision and applied no pressure.

CHECHNYA

During the two successive conflicts in Chechnya, MSF documented the abuses committed against the people and issued repeated public denunciations of the violence against civilians and against relief organisations. MSF expatriate staff were taken hostage on four occasions in the North Caucasus between 1996 to 2004. Despite the number of such attacks, MSF brought no charges before the Russian courts, the national courts of the victims' countries or the European Court of Human Rights.

Only one member of MSF, who had been taken hostage[91], was requested to testify in the trial of his presumed kidnappers, brought by the authorities before the Russian courts. In this case, MSF was obliged to decide whether to participate in identifying the kidnappers and in the judgement of this crime by a national court. In the end, MSF and the person concerned refused to participate in the trial, considering that the presence of the expatriate before the Russian court might be manipulated as constituting a guarantee of the quality of the proceedings. Another reason for this decision was the fact that the expatriate possessed no information that would conclusively establish the guilt or innocence of the accused. In the end, he agreed only to answer written questions sent to him by the Russian judge in his country of residence (the Netherlands). Surprisingly, these written questions were very general in nature.

In June 2004, the suit brought by the Dutch government against the Swiss section of MSF to claim reimbursement of the ransom paid for the liberation of Arjan Erkel, who had been held hostage in Dagestan for twenty months in 2003 and 2004, began a new chapter in the relations between MSF and the courts[92].
Paradoxically, it was now MSF that was on trial. The action brought by the Dutch state before a Swiss court completely perverted the facts, transforming the victim into a guilty party, ignoring that a war crime had been committed (the kidnapping of a humanitarian worker), and focusing solely on a financial dispute.
For this reason, simultaneously with the judicial proceedings, MSF decided to call for the creation of a more appropriate mechanism for establishing the facts, given the highly political nature of the dispute[93]. The purpose of MSF's request for a national or European parliamentary investigative commission on the liberation of Arjan Erkel was to raise the

ties, including the United Nations.
85. The United Kingdom, under its new Labour Prime Minister Tony Blair, sent commandos to the rescue of the international force.
86. UN Security Council Resolution 1315, dated 14 August 2000.
87. Our heads of mission in the field were first approached by an investigator from the Special Court. Graziella Godain, programme officer, then received a letter requesting co-operation from the chief investigator of the Special Court, dated 24 February 2003. Subsequently, another investigator contacted the executive director of MSF Holland, in a letter dated 7 May 2003.
88. See "MSF and the Sierra Leone Special Court", internal document, adopted 24 April 2003.
89. Article 70 of the Rules of Procedure and Evidence in the Statute of the Special Court, as in the statutes of the two *ad hoc* ICTs.
90. As was done for the *ad hoc* tribunal for Rwanda with the testimony of Rony Zacharias (see above).
91. Kenny Gluck, who was held hostage from 9 January 2001 to 4 February 2001.
92. This trial is currently in progress.
93. See Jean-Hervé Bradol, "Enlèvement politique et ▶

question of the responsibility of governments for the safety of humanitarian workers, notably with respect to their obligations under international humanitarian law and United Nations law[94]. The legal arguments submitted by MSF to the Swiss judge were based, among other things, on the provisions of international humanitarian law that establish the political responsibility of states for serious violations of humanitarian law.

THE INTERNATIONAL CRIMINAL COURT: FROM THE ROME NEGOTIATIONS TO DARFUR

In July 1998, the signing of the Rome Treaty establishing the International Criminal Court (ICC), the first permanent international criminal tribunal, having jurisdiction to try the perpetrators of war crimes, crimes against humanity and genocide, changed the international context regarding the recognition and prosecution of these crimes.

The role played by humanitarian organisations in giving the alert about such situations was thus reflected in part in the international crisis management system. Judicial action was henceforth a permanent part of the context of humanitarian activity.

1- The Rome negotiations and the International Coalition for the ICC

The negotiations over the creation of the International Criminal Court began in Rome in 1998. NGOs formed a coalition for the criminal court that allowed them to make their voices heard in the treaty negotiation and drafting process[95]. All MSF sections supported this plan and joined the International Coalition for the ICC, which comprised a hundred-odd humanitarian and human rights organisations.

1.1- Support for the principle of creating the ICC

MSF supported the creation of an international judicial remedy against the impunity of the perpetrators of the worst crimes and welcomed the emergence of a venue for arbitration concerning the violence and destruction inflicted on civilians during conflicts. As part of the International Coalition of NGOs for the ICC, MSF also tried to make the voice of humanitarian organisations heard and their specific constraints recognised in a coalition dominated by organisations for the defence of human rights.

The latter launched into highly technical discussions concerning the drafting of the court's Statute. MSF and other humanitarian organisations tried to counter-balance this technical focus so as not to lose sight of the practical realities of situations in which mass crimes are committed. Such crimes are often characterised by the participation or connivance of certain public authorities, intimidation of witnesses and destruction of evidence. It was important not to lose sight of these practical aspects in drafting the Statute of the ICC and

mensonge d'Etat", article posted on the MSF website on 21 June 2004. This call, however, was not accompanied by practical approaches to achieve this end, owing in particular to disagreements among the operational centres concerned over the communication strategy to be adopted.

94. In addition to the Geneva Conventions and their Additional Protocols, the Security Council has adopted many resolutions on the safety and protection of humanitarian workers and on sanctions for violence committed against relief organisations and personnel.

95. This "new" form of non-governmental diplomacy had already enabled NGOs to be closely involved in the drafting of the Convention on the Rights of the Child in 1989 and the international convention on mines in 1997.

in the nature of the obligations that the Court imposes on victims and witnesses, including the personnel of humanitarian organisations working on the scene of the crimes.
A delegation representing the various sections of MSF was present in Rome for the negotiations. The documents disseminated by MSF called for effective measures for the protection of victims, witnesses and humanitarian organisations in future international judicial proceedings and argued in favour of an independent status for the court, which would limit the risks to personnel in the field arising from its operations[96].

In the case of MSF France, this involvement continued at national level with the creation in 1998 of the French Coalition for the ICC, in which MSF held the vice-presidency for a time. The role of this coalition was to promote the ratification process and the adaptation of French law to the Statute of the ICC. Like all the countries that had signed the Statute, France needed to introduce considerable changes in its national legislation to enable its own courts to sanction war crimes, crimes against humanity and genocide, and to co-operate with the ICC[97].

France was in a curious position, since it had been the instigator of article 124 of the Statute of the ICC, which provided for refusal of the Court's jurisdiction over war crimes for a period of seven years. France had also decided to invoke this article on its own account, thus rejecting the competence of the ICC regarding war crimes committed by French nationals or on French soil. In addition, as France had never transposed into domestic law the provisions of humanitarian law relating to the punishment of such crimes, French law contained no specific definition or means of repression concerning war crimes[98]. MSF's participation in the French Coalition for the ICC concerned only the modification of French law to bring it into conformity with international humanitarian law, and the rights of victims where prosecution of war crimes is concerned[99].

In the case of the ICC, the obligation to co-operate is very broadly defined. It covers all UN bodies and agencies, and thus potentially affects the relations between NGOs and these bodies and agencies. The United Nations has signed a framework agreement on co-operation with the ICC[100]. This document recognises the respective roles and mandates of the two organisations. It lays down a general principle of co-operation between the UN and the ICC concerning the testimony of staff members and the provision of information and UN documents. This principle is qualified by the possibility of protective measures. It is up to the office of the Prosecutor to negotiate specific agreements on co-operation, on a case-by-case basis, with the various UN agencies operating in the field and with peacekeeping operations.

