

MSF & INTERNATIONAL HUMANITARIAN LAW (IHL)

In 1990, realising that International Humanitarian law could be helpful to improve the quality of its missions MSF France hired a lawyer, Françoise Bouchet-Saulnier. She was tasked to work on how MSF could use IHL to support its interventions. She produced a report on 'Law and Customs of Humanitarian Action' that was shared at the international level.



Minutes from MSF France's Board meeting, 6 August 1990 (in French)

Extract:

Sri Lanka update: Back from Sri Lanka, Rony presented the broad outline of the situation in the country following the offensive launched in the east and north of the country in June by the Tamil Tigers, followed by a violent counter-offensive by the Sri Lankan army. He explained the circumstances that caused the Manar team to withdraw temporarily, repeated efforts taken with the local authorities to 'neutralise' the MSF compound having come to nothing. [...] He pointed out that MSF was guilty of culpable negligence for not preparing the teams on the principles of humanitarian law and stressed the importance of swiftly resolving this failing by organising training sessions after all field management meetings (particularly PSP (Populations in precarious situations)), coordinator weeks and administrator weeks).



Minutes from the MSF International Council meeting, 11 October 1990 (in French)

Extract:

G. Legal basis for humanitarian action (also regarding Liberia)
Point of departure is the document by Bouchet-Saulnier [MSF Legal advisor]

Important points:

- Legal protection (of MSF) in international conflicts. An international call will come to next to nothing if MSF International doesn't have legal status. MSF International's position is weak. Bouchet-Saulnier's document is the starting point. Protection calls for mutual guarantees. The scope of action still needs to be defined (currently a mix of all sorts of humanitarian projects).

Recommendations:

- define scopes of action
- define criteria
- split public projects (governmental) from private projects (non-governmental)
- define methods of control.

Conclusion: Critical study of the document required. Meeting with Françoise Bouchet-Saulnier to define the terms of reference.

Action: Critical study by Rony Brauman [MSF France President] and Jean-Pierre Luxen [MSF Belgium General Director]



Minutes from MSF France's Board meeting, 19 October 1990 (in French)

Extract:

8- Humanitarian law

Rony [Brauman, MSF France President] explained that following the report from Françoise Saulnier [MSF Legal advisor] on this matter [...], she recommends conducting four studies on the law and scope of application of humanitarian action [...]. This work would be of interest to all European sections and will be proposed at the next International Council meeting. The fact that we agreed to commission this piece of work from her means we don't have to delay it. MSF funded Françoise Saulnier's trip to New York, she read a memo on the matter on behalf of Médecins Sans Frontières before the Third Committee of the UN General Assembly. Max [Doriol, member of MSF France board] wonders what new information this study will provide. Numerous lawyers have been working for over 20 years for the ICRC on the subject. Rony responded by saying that our position is very particular and doesn't pose the same problems as those of the ICRC. Several people think we should team up with other NGOs for this kind of research. Gérard [Bollini, MSF France Board member] asked what MDM [Médecins du Monde] and the Secretary for Humanitarian Action are doing. Robert Muller [MSF's representative at international institutions in Geneva] said that a conversation has already been started with other international NGOs, in particular Oxfam and Save the Children, on the need for an international convention. Rony replied that it's good that we are initiating things, but the consultant will definitely have to work in close contact with other NGOs, which is already happening. Françoise Saulnier's proposed study at a cost of 60,000 French francs was adopted with seven for, three against and one abstention.



Minutes of MSF International Council, 1 February 1991 (in French)

Extract:

5) The working group 5 = legal working group: humanitarian law

- MSF France contracted the study, which has just been signed (cost: 68,000 francs¹).
- MSF France wants all sections to share the funding to make it a European project. The financial breakdown has yet to be determined.
- The global study will apply all existing provisions in international law (from the perspective of humanitarian law). Given the number of humanitarian law's stakeholders (governments, private associations, armies and others), the criteria for implementation must be defined, including: application scope freedom to evaluate needs control over its implementation operators.
- MSF Greece proposal: all sections should contribute to the development of this study by submitting suggestions to MSF France Proposal accepted.

