Privatisation and outsourcing in wartime: the humanitarian challenges

Gilles Carbonnier Economic Adviser and Head, Private Sector Relations, Directorate General, International Committee of the Red Cross, Switzerland

The tendency today to privatise many activities hitherto considered the exclusive preserve of the state has given rise to sharp debate. The specific nature of humanitarian emergencies elucidates in particularly stark contrast some of the main challenges connected to the privatisation and outsourcing of essential public services, such as the provision of drinking water and health care. Privatising the realms of defence and security, which are at the very core of state prerogative, raises several legal and humanitarian concerns. This article focuses on the roles and responsibilities of the various parties involved in armed conflicts, especially those of private companies engaged in security, intelligence and interrogation work, and in the provision of water supply and health services. It highlights the need for humanitarian and development actors to grasp better the potential risks and opportunities related to privatisation and outsourcing with a view to supplying effective protection and assistance to communities affected by war.

Keywords: armed conflicts, humanitarian action, humanitarian law, private military companies, privatisation, public services, security

Introduction
The privatisation of many activities previously considered the exclusive remit of states is highly controversial (Sclar, 2000), especially when it comes to the provision of security and other essential public goods. The recent conflict in Iraq has drawn the attention of the media to the emergence of private military and security firms, with an estimated 20,000 staff members in the war-torn country (Scott Tyson, 2005).

Governments are indeed subcontracting a growing proportion of their principal activities to private companies, particularly in developing and transition countries (Mehrotra and Delamonica, 2005). This has a direct bearing on humanitarian organisations when they have to deal with private contractors to support the provision of essential services, such as the supply of drinking water and health care. The partial privatisation of defence and security, which is at the very core of state prerogative, is giving rise to a variety of misgivings and raises serious legal and humanitarian issues—for instance, when private firms manage detention places in the midst of an armed conflict.

As shown below, the advent of the twenty-first century is marked not only by a fundamental questioning of the traditional responsibilities and remit of public institutions vis-à-vis the private sector, but also by a blurring of lines between non-profit organisations and profit-driven companies. Yet the tension between market forces and state intervention is not new: it has been a matter of dispute ever since the industrial
revolution. This article briefly retraces some aspects of the historical relationship between the state and the private sector before taking a closer look at privatisation and subcontracting in areas of particular interest to humanitarian organisations, namely defence and security, health care, and water treatment and provision.

**An evolving role for the state**

With the industrial revolution in the eighteenth century, market forces took hold not only of trade in goods but also of all factors of production, including labour and land. Society as a whole thus found itself subject to the interplay of supply and demand. During the nineteenth century, governments in industrialised countries adopted a series of measures designed to prevent market forces alone from controlling these two factors of production (Polanyi, 1944). 2

During the two world wars and the crisis of the 1930s, these states adopted a much more intrusive approach to economic affairs, notably by introducing protectionist measures and by planning production to serve the war effort. Since then, one of the most striking developments is the exceptional growth of public spending. As shown in Table 1, the average share of public spending as a proportion of gross domestic product (GDP) in countries of the Organisation for Economic Co-operation and Development (OECD) rose from 23 per cent to 45 per cent between 1937 and 2003, with a very sharp increase between 1960 and 1980.

To understand the rationale for privatisation and outsourcing in contemporary humanitarian emergencies, it is useful to review key developments over the past two decades. During the 1980s, the growth in public spending slowed down considerably following the adoption of neo-liberal agendas. In the mid-1990s, the proportion of GDP devoted to public spending even declined slightly due to the conjunction of an assortment of factors. First, military expenditure decreased after the end of the Cold War. Second, the cost of servicing the public debt fell because of lower interest rates,

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and the debt itself diminished thanks to repayments funded by revenue from the privatisation of state-owned enterprises. Third, fiscal reforms in many countries resulted in lower taxation, which forced most states to take temporary steps to freeze or cut spending on all budget items, through linear reductions, and led to a halt on the number civil servants and the like (OECD, 2003).

