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NEWS ANALYSIS; The Judgment Gap In a Case Like the Blackwater Shootings, There Are Many Laws but More Obstacles

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If a private in the United States military fires on civilians, a clear body of law and a set of procedures exist for the military to use in investigating each incident and deciding if the evidence is sufficient to bring charges.

But when private security contractors do the same, it is exceedingly unlikely that they will be called to account. A patchwork of laws that are largely untested, and practical obstacles to building cases in war zones, have all but insulated contractors from accountability.

Those gaps were brought into sharp relief after Sept. 16, when Blackwater guards under contract to the State Department opened fire on unarmed civilians and killed 17 Iraqis, according to the Iraqi government.

Even if the State Department and the Federal Bureau of Investigation, which is now looking into the shooting for the department, determine that a crime was committed, there are formidable obstacles to mounting a case, according to interviews with former prosecutors, lawyers and experts in military and civilian law as it is applied overseas.

Roughly 100,000 American contractors are working in Iraq, but there has yet to be a prosecution for a single incident of violence, according to Scott Horton, a specialist in the law of armed conflict who teaches at Columbia University.

"Imagine a town of 100,000 people, and there hasn't been a prosecution in three years," Mr. Horton said. "How do you justify the fact that you aren't addressing this?"

One remedy is not being discussed: the State Department can waive immunity for contractors and let the case be tried in the Iraqi courts under Order 17, which is the section of the Transitional Administrative Law approved in 2004 that gives contractors immunity.

L. Paul Bremer III, who supervised the drafting of the immunity order as administrator of the United States occupation authority, said: "The immunity is not absolute. The order requires contractors to respect all Iraqi laws, so it's not a blanket immunity."

The order was intended as a substitute for a status of forces agreement, which can be made only with a sovereign country, Mr. Bremer said. While the military has immunity from Iraqi law, it agrees in exchange to subject its members to American military law. In contrast, civilian contractors have immunity, but it is unclear which laws, if any, can be used to hold them to account.

The Iraqi government has not begun to discuss legislation to overturn the immunity provision, although the government of Prime Minister Nuri Kamal al-Maliki has said that contractors should be tried under the Iraqi legal system.

However, legal specialists say that the government would probably be reluctant to throw the cases into the Iraqi courts, because there is little confidence that trials would be fair and defendants in those courts have few

of the legal protections that are mandatory in the United States.

Contractors accused of crimes abroad could be tried in the United States under either military or civilian law, but lawyers foresee many problems. In both cases there are questions about whether the laws extend to contractors working for the State Department.

The applicable military law, the Uniform Code of Military Justice, was changed at the end of 2006 under an amendment proposed by Senator Lindsey Graham, a South Carolina Republican who is in the Judge Advocate General Corps of the Air Force Reserve, to cover contractors "in declared wars or contingency operations." But disputes have arisen about whether that would include State Department contractors like Blackwater that provide security escorts for a civilian agency.

As recently as Oct. 3, Defense Secretary Robert M. Gates indicated that no decision had been made on how to apply the new language. In other statements, Pentagon officials have suggested that they would apply the military code to Defense Department contractors. That could leave contractors working for other agencies, such as Blackwater, outside military law.

Neither the Pentagon or the U.S. Embassy in Baghdad responded to requests for comment.

In any case, military lawyers have yet to determine how to put the new language into effect. Among the questions they are wrestling with are these: What categories of crimes should it cover? How should it treat employees who are not American citizens? What are the chances that the provision would be upheld by the Supreme Court?

"There's also a very open constitutional question about whether we can try civilians in military courts," said Laura Dickinson, a professor of law at the University of Connecticut and an expert on laws that govern private contractors in conflict zones. Traditionally, there has been resistance to doing so, but Ms. Dickinson said she believes a case could be made that private security contractors authorized to use force would be covered by the code of military justice.

The options under civilian law are little better. The most likely way to prosecute would be through the Military Extraterritorial Jurisdiction Act, which allows the extension of federal law to civilians supporting military operations. Mr. Horton, the Columbia lecturer, said he believed that "a sound basis" existed for using the act to prosecute security contractors.

However, trying a criminal case in federal court requires guarantees that no one has tampered with the evidence. Because a defendant has the right to cross-examine witnesses, foreign witnesses would have to be transported to the United States.

Robert Litt, a former federal prosecutor and deputy assistant attorney general in the Justice Department's criminal division, said that if anything like the Blackwater shootings occurred in the United States, "within minutes you would have police there securing the crime scene, interviewing witnesses."

"You'll have a secure chain of evidence," he added. "All that requires people on the scene almost simultaneously."

Several legal experts said that evidence gathered by Iraqi investigators and turned over to the Americans, even within days, would probably be suspect.

Another law that might be applicable is one covering contractors in areas that could be defined as American territory, such as a military base or the Green Zone. But the Blackwater security contractors in the Sept. 16 shootings were in neither place.