- A simultaneous study should be conducted on where the governments of various sections stand on the need for a legal basis for humanitarian organisations like MSF (Robert Muller suggestion). [...]

VII. Nobel Prize MSF France's basic idea would be to use the prize as a tool to promote humanitarian law.

 **Minutes** from the MSF International Council meeting, 18 April 1991 (in French)

Extract:

V. Humanitarian assistance law: Recent developments in international law: Robert Muller [MSF's representative at international institutions in Geneva] proposed that each session consider the new resolutions adopted in this area by the UN General Assembly, namely: to establish security corridors for channelling international relief; to create a list of experts in humanitarian aid recognised by the UN who would be sent to the field as observers and then the different sections would submit their points of view for the attention of their respective governments.

Legal research: Rony B[rauman, President of MSF France] proposed the idea of holding a meeting to be attended by the interested persons and representatives of each section to examine the proposal from a theoretical point of view. The goal: to create a 'decision-making chart' to be used as a negotiation instrument for people on missions vis-à-vis their institutional contacts and to continue the discussions on humanitarian law and practice (legal assessment of humanitarian actions). Rony is to take the lead on organising this working group.

 *I was working on a project compiling French databases on human rights violations and I met with MSF due to its position as a humanitarian organisation engaged in 'témoignage' and the public denunciation of such violations. It was in 1988 and the French government, with Bernard Kouchner as Secretary of State for humanitarian action, launched the concept of the 'right to intervene' that forced MSF to state its position on an essential subject: the effectiveness of private humanitarian action in the wake of mass crimes versus the capacity of States to stage military intervention on humanitarian grounds to stop mass crimes. The dilemma faced by humanitarian action confronted with violence was at the heart of the reason for starting MSF and its independent position in relation to the Red Cross. But he also addressed the risk of civil and independent humanitarian action losing its independence and becoming an armed branch of military-humanitarian diplomacy. I presented Rony with a legal interpretation of these political issues. I wrote two consultation reports to explain why international humanitarian law isn't an obstacle but rather a crucial asset to consolidate MSF's position as a civil independent humanitarian organisation in the field of medical and humanitarian relief. Humanitarian law was perceived from within MSF as an obsolete reference and law with which to blame the inefficacy of the Red Cross in the wake of mass crimes during the Second World War or Biafra. MSF was also undoubtedly dealing with an identity issue and wanted to differentiate itself from the Red Cross, and thus humanitarian law, and was tempted to support this new right of humanitarian intervention. In the two studies, I recommended that MSF not leave the monopoly of humanitarian law in the hands of the CICR but rather claim the*

right of initiative it avails to the CICR for other impartial humanitarian organisations as well, in order to legitimise our actions and our principles of independent relief and, above all, our medical missions.

Françoise Bouchet-Saulnier, MSF Legal advisor from 1991
(in French)

In October 1991, Françoise Bouchet-Saulnier was hired by MSF International to implement a series of complementary studies to define a legal framework to MSF interventions that could be used by the operational managers. A study on the humanitarian right of initiative was released in 1992.

 Contact no. 3, **Internal newsletter** of MSF Belgium, October 1991 (in French)

Extract:

Humanitarian action and law: lessons from a practical case, by Françoise [Bouchet -] Saulnier [MSF Legal advisor].