The ICC's Rules of Procedure and Evidence make explicit provision for only one exemption to the obligation to testify. This exemption is in favour of the ICRC, which has

96. MSF press kit, July 1998: "Médecins Sans Frontières souhaite que la Cour criminelle internationale accorde aux victimes et aux témoins les garanties d'une justice indépendante et effective".
97. Unless a situation is referred to it directly by the UN Security Council, the ICC is a judicial mechanism that remains complementary and subsidiary to national courts. It can try certain crimes only if the national courts are unable or unwilling to try them.
98. For example, it is impossible for Chechen, Afghan and Iraqi victims to bring charges for war crimes before the French courts, even if the alleged perpetrators are present on French soil.
99. MSF France thus participated, within the French Coalition for the ICC, in the consultations concerning the adoption of the bills adapting French law to the obligations of the ICC. A first law concerning co-operation with the ICC was adopted by the French parliament on 26 February 2002. A second, needed to harmonise French legislation with the definition of crimes contained in the ICC Statute, is still pending. The government drafted a bill in July 2006, but as of ▶

obtained, during the negotiations over the ICC Statute, total immunity from the obligation to testify, on the grounds of its exclusive mission under the Geneva Conventions[101].

Other humanitarian organisations can only claim such immunity on a case-by-case basis, on the grounds of certain provisions in the Statute of the Court. This Statute, like those of the previous international tribunals, provides for certain measures allowing limitations on the obligation to present witnesses and to produce documents as evidence. As in the case of the *ad hoc* tribunals, humanitarian organisations can invoke these measures relating to the protection of witnesses and sources of information.

The Court can agree to these exceptions to the obligation to co-operate only in certain narrowly defined cases that had previously been recognised by the jurisprudence of the two *ad hoc* international tribunals, which had addressed this type of problem in the past[102].

After affirming its support for the creation of the ICC, MSF explained its reservations concerning its own involvement in the operations of the Court.

1.2 - Practical reservations concerning co-operation with the ICC

A number of debates took place within the various MSF sections to try to clarify the role of MSF and its volunteers with respect to the following questions[103]:

- Was there a fundamental contradiction between humanitarian activity and the international justice system? Or was the fight against impunity a natural outcome of humanitarian activity?
- Should MSF support the work of the International Criminal Court?
- Did MSF have a duty towards those it assisted to co-operate with the international courts?
- Was prosecution of crimes an extension or complement of the work of MSF, and in particular of its testimony activity?
- On what grounds could MSF justify a refusal to co-operate with the ICC when "bearing witness" was a role asserted by the organisation throughout its history?
- What position should MSF adopt if the ICC demanded that it co-operate with the Court, that volunteers testify and that its documents be produced?
- Did MSF wish, and was it able, to forbid its members to participate in judicial proceedings, and on what grounds? If not, could MSF respect the freedom of individuals while protecting its relief operations?

In view of the importance of harmonising the positions of the various MSF sections on this question, an international working group was formed in 2003 to:

- provide a coordinate response to any requests for co-operation with courts that might be made to MSF;

early 2007 it had not yet been submitted to Parliament for a vote. The adoption of this second bill incorporating into the French criminal code the crimes covered by the ICC Statute will mark the end of MSF's participation in the French Coalition for the ICC.

100. "Relationship agreement between the United Nations and the International Criminal Court", adopted by the UN General Assembly on 13 September 2004 and signed by the UN Secretary-General and the President of the ICC on 4 October 2004.

101. Article 70 of the Rules of Procedure and Evidence of the ICT for Rwanda, adopted in June. On the ICRC's position regarding international tribunals, see Stéphane Jeannet, "Recognition of the ICRC's long-standing rule of confidentiality", *Revue internationale de la Croix-Rouge*, No. 838, June 2000, and Gabor Rona, "The ICRC's privilege not to testify: Confidentiality in action", *Revue internationale de la Croix-Rouge*, No. 845, March 2002.

102. See the rulings of the ICTY in the Simic et al. case and the Randal case. Kate Mackintosh, "Note for humanitarian organisa- ▶

- to examine the legal framework of the relations between MSF and the International Criminal Court, and to submit a general policy paper for debate and adoption by the executive directors of MSF[104];
- to present this policy to the organs of the ICC and undertake any negotiations needed.

This policy took a middle path, seeking a compromise between a political decision and a legal obligation. MSF initially refused to take a clear position on the dangers of co-operating with the International Criminal Court, and on whether it was appropriate or necessary to seek exemption from any obligation to co-operate with the ICC[105]. In principle, however, MSF had no choice in the matter. As in the case of any court, co-operation is an obligation incumbent on both individuals and organisations, which must submit to subpoenas of witnesses and requests for documents.

To obtain exemptions, MSF would have to request them and provide grounds on a case-by-case basis. In order for these requests to be accepted, MSF would have to present arguments based on general principles and setting out a clear, consistent overall policy, rather than arguments of sufficiency or expediency put forward in an *ad hoc* manner for each case.

The first aim of this policy was thus to leave MSF free to decide in complete independence as to the feasibility and nature of its involvement in the international judicial process. The second was to gain time, so that MSF, as it gradually saw how the Court functioned, could assess the extent of the incompatibility between humanitarian operations and the provision of legal testimony.

1.3 MSF policy on co-operation with the ICC

The policy on co-operation with the ICC, adopted in April 2004 by all MSF executive directors, made a distinction between the choice of MSF as an organisation, the choice of its individual members and the status of documents.

- The choice of MSF as an organisation

According to the "subsidiarity principle" it had already adopted, MSF intended to limit its participation in proceedings before the ICC to those cases in which it alone possessed crucial evidence establishing the guilt or innocence of a person accused of particularly serious crimes, and only if such evidence could under no circumstances be obtained from other sources[106]. In all other cases, MSF could refuse to co-operate with the Court on the grounds of preserving its main role of providing assistance to the victims of conflict and armed violence.

These criteria stemmed from the case law of the *ad hoc* international tribunals for the former Yugoslavia and Rwanda, which had been obliged to issue rulings on possible exemptions to co-operation with the judicial process. The mission of humanitarian relief is recognised and protected by international law, and international judges are obliged to

tions on cooperation with international tribunals", *Revue internationale de la Croix-Rouge*, Vol. 86, No. 853, March 2004.

103. The questions listed were discussed in the various MSF sections in the framework of seminars, debates during coordinators' days, and written contributions such as Eric Dachy, "Justice et humanitaire: un conflit d'intérêts", in *A l'ombre des guerres justes*, ed. Fabrice Weissmann, Flammarion, 2003, pp. 319-328; and Being a Witness: MSF and International Courts, coordinators' days 2003, MSF Holland, 31 pp.
104. This group represents the French, Belgian, Dutch, Swiss and Spanish sections. The French, Swiss and Spanish sections have a joint representative body, supplemented by members of the Belgian and Dutch sections.
105. See *inter alia* the deliberations of the Board of Directors of MSF France, 26 March 2004.
106. See "Modalities of cooperation between MSF and the ICC", internal document, adopted 3 April 2004 by the international MSF movement.

respect it. The *ad hoc* criminal tribunals recognised the incompatibility between the act of providing humanitarian relief and that of providing legal testimony. Thus, their jurisprudence in this respect limits the obligation to co-operate, in order to allow certain actors on the ground – humanitarian organisations and war correspondents in particular – to remain operational[107].

According to this case law, requests for exemption must be presented with rigorous, consistent arguments grounded on considerations of safety and of incompatibility between relief activity and legal testimony.

- The choice of volunteers

Now that the position of MSF as an organisation was clarified, it was still necessary to consider the case of individuals working for MSF. In contrast to the ICRC and organisations in the United Nations system, MSF does not require its volunteers and employees to sign a confidentiality clause. As it seemed technically difficult and morally questionable to impose the decisions of the organisation on individuals, it was decided that MSF would respect the decision of individuals who wished to testify in proceedings before a court.

In that case, MSF undertook to provide legal support for the volunteer concerned, in order to inform him/her about the workings of international courts and to limit the publicity surrounding the name of MSF, so as to ensure the safety of other volunteers and the operationality of MSF in areas of conflict.

