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Is terrorism a war crime?

Judges and defense lawyers at Guantánamo tribunals argued over whether terrorism should be defined as a war crime.

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GUANTANAMO BAY NAVY BASE, Cuba -- Arguing that the Nuremburg tribunals established genocide as an international crime 60 years ago, the colonel presiding over the first U.S. war-crimes court since World War II left open the possibility Tuesday that terrorism could debut as a valid war crime at Guantánamo Bay.

Defense lawyers argued in pretrial hearings for Australian captive David Hicks, 29, that the Bush administration has retroactively and illegally invented terrorism as a catchall war crime for al Qaeda detainees held at the detention center here.

They repeatedly cited the ex post facto factor in a bid to have charges dropped against Hicks, a Christian convert to Islam who was handed over to American troops in the post-Sept. 11, 2001, invasion of Afghanistan.

Defense lawyer Joshua Dratel of New York explained ex post facto this way: If you swam on Tuesday and Congress outlawed it on Wednesday, you cannot be charged with swimming illegally on Thursday.

"Terrorism is not an offense under the law of war," said defense lawyer Marine Maj. Michael Mori, calling it "a descriptive term, not a charge in and of itself."

The prosecutor, Marine Lt. Col. Kurt Brubaker, countered that the principle has been around since "pirates posed a problem from outside our shores."

Army Col. Peter Brownback, the presiding officer in the war-crimes court at Hicks' trial, resolved it this way: "We're arguing from analogies here. Genocide wasn't a crime until Nuremburg, right? Nuremburg was the first one for genocide."

The crux of the issue is whether the Bush administration has improperly designed a new legal system to try suspected terrorists captured in a third country, Afghanistan, and transferred to another country, Cuba, rather than use existing laws in U.S. military or civilian courts.

Attorney Kenneth Hurwitz of Human Rights First, the new name of New York-based Lawyers for Human Rights, watched the arguments with alarm, in part because two members of the three-judge panel have no legal training. In the Pentagon's newly designed court, the Marine and Air Force colonels sitting with Brownback have equal status in ruling both on facts and law, a fusion of the modern judge-and-jury system.

The prosecutor, Brubaker, characterized the new court and laws as suitable to the 21st century challenges of al Qaeda, a new kind of conflict that doesn't fit traditional international rules governing armed conflict.

"Defense tells you we could've shot him and killed him when he was on the battlefield. The laws of humanity say we can capture him, . . . detain him, and . . . try him under the laws of war," he said.

The panel is expected to rule this week on a series of motions that challenge the charges and President Bush's framework for trying them. If they lose, Hicks' trial is slated to start Jan. 10.