The OECD notes that public expenditure is very likely to rise again because of population ageing, higher interest rates on debt servicing and a considerable enlargement of security spending under the framework of the ‘global war on terror’. The latter implies that several OECD countries may increasingly entrust private contractors not only with providing security at home, but also with training, equipping and assisting security forces in developing nations.

Because of growing budgetary pressure and concerns about the long-term financing of social expenditure, OECD governments have introduced new practices aimed at improving the cost–benefit ratio of taxpayers’ money. Bent on efficiency and effectiveness, governments are adopting private sector methods of financial management, auditing, monitoring and evaluation, including in the area of development co-operation and humanitarian aid (Hofmann et al., 2004). As will be shown later, systematic recourse to private sector management approaches and methods that have proved their worth in the case of commercial activities may turn out to be counterproductive when applied to complex social phenomena such as peace processes or the rebuilding of societies disrupted by war.

In developing countries, public spending accounts for a smaller percentage of GDP than in the OECD area. A study by Fan and Neetha (2003) based on data collected from 43 developing nations shows an overall decline in public spending from 19 per cent of GDP in 1980 to 16 per cent in 1998, a portion of which is allocated to debt servicing. The authors concluded that structural adjustment programmes have had several different effects on the size of government expenditure depending on the sector and the country concerned.

At the end of the Cold War, the withdrawal of support by the superpowers from their southern allies increased the risk of collapse of weak states. This became a major concern by the mid-1990s (see, for example, Zartman, 1995). In many developing countries, private operators have gradually become instrumental in providing security and essential services such as health care and education, at least to those individuals and organisations rich enough to pay the price.

**Security sector reform**

In the aftermath of the events of 11 September 2001, several OECD countries have shown a renewed interest in engaging in failed states or ‘poorly performing’ nations in the context of the ‘global war on terror’, primarily out of security concern (Macrae et al., 2004). Donors often include in aid packages some form of support for the armed and police forces of recipient countries, for instance under security sector reform programmes. The build-up and training of local security forces are increasingly
outsourced to private military and security firms whose headquarters are located in donor countries (Mancini, 2005). Private contractors, such as risk management consulting firms and private security companies, are ever more involved in reforming governmental security forces around the world under security sector reform packages sponsored by donor countries.

This raises the fundamental question of whether security should be a public or a private good. Economic textbooks define a good (or service) as public when it is available to all for consumption. Public goods have two basic properties: they are non-rival or public in terms of consumption in that their enjoyment by one person does not reduce their utility for others; and they are non-exclusive in that they do not discriminate between potential consumers. Does security qualify as a pure public good? Not systematically. It is a public good in the case of an army defending the integrity of national territory against foreign invasion. Hence, the armed forces provide security to each and every citizen, who can collectively enjoy it all at the same time. Yet security services can be sold exclusively to specific consumers to protect them from theft and assault in a given geographical zone. While security was widely regarded as a public good in the past, when public security forces enjoyed an absolute monopoly over the legitimate use of force, today it is increasingly often seen as a private good provided by companies, as will be shown below.

In an article on the private provision of public goods, Kaul (2005, pp. 137–140) remarks that ‘only in very few cases is “privateness” of “publicness” of consumption an innate property of a good. Rather, it is a matter of policy choice’. Kaul underlines that one person alone cannot provide law and order: a collective effort is required, allowing a community to enjoy an orderly, safe life. She concludes that a ‘public’ good might sometimes be better provided privately, but that the state retains a critical role in ensuring the proper outcome in relation to welfare or ‘public good’, if necessary through regulatory means, subsidy or direct provision of services.