If the volunteer refused the legal support offered by MSF, the organisation could make a direct request to the court for protective measures so that the name of MSF, those of other volunteers and internal documents would not be used and made public in a trial.

- The status of MSF documents

When a document is used in a trial, the author of the document is obliged to submit to examination and cross-examination by both parties, particularly as regards his/her sources of information.

Certain provisions of the Court's Statute, however, make it possible to limit this constraint. Documents protected by these provisions can for instance be used by the Prosecutor's office to guide its investigations and lead it to other sources of information or evidence, but they cannot be used directly in trials. Thus, they do not engender an obligation to testify for MSF.

MSF decided to request such protection not only for its internal documents but also its public documents, because justice is not done at the same time as the violence occurs. It is important that MSF be able to continue to issue public alerts concerning violence and to publish reports on the situation of the populations in danger, but it is also necessary to limit the burden of subsequent use of these documents in legal proceedings.

For the sake of consistency, MSF also decided not to publish or to provide to the Court any information containing names or any lists of witnesses or victims. All medical information

107. See the decisions of the ICTY and the Chamber of Appeals of the two *ad hoc* ICTs in the Simic et al. case (27 July 1999) and the Randal case (11 December 2002).

concerning individuals would still be covered by medical privilege; under no circumstances can MSF give such information to the Court or obey a Court injunction to do so, unless an explicit request is made by the patients concerned. It was also agreed that MSF field missions would refrain from all contact with ICC investigators and that any requests for information would be addressed to the European headquarters of the organisation.

In view of the discretionary power of the ICC Prosecutor and judges to grant such measures limiting the obligation to co-operate with the Court, the MSF working group contacted the prosecutor and judges of the ICC to explain MSF's policy and to obtain general assurances as to whether these exemptions from co-operation would be observed.
These assurances, covering the status of documents, of individuals and of the organisation, as well as the policy against direct contact with investigators on the ground, were recognised and officially agreed at a meeting held on 17 March 2004, followed by an exchange of letters between MSF and the ICC Prosecutor's office[108].

2- MSF and the first steps of the International Criminal Court: Uganda, Democratic Republic of Congo, Central African Republic, Sudan

The Statute of the ICC, signed in Rome on 17 July 1998, came into force in July 2002, when it was ratified by the sixtieth state. The Court was not actually established, however, until June 2003, after the appointment of the judges, prosecutor and registrar.
At his first press conference, in July 2003, ICC Prosecutor Luis Moreno-Ocampo stated that his office had already received nearly 500 complaints and that some of them related to crimes that indeed came under the Court's jurisdiction. He announced that the situation in Ituri (Democratic Republic of Congo – DRC) had caught his attention and that he considered that situation as "the most urgent case to be addressed"[109]. In the following months, however, he did not take the decision to address the case officially on his own initiative, which the Rome Statute authorises him to do, and hence did not begin an investigation[110]. He explained that it would be preferable for the DRC to refer the matter to the ICC.

- Uganda

In January 2004, at a joint press conference in London, Uganda's President Yoweri Museveni publicly announced that in December 2003 he had referred the crimes committed by the Lord's Resistance Army (LRA) to the International Criminal Court. This was the first referral of a case to the new ICC. Luis Moreno-Ocampo immediately confirmed that he had received Uganda's request favourably and that he might initiate the first ICC investigation. Replying to criticisms that the ICC was being instrumentalised by a regime that was itself implicated in the crimes committed in the eastern DRC, the Prosecutor stated that he had jurisdiction over acts of violence perpetrated anywhere on Ugandan territory and by all

108. Letters from MSF to the ICC Prosecutor, dated 12 May 2004, 9 September 2004 and 12 April 2005. The ICC Prosecutor sent two letters to MSF, dated 21 December 2004 and 12 July 2005.
109. Press release from the Office of the ICC Prosecutor, 16 July 2003.
110. The Prosecutor can investigate situations on his/her own initiative, subject to the go-ahead of the Pre-Trial Chamber, which consists of several judges whose task is to verify that the Prosecutor's use of this right of initiative is in accordance with the ICC Statute and that the Prosecutor does not take heed of wholly unreasonable complaints

parties to the conflict, including the Ugandan army. On 29 July 2004, he made a public announcement that an ICC investigation into the situation in northern Uganda had been officially launched[111]. In February 2005, the Prosecutor's office declared that warrants for the arrest of LRA leaders would be issued during the year. Despite allegations made in April 2005 that the ICC was willing to suspend its investigation to smooth the way for a peace agreement, the Prosecutor confirmed in June 2005 that two warrants were in preparation, for the arrest of the leader of the LRA, Joseph Kony, and one of his deputies, Vincent Otti.

These first indications showed that the Prosecutor had decided not to assert his independence, preferring a mode of operation in which the ICC acted at the request of the states concerned, and in concert with the management of peace processes.

In March 2005, the MSF field teams in Uganda were asked to meet ICC investigators to provide information on the violence and the names of victims and witnesses. The Prosecutor's office in The Hague was contacted to ask for an explanation of this request, which was contrary to the principle proscribing direct contact in the field. After this clarification, it emerged that the request for this meeting and the publicity surrounding it were the initiative of certain Ugandan NGOs.

This episode confirmed that extreme caution was needed concerning contact with people who claim to work for or support the ICC. The MSF teams in Uganda took an even more cautious attitude when they realised that ICC investigators were attending, by invitation, meetings to coordinate humanitarian relief organised in Uganda by the UN Office for Coordination of Humanitarian Affairs (OCHA), in accordance with the co-operation agreement signed between the UN and the ICC.

In April 2005, MSF reaffirmed its concern for making a distinction between humanitarian activity and judicial activity on the ground, addressing its views to the Prosecutor's office in The Hague and to certain OCHA officials in New York and Geneva[112]. The MSF field teams also decided not to participate in the coordinating meetings when ICC staff members were present.

- Democratic Republic of Congo

In March 2004, four months after Uganda's appeal to the ICC, the DRC in turn referred to the Court the situation prevailing throughout the country. This was made public on 19 April 2004[113]. President Kabila probably took this step with a view to supporting "the process of standardisation and extension of state control" over the eastern territories of the DRC. By singling out the perpetrators of serious crimes in that part of the country, which was not under the control of the central RDC government, Kabila's decision had the effect of marginalising certain political leaders who were officially supposed to be central to the process of finding a political solution to the crisis. The first accusations related in particular to acts committed by troops acting under the authority of one of the "national

111. Press release from the Office of the ICC Prosecutor, 29 July 2004.
112. Protests and requests for clarification made by email to the chief of staff of the ICC Prosecutor dated 11 April 2005, during a tele-conference with OCHA officials on 3 June 2005 and, in the field, by the MSF heads of mission in April 2005.
113. Press release from the Office of the ICC Prosecutor, 19 July 2004.

union" vice-presidents in post in Kinshasa. On 23 June 2004, the ICC Prosecutor announced the "opening of the first investigation by the first permanent international criminal court"[114].

It should be noted that when this judicial mechanism was set in motion, a UN military operation (MONUC) was already deployed in the DRC to help restore the peace and protect civilians exposed to imminent danger around the deployment areas of the international forces. This combination of military and legal operations, made official by the signing of an agreement between the MONUC and the ICC, created additional problems of positioning for the humanitarian organisations on the ground. It was important to maintain, to the extent possible, the perception that MSF was a humanitarian organisation standing outside the UN and ICC mechanisms.

- Central African Republic (CAR)

In January 2005, the ICC received a referral from the Central African Republic.
MSF, which had specific information on the violence committed against civilians and refugees in the CAR, refused to provide the ICC investigators with the names of victims and the medical records concerning them. Information of a general nature on the dates and locations of the attacks reported by victims and on the scale of the violence was made public by MSF, and hence was accessible to the ICC. However, nothing prevented the victims from voluntarily contacting the ICC investigators.

