A rules-based order?

Reflections on the Iran war, the ICC and its prosecutor

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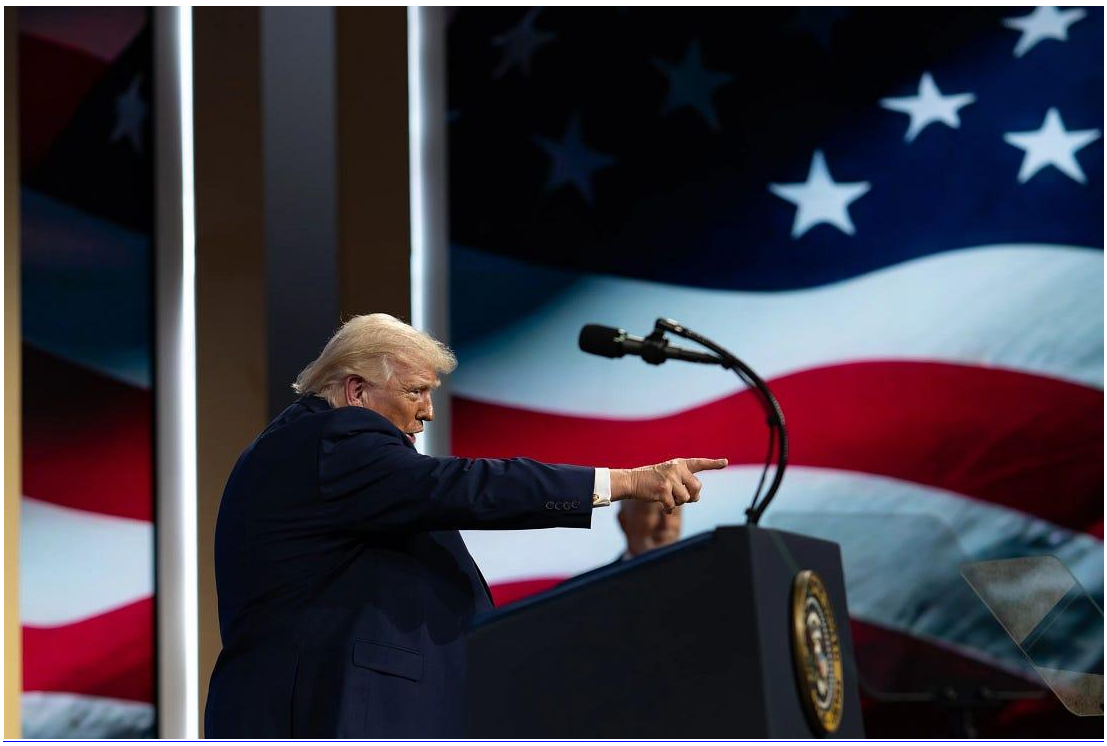
Donald Trump said yesterday he was "not at all" concerned about committing possible war crimes by destroying Iran's bridges and power plants if Tehran does not meet his deadline tonight to reopen the Strait of Hormuz.

"I'm not worried about it," the US president said. "You know what's a war crime? Having a nuclear weapon."



But it's too soon to judge the impact of the Iran war on the rules-based international order — the international rule of law. Instead, I want to consider the damage it has done to the International Criminal Court.

How things used to be

Little more than 24 hours after Russia invaded Ukraine on 24 February 2022, the ICC's prosecutor Karim Khan KC issued a statement saying that "any person" who commits war crimes on the territory of Ukraine faced prosecution. A year later, Khan announced that he had been granted a warrant for the arrest of Vladimir Putin.

Five days after Hamas terrorists invaded Israel on 7 October 2023, Khan reminded "Palestinian nationals" that the ICC had jurisdiction over any war crimes they had committed. "We simply cannot live in a world", he added later that month, "where burnings and executions and rapes and killings can take place as if they are normal, as if they are to be tolerated, as if they can happen without consequence."

But we have heard nothing from the prosecutor's office about Iran.