An evolving role for the private sector

Nowadays, a large transnational company may appear better placed than states to operate in a coordinated manner at the global level, to take swift decisions and to act on them simultaneously on several continents. As the main agents of globalisation, private companies enjoy greater rights and freedom than ever before with the liberalisation of trade and investment (Ruggie, 2003). Moreover, the largest multinational firms generate revenues that go far beyond the GDP of many countries. It is not surprising therefore that international organisations and members of civil society are asking the corporate sector to assume greater responsibility for resolving worldwide problems such as poverty, water shortage, global warming (Rischard, 2002), or even armed conflicts. In addition, economic issues are also increasingly included in peace deals, as shown by the agreements in Sudan and Guatemala.

Given the growing expectations of non-governmental organisations (NGOs) and consumers, most large transnational companies have subscribed to the idea of businesses...
having social responsibility and have entered into a series of voluntary commitments on environmental protection and compliance with various norms recognised under international public law. For example, the large American and British extractive industries announced in December 2000 that they would back the objective of respecting, and promoting respect for, human rights and international humanitarian law (IHL) (US Department of State, 2001). The main challenge for companies is to translate their commitment into operational reality when managing security in dangerous places. This requires not only adopting and disseminating internal guidelines and procedures at the corporate level, but also engaging in a sensitive dialogue with governments and security forces in host countries with a poor human rights track record. Conducting such a dialogue may prove difficult for a private company, especially if it does not have the backing of its home government or of its peers or competitors. A company may fear losing its business if it has to lead a sensitive dialogue on its own with a host government on how local security forces should refrain from human rights and IHL violations.

Multinational companies have come to play a greater role in the provision of essential public services in developing countries over the past decade through what they refer to as community development or social development programmes. Large corporations operating in regions where there are virtually no public services have implemented broad programmes that favour local communities in order to enhance their acceptance on the ground and to mitigate the shortcomings of public institutions.

Private sector responses to complex social problems are however likely to exacerbate tensions rather than allay them, as illustrated in a 2003 study commissioned by Shell and presented to a group of conflict resolution experts. The latter examined the impact of the petroleum company’s activities on peace and security in the Niger Delta. According to the Bloomberg news agency, the study concluded that Shell’s activities were increasing levels of tension and violence in the region rather than reducing them. While Shell did not agree with the study’s recommendation simply to stop its onshore activities in the Niger Delta, it said that it intended to change its operating, security and community development practices to help reduce conflict (Bloomberg.com, 2004).

Like development agencies and humanitarian organisations before them, firms are now discovering that projects to assist host communities, although set up with the best of intentions, may have negative side effects that far outstrip the positive outcome initially planned.

A growing number of consultancy firms have specialised in development cooperation, economic reform and privatisation, humanitarian aid and post-conflict rehabilitation and the like. In 2003, for example, the United States Agency for International Development (USAID) awarded Abt Associates a contract worth several tens of millions of US dollars to ensure the rapid restoration of the health system in Iraq (USAID, 2003). Predominant among the other private companies engaged in post-conflict restoration are US entities such as Chemonics International (The Center for Public Integrity, 2004), Planning and Development Collaborative International (PADCO) and DPK Consulting, which provide advice and support in various fields, including governance and the privatisation of public sector institutions in Afghanistan, Iraq or Sudan. Private firms are increasingly competing with non-profit organisations to carry out
humanitarian and development work financed by donor governments, which is a trend that is likely to grow in the future.

**A new role for the non-profit sector**

One of the most striking phenomena of recent decades is the rise of NGOs in the public domain—in political debate, defending the rights of vulnerable groups and in humanitarian aid. According to the *Global Humanitarian Assistance 2003*, humanitarian aid provided by NGOs exceeded USD 2.5 billion in 2001. The largest organisations manage sums greater than the global development aid expenditure of various OECD countries.