The situations in Uganda, the DRC and the CAR were referred to the ICC directly by these countries' governments, which were unable to impose their authority over their territory owing to opposition from their political and military adversaries. This mode of referral raises issues of political instrumentalisation that are difficult to reconcile with the independence of humanitarian activity and the security of humanitarian workers deployed in conflict zones. This problem is accentuated by the integration of this mechanism into the UN's conflict management processes.

- Sudan

The UN Security Council's referral of the situation in Sudan to the ICC caused just as many problems for the security and independence of humanitarian organisations.
As from April 2004, the violence against civilians committed by the Sudanese army and pro-government militias in Darfur, a region in western Sudan, and the question of the nature of this violence led to an international reaction. In 2004 and 2005, a number of chancelleries described the situation in Darfur as genocide, or spoke of a risk of genocide[115].
On 30 September 2004, the High Commissioner for Human Rights, Louise Arbour, and the special advisor to the UN Secretary-General for the prevention of genocide presented to the UN Security Council an investigation report on the violence in Darfur. They concluded that

114. Press release from the Office of the ICC Prosecutor, 23 July 2004.
115. Those of Sweden, Germany and the United States, among others.

"crimes against humanity, war crimes and violations of the laws of war had probably been perpetrated systematically and on a large scale". They requested that the Security Council refer the matter to the ICC.

On 31 March 2005, after some heated discussion[116], the Security Council voted to adopt Resolution 1593, which referred the situation in Darfur to the ICC, and to give the Court jurisdiction in the country, over-riding the refusal of the Sudanese government and the fact that it had not signed the Rome Treaty. The international community thus added a binding judiciary component to its diplomatic and military management of the crisis[117].

In April 2005, the UN Secretary-General even provided the ICC with a secret list drawn up by the UN commission of inquiry, containing the names of Sudanese officials involved in the violence. A month later, on 6 June 2005, the ICC Prosecutor announced the initiation of an investigation.

In this context, the publication of a report by the Dutch section of MSF on rapes committed in Darfur by the national armed forces and pro-government militias, on the occasion of International Women's Day on 8 March 2005, led to the indictment and arrest of the MSF head of mission and field manager in Khartoum for "espionage, publication of false reports and compromising national security". The two MSF expatriate staff members were eventually released owing to pressure from the United Nations and various chancelleries[118].
To date, MSF has received no official requests for co-operation from the ICC investigators, nor has it sent them any documents on the situation in Darfur.

116. Bearing in particular on Washington's hitherto absolute opposition to the ICC.
117. The United Nations delegated management of the crisis to the new African Union, which among other things mounted a military operation to protect civilians and smooth the way for a political settlement of the crisis.
118. See *inter alia* the deliberations of the Board of Directors of MSF France at its meeting of 23 March 2005.

PARTIE II
Humanitarian activity caught between crime and justice

Decisions concerning the participation of MSF in judicial investigations and proceedings are marked by the constraints specific to humanitarian organisations confronted with crimes.

A- CRITERIA AND REASONS FOR INTERACTIONS WITH INVESTIGATIVE PROCEDURES

The increased number of international interventions to maintain or enforce peace has increased in turn the number and types of organisations present in areas of conflict, as well as the diversity of their mandates. This activism has considerably changed the landscape of such conflicts and blurred the respective roles and responsibilities of the parties on the ground, in particular by subordinating humanitarian efforts to the broader objectives of maintaining peace and international security or combating impunity[119]. The investigative procedures initiated or supported by MSF on Somalia, the former Yugoslavia and Rwanda helped to illustrate the weaknesses in the framework of responsibility associated with the various international innovations concerning conflict management[120]. In some situations – notably the actions undertaken in 1994 and 1996 in the Great Lakes region of Africa – these procedures were also intended to win recognition of crimes and violence that were denied or disparaged by political or military propaganda.

Thus, MSF has supported judicial or independent investigative procedures in only a limited number of situations. MSF's actions have not been undertaken in defence of general principles of truth and justice, but pursuant to objective criteria involving its direct operational responsibility.

MSF became involved only in cases of mass crimes committed against a civilian population with which its teams were working. The victims were either people assisted by MSF as part of its relief programmes or humanitarian staff working for MSF[121]. The establishment of

119. International interventions have taken a variety of forms that differ in both their composition and their mandates. On this subject, see the section on peacekeeping in Francoise Bouchet-Saulnier, *Practical Guide to Humanitarian Law*, Rowman Litllefield.2007. pp302.

120. The investigative proceedings supported by MSF have endeavoured in particular to specify the roles and responsibilities of new international actors in conflict management, particularly peacekeeping forces in their various forms. In the case of Somalia, the aim was to understand how the military forces operating under a United Nations mandate came to use force, including against civilians and humanitarian facilities. In the case of former Yugoslavia and ▶

individual criminal responsibility with a view to punishment was never an overt objective of the investigations initiated or supported by MSF.

In the meanwhile, violence against civilians has become a central issue in the UN's political, military and judicial management of conflicts – a development that at the same time gives greater weight to issues of propaganda and of the political and military instrumentalisation of these questions.

B- JUDICIAL OBLIGATIONS VERSUS THE INDEPENDENCE OF HUMANITARIAN ORGANISATIONS

The emergence of international tribunals has an impact specific to MSF in that it calls into question MSF's practice of "testimony" and the ambiguity surrounding this word.
The practice of humanitarian testimony developed by MSF has two main pillars:
- Refusal to conceal mass crimes behind the spectacle – or illusion – of relief activity;
- Willingness to play a role in alerting the authorities and naming those responsible for the violence while the humanitarian effort is in progress.
These two functions are as relevant as ever, and they can be neither "outsourced" nor postponed until judicial action is initiated.

To some members of MSF, broadening the notion of "humanitarian testimony" to include serving as a witness or judicial advocate for the victims seemed to be a logical extension of MSF's practice of denouncing certain crimes. Internal debates pointed out the paradox between MSF's public statements denouncing certain crimes and its support for the creation of the International Criminal Court, on the one hand, and on the other its wariness about co-operating directly with the international tribunals[122].

Despite these debates, MSF's caution regarding the obligation to provide legal testimony (clearly expressed as early as 1993 in its policy on relations with the *ad hoc* international tribunals) has been confirmed on a number of occasions. It was reiterated, on the basis of the same arguments, on the creation of the International Criminal Court. In addition to the fears already mentioned in the case of the *ad hoc* tribunals, the International Criminal Court places additional constraints on and raises new challenges for the activity of humanitarian NGOs.
Although the creation of the ICC is good news for humanitarian NGOs, it faces them with a new challenge: that of redefining the independence and complementarity of humanitarian action and judicial action. This is not a matter of questioning the desirability of either judicial or humanitarian activity, but rather of understanding how and why these two activities, both of which are useful and legitimate, are largely incompatible and governed by different motivations and modes of operation.

Rwanda, it was more a matter of understanding why the use of force to protect civilians in danger might be refused, in law or in practice, to the international forces charged with precisely this mission. In this respect, the French parliamentary investigation on Srebrenica took our understanding a step further. It was already known that the use of force to protect endangered civilians could be refused when the international contingents did not possess the human and material resources needed. The use of force was not supposed to put the international contingents in danger. This argument was made in various forms to justify the inaction of international troops in the former Yugoslavia and Rwanda. The French parliamentary hearings on Srebrenica explicitly added a new criterion: force could not be used by international troops to protect endangered civilians if such use of force might impede the peace negotiations. Thus, the subordination of the human factor to political considerations was demonstrated at last. ▶

For humanitarian NGOs, it is important to optimise the workings of the ICC to clarify the responsibilities of humanitarian organisations and obtain increased respect for their mission. To this end, it is necessary that the role of the international justice system should not weaken that of humanitarian organisations or take precedence over it. It can at times be more tempting to judge and condemn violence from a distance than to undertake relief actions in such situations.