MSF has not brought up the question of law merely out of vanity or latent jealousy towards other organisations. It is because we are in the heat of action and driven purely by the effectiveness of humanitarian relief that we are exploring this subject. In Sri Lanka, MSF France provides medical treatment to civilian populations and runs the main hospitals in this country experiencing civil war. When, after a long list of blunders by the army, one of our teams was bombarded for several hours on 8 May, they had to decide between leaving or finding a way to try and avoid this type of accident or 'misunderstanding' happening again. The report by the Presidential Investigative Committee did not hold back in casting light on the relative carelessness and inexperience affecting our work in the country: in terms of an expired agreement that did not cover the zones where we were actually based, and our irresponsible and imprudent attitude towards our movements and our relations with the authorities. We, therefore, decided to steer clear of these facile but grounded criticisms to test the government's willingness to let us continue our actions. Negotiating the new agreement has given us an opportunity to identify the real obstacles and evaluate the degree to which the principles of humanitarian action have penetrated the hearts and minds of our interlocutors. Contrary to other MSF missions, the Sri Lanka mission is being conducted in the midst of a clearly defined domestic conflict with clearly identified points of contact. We, therefore, based our agreement on the application of international humanitarian law in conflict situations. We will thus benefit from the rights and protection afforded to relief organisations and medical personnel. This first step of recognition did not pose any particular problem as we were regarded by the authorities as providing, for the medical relief of the local population, a type of mission similar to that given by the CICR to prisoners. However, the necessary neutrality of humanitarian action in a period of conflict was interpreted in a different, not to say contradictory, way. Depending on the given moment and who we were speaking to, our neutrality might mean that we ought to work all over the country and not just in conflict zones, or that we should not work in regions controlled by the guerrilla forces, that in addition to the civilians we should treat govern-

ment soldiers but never the Tamil Tigers, and so forth. To clear up this debate, we had to remind them and have them acknowledge that neutrality is a subsidiary question that can only be assessed in the context of the overriding issue of impartiality. Impartiality is a more clearly defined notion that encompasses non-discrimination. Impartial relief is that which is provided regardless of political affiliation, race, religion, etc., and on the basis of freely evaluated needs. Placing the imperative of impartiality before that of neutrality is crucial if we hope to avoid perverting the interpretation given to the latter notion. Neutrality is understood by relief organisations to mean not actively taking part in conflict. This is open to various interpretations. In the strictest sense, this supposes never participating in armed operations alongside any of the parties involved. It is, however, impossible to avoid any humanitarian intervention in the balance of combat. This aid inevitably indirectly influences the respective power of the warring parties. But certain provisions of humanitarian law curtail this influence: working on both sides, relief has to be distributed solely under the authority of the aid organisations to avoid any of the powers reaping political benefit.

It is on the basis of these few principles that we have attempted to ensure our mission in this country is respected and acknowledged. The debate on security also cleared up one particular point. The only commitment we expect from the warring parties is to abstain from making us the target of their actions. The question of our security is thus also about our immunity. We do not ask for armed forces to protect us in the way bodyguards would do against the abuses of the opposing party. Our neutrality is the only guarantee of our safety to be able to work on both sides of a conflict. The authorities cannot therefore use the argument that a region is insecure to block access to us. Along the way, reference to the principles of humanitarian law enabled us to start a dialogue from which there emerged a new capacity of negotiation, a better understanding of humanitarian principles among a small but not negligible number of our contacts. This reference also opened a discussion on new directions for MSF.

 **Minutes** from the MSF International Council meeting, 10 January 1992 (in French)

Extract:

4 – International projects [...]

– Humanitarian law project:

JDM [Jacques de Milliano, General Director of MSF Holland] made several remarks on Françoise Saulnier's project, designed to be a European-wide project with participation by the sections. He noted that so far this project had contributed little to the other sections. Françoise is working above all on cases regarding MSF France. There has not been much contribution at the operational level. Either she needs to feed more back to the other sections or her work is difficult to translate in operational terms or we give this department greater resources to gather more operational findings. MSF Holland has hired a person on a fixed-term contract to work on the International Law project. Should we keep them, have them work with Françoise Saulnier? Do we need a legal office? Rony [Brauman, President of MSF France]: Françoise is conducting a legal study on the instruments we can use to give more weight to our negotiations, a legal grounding to our actions. She is also preparing legal consultations on specific cases, for example Sri Lanka (which helped to identify the problems in the field). The question we effectively have to answer is whether

we need a full-time lawyer. The proposal is to read Françoise's report, which should be completed by late January, and evaluate it to see if we need permanent legal counsel or just help as and when needed, consultations on specific cases. A decision should be made at the next IC [International Council] meeting.