As a result of the tendency for states to subcontract their humanitarian aid and development cooperation programmes or to manage them in a remote-control mode, states’ share of the financing of the international activities of NGOs rose from 1.5 per cent in 1970 to more than 40 per cent in 1998 (Davies, 2000). Given the security risks and access problems encountered by humanitarian organisations and reconstruction agencies in places such as Afghanistan and Iraq, they in turn subcontract the execution of their programmes to local ‘NGOs’. These frequently prove to be more akin to commercial enterprises than to non-profit organisations, for in the absence of viable economic alternatives many Afghan or Iraqi businesspersons set up NGOs in order to benefit from the financial ‘manna’ bestowed by subcontracted reconstruction programmes. Although this mechanism makes it possible to provide work and a temporary income, or even to pass on new skills and technologies, to a small proportion of the population, long-term economic growth cannot depend on the rise of a host of local NGOs whose financing is ultimately bound to dry up.

The strict lines of demarcation between the business and NGO worlds are getting thinner and exchanges between executives from private companies and humanitarian organisations are becoming more commonplace. Oxfam, for instance, has called on experienced managers from business to take charge of its international humanitarian programmes (Pandya, 2004). Its International Human Resource Director, Andrew Thomson, reportedly declared in June 2004 that the organisation was ‘openly inviting applicants from the business world and the public sector because their skills are transferable’.

**Challenges for humanitarian action**

The phenomena described above raises serious challenges for a humanitarian organisation such as the International Committee of the Red Cross (ICRC). This article first examines in greater detail the rise of private military companies in contemporary conflicts and the ensuing legal and humanitarian issues. It goes on to illustrate the implications of the privatisation phenomenon in some sectors that are relevant to humanitarian work: water supply, prison management, and health services.
Privatising military functions

For several decades, the armed forces of many states have been engaging in commercial activities that enable them to cover much of their expenditure and increase their autonomy, particularly vis-à-vis the budgetary allocation decisions of legislatures (Brömmelhörster and Paes, 2003). However, a new occurrence has been attracting the attention of experts and the media for some years now: the privatisation of a number of functions and activities that were previously deemed the exclusive domain of government security forces.

Since the end of the Cold War, the market for security services has been booming. The turnover of private military companies was estimated at more than USD 100 billion in 2002, that is, before the most recent conflict in Iraq (Singer, 2003). The proliferation of such firms working in Iraq following the intervention by Coalition forces has heightened media interest in this phenomenon. The assassination of employees of the US company Blackwater in Fallujah and the involvement of staff members of CACI International, Inc. and Titan Corporation in the ill-treatment of detainees at the Abu Ghraib prison have drawn attention to the ever-wider range of services provided by private companies, including logistic support, training of armed and police forces, interrogation and intelligence gathering, guarding of strategic spots, bodyguard services, tactical advice and direct participation in the hostilities.

The primary objective of private companies is to ensure a maximum return on investment. The same applies to private military companies. Their profit motive raises ethical questions in the context of armed conflict. Cost cutting, for instance, may cause a firm to neglect to train its personnel to respect the principle of proportionality in the use of force and to show restraint in the exercise of violence. In a reference work on the rise of the private military industry, Singer (2003) points out that the legislative authorities risk losing control of certain military operations abroad because of subcontracts that the executive body is able to conclude directly with private security companies. In the US, for example, Congress does not have to be notified of contracts granted by the Pentagon to private security contractors if they are worth less than USD 50 million.

The rise of private military companies and their relationship with states raise numerous legal questions. The first has to do with the status of those companies and their employees in armed conflicts. Do they qualify as mercenaries? Article 47 of Additional Protocol I to the 1949 Geneva Conventions (Protocol I) stipulates that a mercenary shall not have the right to combatant or prisoner-of-war status and specifies that the term ‘mercenary’ applies to anyone who meets six cumulative criteria. Yet this definition is so restrictive that, in practice, those in charge of private military companies would have to be rather foolish and unfortunate for their employees to fall within that category. Given that such an occurrence is rather rare, staff members of private military companies may therefore have either civilian or combatant status. Under IHL, they are deemed to be civilians unless they form part of the armed forces of a party to a conflict (see Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949). They cease to enjoy the protection afforded to
civilians against attack (see Article 51 of 1977 Protocol I) if they take an active part in the hostilities, and for as long as that participation lasts. Even if IHL does not provide a crystal-clear definition of what constitutes direct participation in hostilities, certain activities of private military companies nonetheless undoubtedly fall into that category, for instance the use of an armed force to protect a military objective, targeting and launching missiles, and transporting munitions. In the latter case, it is quite conceivable that truck drivers from low-income countries, attracted by the wages offered by private companies to transport military equipment during an armed conflict, are not necessarily aware that they are a ‘legitimate target’ for attack under IHL.