In the negotiations over the Rome Treaty, MSF had requested appropriate measures to protect victims, witnesses and the personnel of humanitarian organisations before the future Court. MSF had also insisted that the burden of the investigations and evidence of these crimes should not be borne mainly by humanitarian workers or the victims themselves[123].

1- The necessary independence of humanitarian activity

If humanitarian organisations are to enjoy legitimacy[124], they must be independent with respect to all parties involved, all forms of pressure and the pursuit of other objectives. It is perfectly legitimate for humanitarian workers and victims to desire justice, just as they may desire peace, but these wishes must not lead to the subordination of relief efforts to this other objective.

The problem is that the main characteristic of judicial proceedings lies in the fact that they are obligatory for all. Neither victims, nor witnesses, nor of course the accused have a choice as to whether they will participate. National law recognises jurisdictional immunity for certain very limited categories of individuals, such as diplomats, so as to ensure their independence.

The existing tribunals do not allow MSF to decide its policy on co-operation on a case-by-case basis, nor to choose whether it prefers to testify for the prosecution or the defence. If MSF agreed to participate in proceedings before the international tribunals, it would be giving a commitment to place its personnel and documents at the disposition both of the Prosecutor and of the victims or defendants.
This constraint was clearly seen in the Talisman trial in the United States. A group of victims brought charges against this Canadian oil consortium for violations of human rights and crimes committed in Sudan, where it was operating oil leases. The victims' complaint was based on documents produced by human rights organisations and MSF, describing the fate of the people living in and around the leased oilfields. Exercising its right to defend itself, Talisman demanded before the US judge that MSF open its archives to Talisman's scrutiny and divulge the names of those involved in drafting the document, either as witnesses or as investigators. MSF's pleadings before the US court led to an agree-

121. The latter criterion had been invoked as grounds for MSF's interest in taking action, in the quasi-legal sense of the word, regarding the investigations on Rwanda and Srebrenica. MSF argued that it had been physically harmed by the attacks on its local employees and its patients.
122. See *inter alia* the deliberations of the Board of Directors of MSF France at its meeting of 26 March 2004: "Thierry Durand: I think that collaboration with the courts is not negative per se, since we have always associated provision of medical care with the role of testimony. We conduct investigations on our own account to denounce and describe crimes. In addition, we are regularly heard by the Security Council, the Council of Europe, etc. […] Jean-Hervé Bradol: I do not agree with the presentation made in the memo [on relations between MSF and the ICC concerning Uganda], since we start from a single point of view: the effects of the ICC will be negative for our work. The tone of the memorandum is too unbalanced and in opposition to the campaign ▶

ment between MSF, the defence and the prosecution, in which each party agreed not to use these documents in actual proceedings, in order to let MSF and the other organisations remain exempt from the constraints associated with such judicial use[125].

for the creation of an international criminal court, in which we participated. Expressed in this way, the change in our views on the issue – which is real – of international justice looks like an about-face, the reasons for which are not understandable".

123. See inter alia the deliberations of the Board of Directors of MSF France at its meeting of 19 March 1998.

124. By legitimacy, we mean the rules and principles to which relief efforts are subject under humanitarian law. Justice is not one of these, whereas independence is one of the crucial attributes of humanitarian action.

125. Letter from the law firm Simpson, Thacher and Bartlett, New York, 16 December 2004.

126. By way of example, we may note that MSF's activities in Kivu and Ituri are conducted in an area where a number of war criminals (Kony, Nkunda etc.), under indictment or investigation by the ICC, have taken refuge and remain active.

2- Judicial action and the security of relief workers

The *ad hoc* international tribunals for the former Yugoslavia and Rwanda were designed to serve as complementary instruments for operations to keep or restore the peace. The work of these tribunals was conducted simultaneously with the continuation of the conflict – and of the crimes that accompanied it. In this case, it is all the more necessary to distinguish the role of the relief worker from that of the judicial investigator or witness. This trend was confirmed with the advent of the ICC, which is designed as a means of influencing the behaviour of belligerents and bringing pressure to bear on them, within the framework of broader peacekeeping of peace-building actions.

Today, this is true of the three situations referred to the International Criminal Court: the DRC, Uganda and Sudan. All three countries are still in conflict, and the referral of the situation to the ICC is part of the overall international process of conflict settlement.

The safety of relief workers could be compromised in the event of any confusion between their provision of emergency assistance and of information on the prevailing situation, on the one hand, and any contribution they might make to international judicial action on the other.

It is not easy to evaluate the extent to which the risk to relief personnel in the field would be increased by their participation in judicial proceedings. It has always been recognised, however, that the security of humanitarian personnel depends in particular on the belligerents' perception of the organisation's independence and of the strictly humanitarian and transparent nature of its activity.

The desire to participate in judicial proceedings would entail a genuine risk for humanitarian organisations: that of no longer being able to maintain their presence and to continue relief operations in situations of conflict. They would then be obliged to fall back on denunciation of crimes, pending the punishment of the perpetrators and the possible judicial rehabilitation of victims[126].

Having refused to let humanitarian activity be incorporated into the broader activity of peacekeeping, it would have been inconsistent for MSF to subordinate its relief activity to the higher obligation and constraint of justice.

3- Dependence with respect to tribunals and national governments

In contrast to the *ad hoc* international tribunals for the former Yugoslavia and Rwanda, the ICC takes action only when national courts are unwilling or unable to try the cases themselves. Its international jurisdiction is thus a jurisdiction by default, in that the failure of the national justice system must first be established or acknowledged.
This rule adds a further constraint concerning any judicial testimony by relief organisations. It would be inconceivable that some organisations and witnesses would co-operate only with the ICC and would refuse to do so with national courts.

This measure, initially intended to circumvent governments that refuse to prosecute crimes in their national courts, is also used by certain governments to obtain judicial sanctions against their political and military adversaries. For example, it was the governments of the DRC and Uganda that referred to the ICC Prosecutor the crimes committed in conflict-ridden areas of the country where the central government's authority was not established and where the national courts could not function. The Prosecutor attempted to limit the perception that the ICC was being instrumentalised by explaining that, in both cases, the Court would have jurisdiction not only over crimes committed by the rebel forces but also those committed by the other parties to the conflict. It is nonetheless true that, as the Court is responsible for prosecuting the most highly placed criminals, this criterion is particularly aimed at leaders who might refuse to participate in or endanger peace agreements[127].
In this context – politicisation of judicial handling of crimes at a time of ongoing conflict – the overt participation of relief organisations in ICC investigations would engender additional risk for both international and local humanitarian personnel and would further limit the possibility of gaining access to certain areas of the country, as well as the possibility of dialogue with the most marginalised and radicalised armed groups.

Similarly, an attempt to justify why NGOs would give certain information to the international court but not to national courts would lead to a political debate over internationalism versus national sovereignty. Governments would be tempted to criticise foreign NGOs that refused to participate in national court proceedings, thus depriving the national courts of the evidence they needed to do their job. These tensions could also lead to accusations that the NGOs had destroyed or falsified evidence.

These risks are not theoretical. They arise regularly in the field, notably when MSF refuses to reveal the identity of the victims of sexual violence to the country's police authorities. In such cases, some people accuse the organisation of concealing the victims to prevent the police from doing its job and to hamper the restoration of law and order, while others insinuate that MSF refuses to give the victims' names to the police and judiciary because it simply invents these victims. MSF's arguments on why it refuses to co-operate and

127. This judicial policy has been tried out and implemented by the mixed court for Sierra Leone.

disclose names will not be heard unless these arguments apply to both national and international tribunals.

The referral to the ICC of the crimes committed in Darfur illustrates the real impact of these changes. After the controversy over whether these crimes could be termed genocide, the United Nations Security Council supported the deployment of an inter-African international force and over-rode the Sudanese government's objections by giving the ICC jurisdiction to investigate and try the crimes committed in the region. The ICC Prosecutor, however, instead of accepting the jurisdiction just attributed to him by the Security Council, declared that he should first examine the efforts made by the Sudanese government to bring to justice a number of military and militia officers who were responsible for the crimes committed in the province.