Khan took leave of absence last May while investigators continued to examine rape allegations against him. As far as I can see, his only public comment since then seems to have been about the way those allegations have been handled. As I shall suggest, not even the BBC could done a worse job of investigating sexual misconduct allegations against one of its most prominent figures.

In Khan's absence, his responsibilities have been shared by his two deputies, Nazhat Shameem Khan and Mame Mandiaye Niang. They have not made any public comments about the Iran war either. Neither warned Iranian leaders that the ICC has asserted jurisdiction over territory where they have committed war crimes.

Office of the prosecutor

Some of my readers will think it's not the job of a prosecutor to advise criminals that they face prosecution. But that would be to misunderstand the ICC prosecutor's role.

In England and Wales, the Crown Prosecution Service relies on the police to gather evidence. Prosecutors can certainly advise the police what evidence to look for. But the CPS does not carry out its own investigations or, in most cases, order investigations to be initiated.

By contrast, the "office of the prosecutor" at the ICC "is responsible for examining situations under the jurisdiction of the court where genocide, crimes against humanity, war crimes and aggression appear to have been committed, and carrying out investigations and prosecutions against the individuals who are allegedly most responsible for those crimes".

The prosecutor is not only the public face of the court. He or she is the linchpin that keeps the wheels from falling off the bus. Of course, there are judges to keep the prosecutor in check at every stage in the legal process. But the only person at the court with the status to speak out against the world's tyrants is the prosecutor.

How things are now

The ICC has been "conspicuously quiet on the Iran conflict", Professor Eugene Kontorovich observed in the Wall Street Journal last week, even though it may have limited jurisdiction over Iranian leaders. The reason, he suggested, was a lack of political will:

> Iran has a track record of trying to assassinate its critics abroad and sponsoring bombings of buildings abroad. Would a country enforce an ICC warrant against Iranian leaders fearing it would lead to terror attacks? The Hague's jurists may recall the 2015 murder of Alberto Nisman, the Argentinian prosecutor investigating Iran's 1994 bombing of a Jewish centre in Buenos Aires.

Also, Kontorovich argued, speaking out wouldn't necessarily change Iran's conduct:

> After massacring thousands of their own people in response to this year's protests, Tehran's leaders will do whatever they can to survive. But the court's irrelevance here also demonstrates its structural flaws. It can at most deter liberal democracies, thus tilting the playing field against such states when they confront despotic regimes.

I would add a third reason. When it comes to running an organisation, two heads are usually worse than one. A jobshare can work at some levels of a structure if those sharing the post can establish a close working relationship with each other. But giving two individuals equal responsibility for the top job is not usually a recipe for decisive management.

Jurisdiction

In 2000, Iran signed the treaty under which the ICC had been established in Rome two years earlier. It was perhaps on that basis that Iran was allowed to address the states parties to the Rome statute at their annual meeting last December and solemnly pledge its commitment to "effective prosecution of perpetrators of the most serious crimes of concern to the international community".

But signing a treaty does not make it binding: Iran has never ratified or become a party to the Rome statute. How then can the ICC claim jurisdiction over some of the war crimes Iran has committed during the current conflict?

Under article 12 of the Rome statute, the ICC may exercise its jurisdiction if "the state on the territory of which the conduct in question occurred" is a party to the statute. Palestine has been a party since 2015. And its territory, according to a majority ruling by the court in 2021, "extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem".

Under article 8 of the statute, "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" is a war crime.

In a letter to Iran's UN ambassador on 30 March, the campaign group Human Rights Watch accused Iran of "strikes on Israel using internationally banned cluster munitions". It reminded Iran that the laws of war prohibit reprisal attacks against civilians and civilian objects. "The principle of non-reciprocity is foundational," said Human Rights Watch: "no violation by one party justifies a violation by another".

Amnesty International said last week that a missile strike by Iran that killed nine civilians in central Israel on 1 March "must be investigated as a war crime". A senior research director at the campaign group said that the missile used by Iran was "wildly inaccurate and carries a massive warhead, making it completely inappropriate for use in densely populated civilian areas".