As the employees of private military companies are deemed to be civilians provided that, and for as long as, they do not form part of the armed forces of a party to a conflict, there is a real danger that the growing numbers of private security contractors in the field may make it more difficult to distinguish effectively between civilians and combatants in the conduct of hostilities and thus weaken in practice the protection to which civilians are entitled.

The appearance of these new players on the scene creates a further source of concern for the ICRC, namely the need to ensure that the privatisation of activities traditionally carried out by regular armies, at least in the past two centuries, does not have negative repercussions on the civilian population affected by the armed conflict. Compliance by states with their responsibility to ensure respect for IHL, including by private security contractors operating in their territory or which they have commissioned to carry out operations abroad, is therefore essential. In that regard, Article 1 common to the four Geneva Conventions of 1949 stipulates that signatory states undertake not only to respect but also to ensure respect for those conventions.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts, drawn up by the United Nations (UN) International Law Commission and adopted by the UN General Assembly in 2001, furthermore confirm a relevant principle of international public law: states are responsible not only for acts committed by their own organs but also by any person or entity that is not an organ of the state but which is empowered by the law of that state to exercise elements of governmental authority (Article 5). Article 8 adds that ‘[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’.

States consequently cannot absolve themselves of their obligations under IHL by subcontracting certain military activities to private companies. If, for example, a state is holding prisoners of war and entrusts the management of their places of detention to a private company, it is nonetheless responsible for ensuring that those facilities are run in accordance with the rules laid down in the Third Geneva Convention. States cannot argue that any shortcomings are the responsibility of the private company alone. States that hire private military companies are responsible for any violations of IHL that they may commit.

Private military companies themselves and their employees also bear responsibility for any violations of IHL that they carry out. Whereas this legal responsibility is clearly
established, the existing mechanisms for bringing claims against a company or prosecuting individual employees leave much to be desired. While the civil responsibility of companies is generally accepted, their criminal responsibility is much more limited. Similarly, although the criminal responsibility of the perpetrators of IHL violations is clearly established, it may prove difficult in practice to take legal action against them. Both companies and their employees may have been granted immunity from judicial process in the country where they are operating—for example, when the legal system is too weak to operate satisfactorily because of an armed conflict. It may also prove difficult to prosecute perpetrators of IHL violations in the private military company’s headquarters’ jurisdiction because the wrongful acts occurred abroad and the courts concerned may either not have the necessary extraterritorial authority or may be unwilling to exercise it for practical or political reasons (because of a lack of evidence, for instance).

Legal loopholes must be prevented from conferring de facto immunity on employees of private military companies who act in breach of IHL. Thus it is necessary to clarify these issues to ensure that appropriate sanctions can be imposed on those who are responsible for IHL abuses, irrespective of the country in which the violation was committed, or of the perpetrator’s nationality and that of the company for which he or she works. The situation becomes more complex still when a private military company subcontracts part of the tasks assigned to it to private local militias, or if it works on behalf of a multinational company rather than for a state. All too often contracts signed with private military companies contain no clause on respect for human rights or international humanitarian law. The ICRC believes that it is crucial that states adopt an appropriate set of regulations, that security contracts contain standard provisions, and that the vetting and training of security contractors all contribute to minimising the risk of IHL violations and the further suffering of communities affected by armed conflict.