The Sudanese government therefore set up a special military tribunal to try the alleged perpetrators of these crimes[128]. The creation of this military tribunal raises obvious practical issues regarding MSF' cooperation to trials.

4- Humanitarian activity and obstruction of justice

Humanitarian organisations' whistle-blowing role when violence occurs is very different from the judicial process of establishing individual criminal responsibility. The purpose of the report published by MSF Holland on the rapes in Darfur, for example, was to alert the international community that these crimes were being committed. However, if the report were to be used in trials before the Sudanese courts or the ICC, MSF Holland would be obliged to divulge the names of victims and witnesses.

MSF's refusal to provide the court with this information and with medical certificates could come under the heading of obstruction of justice.

In this respect, it should be noted that after arresting the head of mission and field manager of MSF Holland following the publication of the report on the rapes in Darfur, the Sudanese authorities did ask MSF to provide the names of victims and medical certificates. Their accusation that MSF had lied was based in particular on MSF's refusal to provide this information.

MSF field teams already face this type of dilemma. In Darfur, even before the incident discussed above, the field teams were under police pressure to report rape cases whose victims received care in MSF health stations. As rape is a crime, it was a legal requirement in Sudan to report such cases to the police. In the ensuing clash on this subject, the police accused MSF of giving international publicity to these rapes while preventing the local authorities from prosecuting them.

In the DRC, MSF also encountered a request that it co-operate with the national police and justice system. Here again, as part of the ICC's examination of the situation in the country,

128. Special military tribunals were created for each state (North, West and South Darfur) by an order in 2001. Specialised criminal courts were created by an order in April 2003.

129. Letter from the Attorney General of South Kivu dated 2 July 2004 concerning information, including names, on victims of sexual violence or violence by firearms or edged weapons.

130. The non-participation principle is justified by reference to a special immunity arising from the purpose of humanitarian activity. This immunity has been partly recognised by the international tribunals. It is based on the recognition that: - the role of a humanitarian organisation is a role in the public interest that stems from international agreements and consists in providing assistance in situations of violence, bearing witness to violations of humanitarian law and alerting the proper authorities to these situations; - judges must respect this general-interest role by granting special exemptions and protective measures to humanitarian organisations before the courts.

the justice ministry had asked the health authorities to report all cases of rape. MSF was therefore requested to make its medical reports available to province-level public health physicians[129]. Among other reasons for this request, it was important to the DRC authorities to show that the national justice system was working in certain provinces, as the crimes referred to the ICC concerned only the eastern provinces of the country and the referral was motivated by the government's inability to control these areas. MSF's refusal to co-operate was based on its general principle of refusal to participate in judicial proceedings and preservation of medical privilege.

This type of situation is now frequently encountered in countries where MSF has missions. To be able to resist these demands, MSF must rely on a coherent policy and closely reasoned legal arguments concerning its participation in judicial proceedings and its policy on testimony.
This general policy must be able to hold two elements in balance:
the principle that MSF does not participate directly in judicial proceedings[130],
humanitarian and medical practice that respects the rights of victims and medical privilege[131].

International judges have recognised the incompatibility between relief activity and judicial activity, and have agreed to limit the obligations to which humanitarian organisations are subject. Paradoxically, however, it is humanitarian organisations that must continue to clarify this incompatibility in order to dispel the remaining ambiguities between humanitarian testimony and legal testimony.

The challenge consists in redefining the meaning and the form of humanitarian organisations' role in sounding the alert concerning certain crimes, in an international judicial environment that is profoundly changing.

131. MSF's refusal to participate in judicial proceedings should not, however, contribute to the disappearance of the fact and evidence of certain crimes, nor deprive victims of their right to be recognised as such. The medical practice of MSF can remain in compliance with the law on victims, in particular, by issuing public reports that certain crimes are being committed and, at the individual level, by providing medical certificates to the victims of rape or armed violence. After that, it will be up to the victims to decide if and when they wish to bring charges or testify. It is the victims who will evaluate the risks and benefits of doing so, according to the procedural guarantees offered to them at the national or international level.In many situations, defending medical privilege also allows MSF to avoid subordinating the requirement to provide care to those of denouncing crimes and identifying victims to the police. Medical certificates make it possible to attest to an individual's status as victim and to preserve the evidence for any later action that might be taken.

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[132].

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[133].

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.

132. The term "humanitarian testimony" is used to describe this activity, but it is a term that has resisted all attempts at precise definition and whose ambiguity has been increased by the advent of the international tribunals. The international board of MSF requested that a historical and educational work be produced on testimony at MSF, recognising that this notion could not be encapsulated in a guideline. This project led to the drafting of a series of historical case studies concerning public statements on a dilemma of humanitarian activity that had given rise to controversy. See the series "MSF speaking out", edited by Laurence Binet and published by Crash-Fondation MSF and MSF International as from 2004.

133. This was particularly true of the massacres in Srebrenica and the genocide in Rwanda.

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.

TIMELINE

1985	**Oct.-Nov**	MSF publicly accuses the Ethiopian government of using humanitarian aid and logistics to carry out forced displacement of the population Expulsion of MSF from Ethiopia
1986		MSF mounts an explanatory campaign to persuade other NGOs and international organisations present in Ethiopia to join it in opposing misappropriation of aid in Ethiopia
1989		Investigation by MSF-Holland to establish medical and scientific evidence of the use of gas against the Kurdish population of Iraq at Halabja
1990		The EEC (subsequently the European Union) and the UN take over management of the conflict in the former Yugoslavia and decide to respond through militarised humanitarian assistance
1991	**20 October**	Former Yugoslavia: MSF denounces an attack on a convoy evacuating patients from the hospital in Vukovar
	19 November	Fall of the town of Vukovar and massacre of patients in the hospital
1992	**May**	MSF denounces the international community's "crime of indifference" concerning the famine in Somalia
	7 December	MSF denounces ethnic cleansing in the former Yugoslavia and publishes a report entitled "La purification ethnique dans la région de Kozarac (Bosnie Herzégovine)"
	December	Initiation of "Operation Restore Hope", consisting in the deployment of a United Nations military force in Somalia
1993	**22 February**	Creation of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY)
	16 April	Creation by the UN of the Srebrenica "safe area" in eastern Bosnia-Herzegovina
	17 June	Bombing of the MSF/AICF headquarters in Mogadishu by United Nations forces (UNOSOM), killing one person, seriously wounding another and lightly wounding seven more
	20 July	MSF files a complaint with the UN Security Council concerning violations of humanitarian law committed by UN forces in Somalia in relation to the 17 June 1993 attack on MSF headquarters

1994	**6 April**	Beginning of the genocide of Rwandan Tutsi and the massacres of Rwandan Hutu opposed to the genocide
	7 April	After the killing of ten Belgian Blue Helmets in Rwanda, the United Nations military force in Rwanda (UNAMIR) is reduced to 250 soldiers
	April-May	Teams from the various MSF sections throughout Rwanda witness widespread selective massacres
	28 April	The president of the Belgian section of MSF, on his return from Rwanda, publishes an opinion column describing and denouncing the genocide
	17 May	Rwanda: the UN Security Council passes Resolution 918 authorising the establishment of a humanitarian safe area protected by soldiers under an international mandate and authorising these soldiers to use offensive force
	24 May	In an extraordinary session of the UN Commission for Human Rights on Rwanda, held in Geneva, the co-ordinator of the MSF-Belgium mission presents his personal testimony on the acts of genocide committed in the town of Butare and in the hospital where the MSF team was working
	June	MSF drafts a report on the genocide in the various provinces of Rwanda, based on all the testimony of MSF staff members present in the field at the time. A version from which the names were deleted is made public. The version of the report containing names is send to the Special Rapporteur appointed by the UN Commission of Human Rights to determine whether genocide had occurred in Rwanda
	18 June	MSF-France launches a press campaign calling for UN intervention to stop this crime under the title “On n’arrête pas un génocide avec des médecins”
	July	MSF and other humanitarian organisations begin to report problems related to the criminalisation of the Rwandan refugee camps in Tanzania and Zaire
	September	MSF sends the version of its report on the Rwanda genocide that contains names to the Expert Group appointed by the UN Security Council to investigate whether acts of genocide had been committed in Rwanda
	8 November	The UN Security Council creates the *ad hoc* International Criminal Tribunal for Rwanda (ICTR)
	November	MSF sends the version of its report on the Rwanda genocide that contains names to the ICTR
	December	Public announcement of the withdrawal of MSF-France from all Rwandan refugee camps in Zaire and Tanzannia