In April 1992, the International Council decided to extend Françoise Bouchet-Saulnier's contract for one year. She was asked to advise the movement on Humanitarian International Law and wrote a first "Handbook of Humanitarian law" that was published in January 1994. She also provided legal consulting on specific crisis and trainings for all the operational sections.

 **Appendix** to the MSF International Council meeting, 10 April 1992 (in French)

Extract:

Workstreams of MSF's legal department

International Council assessment and objectives (Françoise Bouchet-Saulnier) [MSF Legal advisor]

After several collaborations with external parties and writing two working documents on the law and principles of humanitarian action and international humanitarian right of initiative, and after six months of working daily at the MSF Europe offices, a first assessment and a new reorientation are possible and necessary. The progress report of the past six months at MSF Europe shows a rise in the number of requests for legal intervention in a broad range of areas along with anticipated operational difficulties. Rather than discussing these issues, here are the recommendations for reorientation and solutions that I'd like to submit to the wise heads at the IC.

The quantity and variety of requests: the quantity of the requests made is largely due to the delayed consideration in this area which cannot be compensated for in one fell swoop. I need to be given the time and space to be able to reorganise the department so that we can find appropriate solutions for the many questions at hand: writing and negotiating standard contracts for our interventions; training and user manuals for these instruments. Diversity has to be accepted as a reflection of the true substance of this sector. Humanitarian law isn't more noble or more important than the other areas of our activity. But there is a coherent attitude to the law to be found in each sector of activity. This attitude presupposes an accurate understanding of our responsibilities and healthy risk-taking. This is only possible through resisting the urge to break down the department into smaller chunks. But the current organisation chart cannot easily meet these needs and redress the consequences of my being in Paris. Presently it is impossible for me to fulfil my communication responsibility with regard to my line managers, of whom there are too many, who are not clearly identified and not sufficiently available. I am, however, in direct contact with requests or initiatives from very different sources in each section: the Presidency and the general management of the main sections, programme and communication managers, technical divisions [...] There isn't any filter or safety net for this activity. Imposing a

communication circuit or rigid consultation in this sector would seem to go against MSF's dynamic and spontaneous nature.

The way of working in this area therefore needs to be reviewed. To overcome the impasse, we could argue as an autonomous service rather than an individual one. A European legal department would have de facto operational autonomy, would be set up as an open point of contact, to serve everybody, but would manage its time and priorities independently.

A regularly updated progress report would replace the untenable piecemeal daily pressure. It would also have the benefit of showing MSF's consensus with regard to the legal process. This would considerably stabilise working conditions. It would also create a permanent framework for this approach and enable us to plan the workload effectively over time. All things we can't do today other than at exorbitant cost. The department would be placed under the authority of the International Bureau and hence Alain [Destexhe, International Secretary]. He can provide the department with the visibility and the oversight needed for greater effectiveness. To facilitate the operational translation of this activity, I could take part in the international operations and communications meetings. This would allow me to meet people when they are gathered together rather than going fishing in each section and wasting my energy on trips here and there. Setting up a humanitarian law committee within the IC might provide an interesting forum for discussing, leading and distributing these various elements. As a last point, it would be good to set out clearly and share the mission of the legal department and how to work with it.

 **Minutes** from the MSF International Council meeting, 10 April 1992 (in French)

Extract:

2.4. 'Humanitarian law' project General remarks:

- All the sections believe the MSF would benefit from a legal department.
- The objectives should be narrowed down and the priorities more clearly defined.
- With the exception of MSF France, all the sections have complained about the lack of regular contact with Françoise Saulnier.
- There is an insistence on the importance of training, in particular for MSF staff who already have some experience.
- The quality of written documents needs to be improved. Documents also need to be acceptable for English-speaking countries.