Privatising the water supply
Privatisation of the parastatal companies responsible for providing drinking water and for treating wastewater has been going on for several decades, particularly in developing countries, in response to recommendations by the international financial institutions. Hence, multinational companies have been entrusted through franchise agreements or leasing contracts with managing the pumping stations and water treatment plants, operating the water supply system, and collecting user fees. The World Bank and other financial institutions see this as a way of improving the sector’s efficiency and profitability.

Various features make the water market different from other markets. The sector’s profitability depends, in particular, on how much is charged for a cubic metre of water—a price often kept down arbitrarily by governments for political reasons. In a humanitarian crisis, access to drinking water remains a top priority in order to avoid epidemics and to maintain public health, especially in urban centres. For this reason, it is essential that private operators continue to provide people with their services in the event of
war, even if it is then no longer technically feasible to collect user fees. Legally speaking, depriving the population of drinking water may constitute a grave breach of international humanitarian law.

If war breaks out, a pure business rationale will induce these companies to withdraw from the market to avoid financial loss. Mindful of their corporate responsibility and taking a long-term view, some companies nevertheless decide to carry on their work despite the war and then try to contain the losses by various means, including drawing on funds available for humanitarian aid and reconstruction.

Conversely, donor states and humanitarian organisations make it a priority to keep the population supplied with water. This raises the question of whether a multinational company that provides water in a conflict-ridden environment can be materially supported by an aid agency—and to what extent. The funds and material made available by that agency to the company may become an unwarranted subsidy that runs counter to the provisions of the World Trade Organization. This aid may be difficult to justify in front of the donor government and its taxpayers as well as vis-à-vis the company’s competitors. One option is to specify that once user fees can again be collected from clients, the aid funds advanced will be deducted from what the state owes the private operator. In any case, the responsibility, in the event of armed conflict, of companies in sectors as vital as that of water supply deserves to be much more clearly defined in franchise contracts, especially when the World Bank or other international organisations are backing the privatisation process. A further option is to establish an international mechanism to provide financial cover for the risks of war. Private companies would find themselves obliged to continue their work in such vital sectors even in the event of armed conflict, but with the assurance that their financial losses would be limited by an appropriate insurance scheme.

Some people in charge of humanitarian operations refuse to work in partnership with transnational companies as a matter of principle. Others wonder why such reticence is shown towards private operators, whereas the humanitarian community supports publicly owned companies in other countries without ever carrying out a detailed audit, even though some of those parastatal firms are known for their lack of transparency and questionable accounting practices.

Privatising the interrogation of prisoners

Prisons are managed through public–private partnerships in an increasing number of countries. Services offered to detainees, such as the provision of food and health care, are being subcontracted to private companies, particularly in Anglo-Saxon nations where the management of prisons, including surveillance and warder services, is being placed entirely in the hands of private enterprises. In the literature that looks at this phenomenon from a human rights perspective (see, for example, Coyle, Campbell and Neufeld, 2003), it has been pointed out that the goal of maximising the investment return may run counter to the objectives and constraints of the prison system, such as ensuring that detainees are held in satisfactory conditions, refraining from exploiting their work for financial gain, and preparing their reintegration into society.
The partial privatisation of the interrogation of prisoners is a relatively new occurrence in the context of armed conflicts. The matter only recently made the headlines with the abuses committed in the Abu Ghraib prison in Iraq, where CACI International, Inc. provided interrogators and Titan Corporation supplied translators who allegedly participated in—or failed to report—abuses of prisoners (Merle and McCarthy, 2004). Who is responsible for the ill-treatment and who must be sanctioned? The employee, the company, the ministry concerned, or all three? What responsibility can be attributed to the state from which the private company originates and the state in which the abuses occurred? Under what jurisdiction and according to what procedures must sanctions be imposed? Does the contract between the state and the company contain specific provisions to that effect? Must the ICRC address its recommendations to the states alone, or also to the companies involved in interrogating prisoners? With whom is it most appropriate to talk in order to improve the conditions of detainees? In this case, too, the ICRC wishes to insist on the primary responsibility of states to adopt an appropriate legal framework and to take the steps required to minimise the risk of violation and to ensure proper accountability mechanisms.