1995	**April**	Rwanda: the MSF team witnesses the attack on the Kibeho camp by the Rwandan army and the large-scale massacres of displaced people committed during the attack
	27 April	Rwanda: at a press conference held on the ruins of the Kibeho camp, the head of the Rwandan government denies that these massacres had taken place, stating that there had been only a few deaths and that these were due to the fact that the people had resisted the directives of the army
	8 May	The Rwandan government and the UN create an independent international commission to investigate the Kibeho massacre
	20 May	The report of the independent international commission created by the Rwandan government and the UN on the events in Kibeho speaks of a loss of control rather than a massacre and gives no estimate of the number of victims
	25 May	MSF publishes its own report on the Kibeho massacres
	July	Former Yugoslavia: the fall of the Srebrenica safe area to Bosnian Serb forces is followed by the deportation of 40,000 people and the execution of 7,000 others
	August	An ICTY investigator contacts MSF to find out whether the organisation possesses any documents on the fall of Srebrenica other than those which had already been made public
	August	MSF publishes a report on the fall of the Srebrenica enclave based on the testimony of its personnel on site. MSF report: "Les témoignages bosniaques sur la fin de Srebrenica"
	September	Former Yugoslavia: the Dutch ministry of defence conducts an internal military investigation on the circumstances of the fall of Srebrenica and the behaviour of the Dutch battalion of Blue Helmets present on the ground
	Aug.-Nov.	Withdrawal of the Belgian and Dutch sections of MSF from the Rwandan refugee camps in Zaire
	November	The executive directors of the various MSF sections adopt a joint policy on co-operation with the *ad hoc* International Criminal Tribunals on the former Yugoslavia and Rwanda
	6 December	The Rwandan government expels 39 NGOs from Rwanda, including MSF-France and MSF-Switzerland
1996	**February**	MSF publishes a second, more complete report on the fall of Srebrenica: "Srebrenica Hospital Personnel and Local Staff: eyewitness account of the evacuation from Srebrenica and the fate of missing colleagues"
	November	Former Yugoslavia: the Dutch government commissions a more

1996		detailed investigation of the fall of Srebrenica from the Dutch institute for war documentation (the NIOD, an organisation that conducts historical research, mainly on the second world war)
	November	The Rwandan army launches an attack on the camps of Rwandan refugees in Zaire
	November	Former Yugoslavia: the head of the ICTY's investigations into the massacres in the "safe area" of Srebrenica informs MSF that he has found the body of an MSF employee
	December	MSF denounces the massacres of Rwandan refugees in Zaire
1997	**16-17 January**	Hearing of Rony Zacharias, MSF head of mission, as a background witness in the inaugural session of the *ad hoc* International Criminal Tribunal for Rwanda
	July	The UN Secretary-General appoints a Special Rapporteur for Zaire (DRC) to investigate the massacres of Rwandan refugees
	December	The Belgian Senate publishes the report of a national investigation on the role and behaviour of the Belgian Blue Helmets during the genocide in Rwanda
1998	**January**	Rwanda: the investigation of the Belgian Senate results in publication of a report and paves the way for a formal apology by Belgium to the Rwandan people for having abandoned them at the time of the genocide
	2 March	A coalition of French civil society organisations, including MSF, demands a parliamentary investigation of the role played by France in Rwanda from 1990 to 1994
	3 March	The Chairman of the Defence Committee of the French National Assembly, Paul Quilès, passes an emergency measure to create a commission "on the military operations conducted by France, other countries and the UN in Rwanda from 1990 to 1994"
	May	Publication by MSF of a report on violence against civilians in Sierra Leone
	2 June	Jean-Hervé Bradol, President of MSF and Programme Officer for Rwanda in 1994, is heard by the French parliamentary commission on Rwanda
	June-July	MSF joins the International Coalition of NGOs for the International Criminal Court (ICC)
	17 July	Signature of the Rome Treaty establishing the International Criminal Court (ICC) to prosecute the perpetrators of genocide, crimes against humanity and war crimes
	30 November	The UN General Assembly calls for "a full report including an

1998		evaluation of the events that have occurred in the former Yugoslavia since the creation of the safe area in Srebrenica"
	15 December	Publication of the report of the French parliamentary commission on the role played by France in Rwanda: "Enquête sur la tragédie rwandaise (1990-1994)"
	23 December	MSF holds the vice-presidency of the French Coalition for the ICC, which is responsible for monitoring the process of adapting French law, particularly as regards war crimes
	December	Former Yugoslavia: an MSF expatriate staff member present on site at the time of the fall of Srebrenica is asked to testify by ICTY investigators
1999	**Spring 1999**	Kosovo: armed intervention by NATO against Serbia
	26 March	Creation of an internal UN investigation commission on the genocide in Rwanda in 1994
	29 April	MSF publishes its report "Kosovo: accounts of a deportation"
	May	At the initiative of the new UN Secretary-General (Kofi Annan, head of the Peacekeeping Operations Department at the time of the genocide in Rwanda), the United Nations initiates an internal investigation to analyse the causes of the failure of its political and military involvement in Rwanda in 1994
	June	Publication of an MSF report: "Sierra Leone, mutilations : un mois d'activité a l'hôpital Connaught de Freetown"
	June	Humanitarian organisations enter Kosovo at the same time as the returning inhabitants and NATO troops. MSF provides forms for use in contacting the ICTY to Kosovar families who want them
	27 July	Ruling of the ICTY in the Simic case, limiting the obligation to testify for humanitarian personnel
	30 August	Referendum on self-determination in East Timor organised by the UN
	September	The UN authorises an international military coalition headed by Australia to intervene in East Timor
	October	The UN Security Council decides to deploy a major peacekeeping operation in Sierra Leone (the UNAMSIL), whose mission includes protection of civilians
	November	East Timor: MSF sends a report on the serious violence occurring in the refugee camps of West Timor to the international investigative commission set up by the United Nations
	November	Publication of the Dutch ministry of defence's investigation report (initiated in September 1995) on the fall of Srebrenica
	15 November	Publication of the report of the UN investigation on the fall of Srebrenica