Decisions: The IC [International Council] approved extending the contract of Françoise Saulnier, who will be attached to the International Bureau. The project will be evaluated in a year. The International Bureau will filter the consultation requests it receives. Four priorities have been defined:

- Strengthening MSF's position as an international legal actor;
- Training for MSF workers
- Legal assistance with the international restructuring;
- Legal consultation on request.

While there was an agreement on the need for a lawyer working for the movement on issues of brand and sectional legal statutes, the International Council, in April 1994, rejected

the idea of an international legal team dedicated to humanitarian law. This issues were to be dealt with by each section.

 **Minutes** from the MSF International Council Meeting, 2 April 1993 (in English)

Extract:

2. International Law

There is still a great deal of discussion around this project. Everybody agreed that the minimum that should be preserved in an international framework was the protection of the name, a harmonisation of the legal status of the Delegate Offices and some coherence in contracts, for example with the EC. The following was decided: The project as presently defined will stop at the end of the year. In the meantime Françoise Saulnier will be asked to continue working on some tasks under the umbrella of the International Office (mainly the status of the delegate offices, protection of the name MSF, consultancy on contracts, etc). The work under way concerning humanitarian law (eg. basic manual) should be completed. A budget of 15.000 Ecus was granted to the International Office for these purposes. Sections wishing to request Françoise Saulnier's consultancy or training services (for other purposes than the status of the delegate offices) would have to pay for them. The IC will discuss what we expect from a "humanitarian law project" on a long term basis at a coming meeting.

The 'Chantilly principles' set up after the international meeting on MSF Identity that took place October 1995 recalled MSF's commitment towards Humanitarian Law.

 **Chantilly Principles** on MSF Identity, MSF International, October 1995 (in English, in French)

Extract:

Who are the medecins sans frontieres I the principles [...]

4. Defence of human rights

Médecins Sans Frontières ascribes to the principles of Human Rights and International Humanitarian Law. This includes the recognition of: The duty to respect the fundamental rights and freedoms of each individual, including the right to physical and mental integrity and the freedom of thought and movement, as outlined in the 1949 Universal Declaration of Human Rights; The right of victims to receive assistance, as well as the right of humanitarian organisations to provide assistance. The following conditions should also be assured: free evaluation of needs, free access to victims, control over the distribution of humanitarian aid and the respect for humanitarian immunity.

 *In 1991, my contract was transferred to the International Office so that I could help on the global positioning of MSF's public positions. That year, I went to the former Yugoslavia with the MSF International Secretary General and the MSF International Communication Officer to assist with the evac-*

uation of the Vukovar hospital. These operations required negotiating with the various armed forces, and reminding them of the rules of international humanitarian law concerning medical evacuations. MSF's operational goal at the time was to maintain a presence on both sides of the conflict. This was a turning point for the organisation, and we had to learn how to do this. The principles of humanitarian law were used to create the notion of a humanitarian space, which did not exist when MSF worked under the "protection" of armed opposition groups. After Vukovar, we decided that operations were the direct responsibility of the different sections. In 1993, as the role of the International Office evolved into the coordination of different sections, I returned to MSF France because I wanted to be in direct contact with the management of MSF operations in conflict areas. I was still doing work for the International Office on international humanitarian law, and MSF's position towards mass crimes and the militarisation and judicialisation of humanitarian action. I strongly believed in staying grounded in operations so that our public positions would continue to be based on the realities of our operational dilemmas, rather than on the national ideological and identity-based elements of the intellectual templates we used to analyse situations.

Françoise Bouchet-Saulnier, MSF Legal advisor from 1991
(in French)

In 1995, MSF France decided to strengthen its foundation through the adoption of a new project aiming to support research that could enhance Humanitarian action. This project included research on International Humanitarian law. In October 1998, the *Practical Guide to Humanitarian Law*² was released.



MSF France Foundation **project**, 1995 (in French)

Extract:

1995 Humanitarian Law project

The purpose of the Médecins Sans Frontières foundation is to support research into how to improve the quality of relief operations. The Foundation's humanitarian law department will be contributing towards this objective based on the terms outlined below.