Privatising health services

Free access health services are not or no longer a reality in the vast majority of conflict-ridden countries, with the exception of treatment provided directly by humanitarian organisations. However, the difficulties faced by vulnerable sections of the population in gaining access to health care are not confined to humanitarian crises alone. In most developing nations, a two-tier health system has emerged, with private facilities providing quality treatment that only the wealthy can afford, and bankrupt public facilities increasingly introducing a system of charging for treatment so as to partly cover their costs. Very often, badly paid employees charge patients a variety of unofficial taxes and fees. This informal privatisation from within takes place without the slightest degree of transparency. In other cases, the communities, the health centres and their users agree to set up a system of collective prepayment by means of insurance cover, as for example in certain municipalities in Serbia and Montenegro after the conclusion of the Kosovo conflict in 1999.

A salient feature of armed conflict is that it aggravates the needs of the population and the vulnerability of the poorest people. IHL includes the obligation to ensure that the victims of armed conflict have access to health care. The official and unofficial privatisation of health care, though, adds to the difficulties encountered by humanitarian organisations, which strive to support existing health care facilities rather than substitute them, while simultaneously endeavouring to ensure that people whose health is directly affected by the armed conflict have access to them. In severe crises, it is sometimes not possible to guarantee that conflict victims—displaced persons or the wounded—can receive treatment, because health staff are caring first and foremost for clients with money, that is, those able to make an appropriate payment, and for the resident population better integrated into the local solidarity system.
To enhance their own ability to provide appropriate long-term support, humanitarian organisations that try to support primary and secondary health care systems during crisis periods are finding it increasingly important to understand how those arrangements work and to advise them on administrative and financial management. For experience has shown that even if humanitarian organisations take action in response to short-term crises, their support for local health systems tends to extend over many years. Long-term support for health systems that are being partly privatised, with or without a health insurance scheme, requires an ever-broader range of knowledge and skills, given the failures in the health care market, such as asymmetry of information, moral hazard and adverse selection.

Basic administrative and financial management skills are needed to support better local partner institutions and to comprehend how the material and funds provided can be best allocated within local systems. A good understanding of the local partners’ budgetary and institutional constraints is also useful to ensure a smooth handover of the project and its long-term sustainability once the crisis has ended.

**Conclusion**

The privatisation of activities that were once the exclusive domain of states or international organisations has not yet been the subject of in-depth studies enabling definitive conclusions to be drawn about the advantages, risks and pitfalls of this trend from a political, economic and social perspective. As shown in this article, humanitarian crises—by their specific nature and the dramatic implications for the victims—highlight with particular clarity some of the main challenges and fundamental issues inherent in the privatisation and subcontracting of essential public services.

The first issue concerns the compatibility of profit maximisation, which obviously is the standard objective for private companies, with the maintenance of security and public health, which is normally the responsibility of states. The fact is that the market as an institution gives free rein to the interplay of supply and demand and to competition, the aim being to achieve the best possible allocation of resources and to stimulate creativity and innovation in order to respond to (and encourage) consumers’ needs and aspirations. However, the market evidently has no intrinsic ethics: the law of supply and demand applies just as much to the market for child prostitution or cocaine as to the stock market or the coffee market. It is up to the state to prohibit or regulate certain markets for reasons of law and order, security, morals, health and so on. It is also up to the state to withstand pressure from private companies that might be tempted to incite the authorities to fuel demand for their specific services.

The reality in the field tends to show that to protect victims of armed conflicts, it is imperative that states adopt an appropriate legal framework to prevent the rapidly expanding market for private security companies from being accompanied by a weakening of international humanitarian law and a growing number of violations of IHL by the employees of private companies who would enjoy de facto impunity.
Furthermore, it is essential that subcontracting agreements between governments and private companies in areas as sensitive as water supply and prison management contain specific provisions establishing the responsibilities and obligations of each party in the event of an armed conflict, as well as economic and financial incentives to ensure that humanitarian considerations are given priority in the event of force majeure. Otherwise, the terms of contracts with the authorities that contain no provision to that effect will simply play into the hands of private companies.