1999	**15 December**	Publication of the UN investigation report on Rwanda
2000	**May**	Sierra Leone: following the deployment of international troops in the areas containing diamond deposits, the Revolutionary United Front (RUF) kills seven Blue Helmets and takes nearly 500 hostage
	7 July	Publication of the Organisation of African Unity report: "Rwanda, the inevitable genocide"
	13 July	Opinion column in Le Monde by the new president of MSF, Jean-Hervé Bradol, on the need for a French parliamentary investigation of the circumstances of the fall of the Bosnian enclave of Srebrenica in July 1995
	14 August	Sierra Leone: UN Security Council Resolution 1315 calls for the establishment of a special mixed tribunal to try war crimes committed in the country
	9 November	Creation of a French parliamentary commission on the Srebrenica massacre
2001	**9 January**	Kenny Gluck, expatriate staff member of MSF-Holland, is taken hostage in Chechnya, in the North Caucasus
	March	East Timor: MSF sends its report on violence against refugees in the camps of West Timor to the Attorney General of Indonesia and to the mixed judicial mechanisms established jointly by the new East Timor government and the UN
	21 August	Publication by the UN of the Brahimi report (so-called after the name of its author) on the reform of UN peacekeeping operations
	8 November	Talisman case: a group of Sudanese victims living in Sudan and in the United States, supported by several organisations (Presbyterian Church of Sudan, Nuer Community Development Services in the USA), files a class-action suit in the US courts for compensation of damages sustained as a result of the oil consortium Talisman's operations in southern Sudan. The victims' suit is based on the reports of various human rights organisations (including Human Rights Watch and Christian Aid)
	22 November	Publication of the report of the French parliamentary commission on the fall of Srebrenica Publication by MSF of a briefing paper for journalists entitled "Mission d'enquête parlementaire (française) sur Srebrenica : argumentation, lacunes et contradictions des auditions"
	16 January	The government of Sierra Leone and the UN sign an agreement establishing a Special Court for Sierra Leone
	10 April	Netherlands: Publication of the report of the Dutch research institute NIOD on the fall of Srebrenica in the former Yugoslavia

2002	**16 April**	Netherlands: Following the publication of NIOD's report on the fall of the Srebrenica safe area, the entire government of Prime Minister Wim Kok and the chief of staff of the armed forces resign
	June	Netherlands: the Dutch parliament decides to create a commission to investigate the fall of the Srebrenica enclave
	1 July	Entry into force of the Rome Treaty establishing the International Criminal Court
	12 August	Arjan Erkel, a Dutch expatriate employee of MSF-Switzerland, is taken hostage in Dagestan, in the North Caucasus
	11 December	Ruling of the ICTY in the Randal case, concerning protection of war correspondents' sources before the international courts
2003	**27 January**	Publication of the investigation report of the Dutch parliament on the fall of Srebrenica
	February	Sierra Leone: the Special Court contacts MSF field teams to request information, documents and testimony to facilitate the investigation and the holding of trials
	March	Sierra Leone: the international working group established to formulate MSF's policy on co-operation with the ICC is requested by the operations directors to formulate a coordinated MSF response to the requests of the Sierra Leone Special Court
	24 April	Adoption of the document "MSF and the Sierra Leone Special Court" by the executive directors of the MSF sections
	June	Establishment of the ICC in The Hague, after appointment of the judges, prosecutor and registrar
	July	ICC Prosecutor Luis Moreno-Ocampo declares that his office has already received nearly 500 complaints and that some of them relate to crimes that indeed come under the Court's jurisdiction
	December	Ugandan President Yoweri Museveni refers the crimes committed by the Lord's Resistance Army (LRA) to the ICC
2004	**January**	An MSF volunteer expresses the wish to testify before the Special Court for Sierra Leone
	13 January	Talisman case: requisition order from the judge of the federal court in Manhattan (USA), ordering MSF to provide the defence attorneys for the oil consortium Talisman with internal documents and names of MSF personnel in regard to southern Sudan
	17 March	Meeting between MSF and the office of the ICC Prosecutor to obtain assurances as to the limits of MSF's co-operation with the ICC
	March	The DRC refers crimes committed in certain parts of the country to the ICC

2004	**3 April**	The policy limiting MSF's co-operation with the Sierra Leone Special Court is adopted by the operational centres and then negotiated with the Court
	8 April	Liberation of Arjan Erkel, an expatriate staff member taken hostage in Dagestan (North Caucasus) in 12 August 2002, in return for payment of a ransom
	19 April	The DRC's referral of certain crimes to the ICC is made public
	23 June	The ICC Prosecutor announces the official launch of the Court's first investigation, concerning the DRC
	2 July	DRC: letter from the Attorney General's office of South Kivu to MSF concerning the requisition of patient files relating to sexual violence
	15 July	DRC: reply from MSF to the medical inspector of the Attorney General's office of the province of South Kivu explaining why MSF refuses to hand over patient files relating to sexual violence
	27 July	The Dutch government brings a suit against the Swiss section of MSF for reimbursement of the ransom paid for the liberation of Arjan Erkel, who was held hostage in Dagestan for 20 months in 2002-2004
	29 July	The ICC Prosecutor announces the official launch of an ICC investigation on the situation in northern Uganda
	13 September	The UN Secretary-General signs a co-operation agreement between the ICC and all UN organisations and agencies
	13 September	Talisman case: reply of MSF and other organisations refusing to obey the requisition order on the grounds of the human rights organisations' need to protect sources and the humanitarian organisations' need for independence
	30 September	The High Commissioner for Human Rights, Louise Arbour, and the special advisor to the UN Secretary-General for the prevention of genocide present to the Security Council the report of an investigation on the violence in Darfur
	October	Former Yugoslavia: an MSF volunteer decides to testify for the defence before the TPIY in the trial of Nacer Oric, the former Bosnian military leader in the defence of Srebrenica. The attorney defending Nacer Oric contacts other members of MSF to obtain their testimony
	16 December	Talisman case: letter from the law firm Simpson Thacher and Barlett, confirming that the requisition order concerning the provision of MSF documents has been withdrawn by both the oil consortium and the plaintiffs. Thus, Talisman will be unable to use these internal MSF documents for its defence, but neither will the plaintiffs be able to use them to prove their case
2004	**January**	Referral to the ICC by the Central African Republic

2005	**February**	Uganda: the office of the ICC Prosecutor declares that warrants will be issued during the year for the arrest of LRA leaders
	31 March	The UN Security Council passes Resolution 1593 referring the situation in Darfur to the ICC, over-riding the opposition of Sudan
	March	Uganda: MSF field teams are requested to meet ICC investigators in Uganda
	8 March	Publication of report by MSF Holland on rapes in Darfour
	April	Uganda: MSF reaffirms its concern for making a distinction between humanitarian activity and judicial activity on the ground, addressing its views to the ICC Prosecutor's office in The Hague and to certain OCHA officials in New York and Geneva
	April	Sudan: the UN Secretary-General sends the ICC a secret list compiled by the UN investigative commission containing the names of Sudanese officials involved in the violence in Darfur
	May	Sierra Leone: an MSF volunteer testifies on an individual basis and anonymously before the Special Court in two trials (one against the RUF, the other against the AFRC)
	2 June	Ituri (DRC): an expatriate and a local staff member are kidnapped and held hostage in Ituri province in the Democratic Republic of Congo. Internal discussion by MSF on the possibility and the utility of testifying on these events before the ICC. MSF's decision as an organisation is to refrain from any testimony on these cases before the ICC. The expatriate makes the same choice, after internal discussion and discussion with the ICC on the implications for relief operations and local staff
	6 June	The ICC Prosecutor announces the launch of an investigation on Darfur
	June	The Prosecutor confirms that two warrants are in preparation, for the arrest of the leader of the LRA, Joseph Kony, and one of his deputies, Vincent Otti
	June	Sudan: indictment and arrest of the head of mission and field manager of MSF-Holland for "espionage, publication of false reports and compromising national security" following MSF-Holland's publication of the report on rapes committed in Darfur. The Sudanese authorities request MSF's patient files; MSF refuses.
	12 September	Talisman case: the federal court in Manhattan (USA) dismisses the claim of the group of Sudanese victims against the oil consortium Talisman for failure to provide conclusive evidence that Talisman was responsible for the prejudice sustained

2006	**15 March**	Erkel case: The judge of the court in Geneva (Switzerland) rules in favour of MSF in a case opposing the Dutch government and the Swiss section of MSF, concerning the payment of the ransom for the liberation of the hostage kidnapped in Dagestan in 2002 and freed in 2004
2007	**4 May**	Erkel case: The Dutch government appeals the ruling of the judge in Geneva (Switzerland) in the case opposing the Dutch government and the Swiss section of MSF, concerning the payment of the ransom for the liberation of the hostage kidnapped in Dagestan in 2002 and freed in 2004