

# **Accountability for Civilians in the Battle Space**

**March 19, 2009**

**David C. Hammond, Partner  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
+1-202-264-2510  
dhammond@crowell.com**

7435643

- **Montreux Document On Private Military And Security Companies**
  - Launched jointly by Switzerland and the ICRC in early 2006 (the “Swiss Initiative”)
  - Issued September 17, 2008
  - 17 States - Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America
  - Addresses international legal obligations and good practices for States related to operations of private military and security companies during armed conflict
- **U.S. procurement system largely reflects the “good practices” set forth in the Montreux Document**

- **“Montreux compliant” contractors have written policies and procedures regarding:**
  - Training of personnel
  - Vetting of personnel
    - Rules on the use of force
    - International humanitarian law and human rights law, including laws against human trafficking
    - Local cultural, religious, and gender issues
    - Anti-corruption (e.g., bribery)
    - Applicable local laws
  - Reporting mechanisms for complaints and incidents
  - Internal accountability mechanisms

- **Self-disclosure of misconduct**
  - A “good practice” under Montreux Document
  - U.S. procurement regulations recently imposed mandatory disclosure when there is credible evidence of:
    - Fraud, civil false claims, gratuities, conflict of interest and significant overpayments
    - Requires “full cooperation” be given to all government agencies
    - U.S. procurement regulations also require disclosure, based on credible information, of any suspected or alleged violation of the law of war

- **Structuring statement of work to maximize application of government immunities**
  - Relationship between government supervision and potential derivative immunity of contractors
- **Disclosing risks to and potential jurisdiction over employees**
  - Obtaining waivers and binding arbitration
- **Contract administration and document retention**

- **Authority to direct changes to the contract**
- **Selecting the choice of law**
  - *Contract* – typically choice of law is stated expressly
  - *Tort* – typically the law of the place of the wrong
  - *Fraud* – typically the law where the loss was sustained, not where the fraudulent misrepresentation is made
  - *Property* – typically interests in land are governed by the law of the *situs*

- **Internal Investigations**
  - In a war zone
  - Who do you send?
  - Prepare a written report?
  - Rely on military report?
  - Preserving evidence
  - Host country labor and employment laws
  - Controlling events 7,000 miles away
- **Communications with injured parties or relatives of victims that may be future plaintiffs**

- **Oversight by Legislative Bodies**
  - Hearings often assist the plaintiff and harm the defendant
    - Free discovery before dispositive motions
    - Unfavorable forum for defendant
    - Public relations and reputation implications
  - Oversight bodies may issue report with adverse factual findings before any civil or criminal trial with no opportunity to respond

# Challenge: Protecting the Privilege

- **U.S. Congress does not recognize the attorney-client privilege or work product doctrine (except for Congressional proceedings against its own Members)**
  - Attorney-client privilege and work product doctrine are rooted in common law established by the judicial branch, not the legislative branch
- **Host country protections**
  - Understand the protection of the attorney-client privilege in the host country, especially if you are a subject to the foreign country's legal process

## Challenge: Preparing The Company

- **Plan ahead and think through legal issues**
- **Recognize the human condition**
  - Multiple stressors
  - Cultural differences
  - Language barriers
- **Compliance programs: do not be a penny wise and pound foolish**
- **Have a clear reporting structure for reporting incidents**
- **Form a rapid response team**
  - PR, legal, investigators, lobbyists
  - Run simulations with the team

- *Baragona v. Kuwait Gulf & Link Transport Co.*, CA No.: 05-cv-1267(WSD) (N.D. GA)
  - U.S. soldier killed in traffic accident in Iraq
  - Foreign contractor – no U.S. office
  - Alleged jurisdictional facts:
    - Defendant had U.S. government contracts with the U.S. Third Army in Kuwait
    - U.S. Third Army headquarters located at Ft. McPherson, GA
  - Court found jurisdiction
  - Entered default judgment
  - Motion to vacate under FRCP 60(b)(4) for lack of jurisdiction (pending)

# Jurisdiction Over Contractors Performing Overseas Work

- **S. 526 – Justice For American Heroes Harmed by Contractors Act (Sen. McCaskill (D-MO))**
  - Would require a FAR clause in all prime and subcontracts for work outside the U.S.
  - FAR clause would require consent to jurisdiction by U.S. Federal Courts
    - For civil tort actions brought by U.S. citizen or uniformed or civilian members of the U.S. government
    - For civil or criminal suits brought by the U.S. alleging wrongdoing associated with the performance of a contract

- **S. 526 – Justice For American Heroes Harmed by Contractors Act (Sen. McCaskill (D-MO)) (continued)**
  - Must designate a local agent for service of process if the contractor does not maintain an office in the U.S. (for contracts \$5M or more)
  - Would apply tort law of the state in which suit was brought rather than the law where the tort occurred

# Jurisdiction Over Contractors Performing Overseas Work

- **S. 526 – Justice For American Heroes Harmed by Contractors Act (Sen. McCaskill (D-MO)) (continued)**
  - Civil tort action may be brought in the district
    - of the legal residence of the injured person, deceased, heirs of the deceased, or the place of the estate of the deceased
    - of the command issuing the contract; or
    - the District of Columbia if jurisdiction cannot be otherwise established
  - Civil or criminal action “alleging wrongdoing” may be brought in the District of Columbia if jurisdiction cannot be established in another Federal court

# Jurisdiction Over Contractors Performing Overseas Work

- **S. 526 – Justice For American Heroes Harmed by Contractors Act (Sen. McCaskill (D-MO)) (continued)**
  - Applicability – After Effective Date of FAR Clause
    - Task orders under an ID/IQ contract
    - Modifications of existing prime
    - Required flow-down to all subcontracts
  - Retroactive application to civil or criminal actions commenced during the period September 11, 2001 to date of enactment
    - Must consent to jurisdiction as a condition of
      - entering into any contract with the U.S.
      - receiving payment from the U.S. for performing any activity under a contract with the U.S. on or after the date of enactment

# Jurisdiction Over Contractors Performing Overseas Work

- **S. 526 – Justice For American Heroes Harmed by Contractors Act (Sen. McCaskill (D-MO)) (continued)**
  - Term “contractor” includes primes, subcontractors at any tier, and employees performing work under or in connection with the contract
  - For the retroactive part of the bill, the term “contractor” also includes any subsidiary, parent company, or successor entity

## **Jurisdiction Over Contractors Performing Overseas Work**

- **S. 526 – Justice For American Heroes Harmed by Contractors Act (Sen. McCaskill (D-MO)) (continued)**
- **Amend FAR to permit suspension and debarment if a contractor:**
  - evades service of process, refuses, or fails to appear in any suit brought against the contractor by the U.S. government or citizen or national of the U.S. in connection with the contractor's performance of a contract with the U.S. government