The second issue pertains to respect for international law by private companies and the responsibility of states when the activities of those operators are likely to undermine respect for international humanitarian law. As demonstrated with regard to international public law, states are responsible for acts committed by any person or entity empowered to exercise elements of governmental authority or acting (de facto) on the instructions of, or under the control of, states. It is thus their responsibility to hold firms or private contractors responsible when they commit IHL violations and to implement appropriate sanctions.

The third issue relates to the economic pros and cons of the phenomenon of privatisation, in other words, the costs to and benefits for the consumers of privatised services and the taxpayer who indirectly funds those services. The main argument in favour of privatisation centres on efficiency gains and savings. While the end of the Cold War sanctioned the superiority of the market economy over the centrally planned economy, the outcome of privatising public services remains a matter of controversy. Several experts contend that contract oversight for outsourced support in conflict and post-conflict mission areas remains critically deficient (Mobley, 2004). A survey published in 1998 by Abt Associates concludes that the available analyses and data do not show that using private companies for prison services allows savings to be made (The Sentencing Project, 2004). The organisation War on Want states more incisively that the privatisation of many public services has aggravated poverty in developing countries and that, by supporting those reforms, the UK Department for International Development has helped to enrich British consultants and private firms rather than to reduce poverty in the beneficiary countries (Campbell, 2004). War on Want calls for the creation of an independent commission to examine the extent of privatisation in developing countries and its effects. Pending in-depth studies, the economic, social and political merits of different institutional arrangements between the public and private sectors should be considered with caution.

Humanitarian organisations work ever more often in partnership with local public or private bodies to support the health care and the water supply systems. They are trying to assess the privatisation trend and its consequences, and to adapt accordingly. New skills are needed to gain a better understanding of the private operators’ inputs and working methods, and to enhance the ability to negotiate appropriate arrangements with these newcomers to humanitarian crises. Finally, it is crucial to intensify the dialogue with states in order to guarantee respect for IHL in an armed conflict even as governments outsource some of their prerogatives to private actors.
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Correspondence
Gilles Carbonnier, Economic Adviser and Head, Private Sector Relations, Directorate General, International Committee of the Red Cross, 19 Avenue de la Paix, CH-1202 Geneva, Switzerland.

Endnote
1 The opinions expressed in this article are those of the author and do not necessarily reflect the views of the International Committee of the Red Cross (ICRC).
2 Karl Polanyi demonstrated this in his masterly work on the political and economic origins of the collapse of nineteenth century civilisation and on the major transformation that followed (see Polyani, 1944).
3 When addressing the United Nations Security Council on 13 April 2004, World Bank President James Wolfensohn stressed that the private sector has a big part to play in reducing conflicts and building peace—for example, by presenting younger generations in countries devastated by conflict with employment and career opportunities.
4 The Agreement on Wealth Sharing concluded by the Sudanese government and the Sudan People’s Liberation Movement/Army in January 2004 established a framework for the management and distribution of oil ‘manna’ during an interim period. In Guatemala, the peace accords finalised in 1996 by the government and the guerrillas provided for a rise in state income through higher taxation on a progressive scale.
5 The authors illustrated this trend by drawing on several case studies including Argentina, the Democratic Republic of Congo, Indonesia, the People’s Republic of China and Vietnam.
6 It is interesting to note that this article does not prohibit mercenarism as such, unlike the Convention of the Organisation of African Unity on the Elimination of Mercenarism in Africa of 3 July 1977 and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989.
7 A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.
8 Such as Australia, New Zealand, the United Kingdom and the United States.
9 Including Group 4 Securicor, Serco Group and the GEO Group, Inc.

References