1 – Main objective

The research conducted on humanitarian law should strengthen the legal and theoretical framework of MSF interventions in an increasingly complex environment where the rights of victims are being challenged. MSF doesn't invoke humanitarian law to claim rights but to protect the rights of victims. To this end the humanitarian law department is seeking to:

- 1/ Provide MSF missions with the relevant humanitarian legal texts concerning:
 - Refugee situations
 - Conflict situations

- The other international organisations involved in relief or peacekeeping situations: UNHCR, international military forces
 - Right of medical missions: to allow them to defend the specific nature of MSF's medical missions in light of general debates on insurgency and humanitarian aid
 - The underlying principles of humanitarian aid: to provide a reference framework for negotiations and the definition of programmes in complex conflict situations.
- 2/ Respond to consultation requests on behalf of MSF operations on the above points.
 - 3/ Finalise and publish a guide to humanitarian relief law for use by MSF and also other NGOs that need guidance in the delivery of relief actions.
 - 4/ Contribute to training on humanitarian law in MSF's different field contexts.
 - 5/ Produce texts to challenge and shed light on operational decisions and provide concrete technical support to operations.

Example: the status of local aid personnel; the principles of international medical ethics; the professional responsibility of an expatriate doctor; the use of the medical certificate and the refusal of treatment on orphaned refugees; the status of UN peacekeeping forces in Somalia; the characteristics of international land mine clearance contracts in Mozambique; the history and content of neutrality in humanitarian law.

- 6/ Pursue studying and lobbying activities so the UN peacekeeping forces respect and contribute to the observance of the principles of humanitarian law.



Minutes from the MSF France's Board meeting, 25 September 1998 (in French)

Extract:

Practical dictionary of humanitarian law (Françoise [Bouchet-] Saulnier, MSF Legal advisor)

Humanitarian law is the only law which gives rights. The work done by Françoise has ultimately culminated in a dictionary that applies in emergency situations and is practical. The idea was to provide a dynamic and realistic interpretation of humanitarian law favourable to victims. The book will be released on 9 October (published by La Découverte) and will be available to MSF from 1 October. An English translation is underway. Françoise proposes capitalising on the release of her book to defend MSF's identity. The Board congratulates Françoise on her work.

MSF's interest in Humanitarian law issues was given renewed impetus with the setting up of the International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993 and for Rwanda (ICTR) in 1994, as well as the first steps of the International Criminal Court (ICC) in 1998. MSF was also involved in parliamentary investigations in France and Belgium, from 1997, on the genocide of the Rwandan Tutsis, then in the Netherlands and France, from 1999, on the Srebrenica massacre in Bosnia.

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

Extract:

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

 **Minutes** from MSF France's Board meeting, 27 March 1998 (in French)

Extract:

Call to set up a France–Rwanda 1990–94 parliamentary investigative committee (Cyril Locci [MSF Legal department])
MSF, with a group of researchers, individuals and associations, initiated the request for a parliamentary investigative committee on Rwanda ... Ahead of everybody else, Paul Quilès pushed through the creation of a “parliamentary information mission on the military operations led by France, other countries and the UN in Rwanda from 1990 to 1994”. The French national assembly's defence and foreign affairs committees are equally involved. NGOs have reacted vehemently as this solution does not suit them. There is a huge difference between the power to compel and the guarantee of independence and impartiality of an investigative committee, and an information mission. [...] It has been decided that members of MSF (undoubtedly Jean-Hervé Bradol) will be heard by the information mission.

 **Minutes** from MSF France's Board meeting, 26 March 1999 (in French)

Extract:

Srebrenica: investigative committee

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

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

 *The direct encounter of the teams in the field with ethnic cleansing in the former Yugoslavia and the genocide in Rwanda also reignited humanitarian dilemmas and the role of MSF speaking out to denounce crimes. MSF's 'témoignage', traditionally founded on 'political' denunciation, acquired a legal dimension with the denunciation of rights violations.*

Françoise Bouchet-Saulnier, MSF Legal advisor from 1991
(in French)

TO BE CONTINUED ...