Crucially, attacks such as these have not been confined to areas within Israel's pre-1967 borders. On 16 March, Reuters quoted the Israeli police as saying that shrapnel from ballistic missiles fired by Iran, and debris from the Israeli interceptors that shot them down, had fallen around Jerusalem's Old City and some of its most sacred Christian, Muslim and Jewish sites.

On 18 March, three Palestinian women were killed and eight more injured when a beauty salon in the town of Beit Awwa, near Hebron in the West Bank, was hit during an Iranian missile attack. The Israeli military told the BBC the women were killed "by a direct hit from a cluster munition missile". The Palestinian Red Crescent Society said there was a "direct impact of missile shrapnel".

There have been frequent missile attacks on other towns in the West Bank, according to local residents. Most have been intercepted but that does not make them lawful — or stop them being lethal.

Needless to say, the United States and Israel have also been accused of violating international humanitarian law during the current phase of the conflict. Until now, most of these allegations involve targeting errors, strikes on dual-use infrastructure and political rhetoric — some of President Trump's recent remarks being particularly egregious. Alleged war crimes should certainly be investigated by the US and Israeli governments. But they are not a matter for the ICC because neither Iran, nor Israel nor the US is a party to the court.

So far I have been talking about *jus in bello*, law governing the conduct of hostilities. Concerns were expressed just over a month ago about *jus ad bellum*, the legal justification for US and Israeli strikes on Iran.

Jus ad bellum

Shortly before the strikes were launched on 28 February, I tried asking the attorney general Lord Hermer KC whether the UK government believed that military action could be justified under the principle of anticipatory self-defence.

Readers will recall that I didn't get very far with that. But Hermer was more forthcoming a month later. The government's position, he said, was "no to an offensive war; yes to defending ourselves and our allies from wanton and indiscriminate Iranian retaliation and escalation".

His Conservative predecessor Dominic Grieve KC told me he had seen no evidence that Iran was weeks away from acquiring unimpeded ability to launch nuclear strikes against Israel and its allies, as the US and Israel believed. But Grieve accepted that "the repeated threats of Iran against

Israel that have been going on for a long time to destroy it may well provide a legitimate basis for a *casus belli* on the Israelis' part".

That's certainly the view taken in Israel. On 4 March, the Israel Defence Forces said that the current military operation was

> part of an armed conflict that Iran initiated and has waged for years through a sustained pattern of direct and proxy-based armed attacks against Israel. This conduct has been accompanied by repeated public statements by senior Iranian officials expressing the intent to destroy the State of Israel.

What we are talking about here is the "inherent right of individual or collective self-defence", recognised by article 51 of the United Nations charter as a justification for military action. All this was set out very clearly by the barrister Natasha Hausdorff in an interview a month ago with the redoubtable campaigner Hillel Neuer.

The rules-based international order

The robust, real-world approach taken by lawyers such as Kontorovich and Hausdorff — which strikes me as entirely persuasive given the existential threat posed by Iran — has been questioned by other international lawyers, including some in Israel. They are anxious to preserve a rules-based order, however fractured, believing it better than Trump's "might is right" approach to international law.

Professor Yuval Shany, who holds the Hersch Lauterpacht chair in international law at the Hebrew University of Jerusalem, and Professor Amichai Cohen, a senior fellow at the Israel Democracy Institute, expressed their concern in an article for the Just Security website published on 6 March.

Trying to understand the gap that opened up at the beginning of last month between most international lawyers — who regarded US and Israeli strikes against Iran as going beyond permissible self-defence — and several European leaders, who had initially supported the US and Israeli strikes on Iran, they wrote this:

> If international law norms and institutions cannot deliver peace, security and justice, then it is not surprising that they are increasingly regarded as useless — and, at times, counter-productive. Indeed, one could suggest that had the UN Security Council acted diligently against the Iranian regime's long-standing policy of pursuing non-conventional weapons, exporting terrorism and creating a "ring of fire" around Israel, the attacks against Iran would have never taken place…
>
> While we agree that the rules-based international order is in deep trouble for some of the reasons mentioned above, we also believe that the forgiving approach taken by large parts of the international community toward Operation Epic Fury cannot be explained only by reference to cynical global power calculations and a reluctance on the part of world leaders to upset the US president (although that may be part of the story as well).
>
> Rather, it appears to us that the Iranian regime ceased to be considered, in the eyes of many observers, a legitimate international actor after it brutally massacred many thousands of anti-regime protesters in January 2026 — international crimes which have been condemned broadly (but not universally). What's more, Iran's threat to retaliate against its neighbours if attacked (a threat which it promptly acted upon after Operation Epic Fury commenced) further eroded its international legitimacy.
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> These perceived violations of international law by Iran… have consolidated international positions that the Iranian regime constitutes an unacceptable threat to security in the region, as well as

> a danger to its own citizens. This arguably led the president of the European Parliament, Roberta Metsola, to state that: "international law is sacred, but it cannot be used to defend or justify a bloody dictatorship like Iran, which kills its own people and destabilises the entire region."
>
> Such perceptions pile upon long-standing concerns about political repression in Iran, and the threat it poses to the entire Middle East through its efforts to procure nuclear weapons, to export terrorism, and to develop and deploy an army of proxies.

Shany and Cohen suggest we may be returning to the "illegal but legitimate" approach to the use of force. The best-known example of this was Tony Blair's speech in Chicago at the beginning of the Kosovo war, where the prime minister set out the conditions under which Britain was prepared to use force for humanitarian purposes. The authors take comfort from the view that this is a flexible approach to international law rather than a wholesale repudiation of it.

Arguably, they say, "the paralysis of the Security Council and its inability to deal with threats such as those generated by Iran should have resulted in the emergence of a more flexible and expansive interpretation of what constitutes an armed attack, and a more liberal right to self-defence under article 51, adapting legal doctrine to geopolitical realities and to extreme threats. But the trajectory of international lawyers and international law institutions seems to have been running mostly in the opposite direction."

Calling for a more pragmatic approach by the international legal community, Shany and Cohen rightly conclude that "once international lawyers and institutions stop engaging seriously and professionally in problem-solving and turn to political grandstanding or lecturing states on how to behave — without offering them credible practical solutions to their actual and acute problems — they bring the whole field into disrepute and, ultimately, irrelevance."

Karim Khan KC

Bringing the whole field of international criminal law into disrepute is the charge now faced by the International Criminal Court. It has shown itself unable to deal with the most serious allegations against its most senior non-judicial staff member, leaving the court functioning well below par for a period of almost two years.

According to a report in the Wall Street Journal on 10 May 2025 — covered here at the time, a woman working in the prosecutor's office broke down in tears at work on 29 April 2024, telling Thomas Lynch, an American lawyer who was a close adviser to the prosecutor, that Khan had been sexually abusing her for a number of months and that she couldn't take it any more.

Lynch and two other aides were said by the WSJ to have confronted Khan at his home three days later. "Khan responded that he would have to resign, according to people familiar with the conversation, before adding: 'But then people will think I'm running away from Palestine.'"

According to the WSJ, Lynch alleges that Khan retaliated against him by moving him to a less important role.

The alleged victim was reluctant to speak to internal investigators and it was not until 11 November 2024 that the ICC's member states announced an external investigation.

Six months into the investigation by the United Nations Office of Internal Oversight Services, Khan announced that he would take leave of absence from his post until it was over.

On 11 December 2025, 13 months after the investigation had been announced, investigators finally delivered their report to representatives of the states parties. You might then have expected some sort of disciplinary hearing. An independent panel might have been set up to consider the available evidence, receive legal submissions, hear from

witnesses and recommend whether the case against Khan justified disciplinary action.

The judicial panel

But none of that happened. Päivi Kaukoranta, president of the Assembly of States Parties, simply sent the investigators' report off to what she and her senior colleagues described as a "panel of judicial experts".

We have no idea who these experts are (see update below timed 0730). They may or may not have expertise in employment law. For all we know, they may be judges at the ICC who have worked with Khan in the past and believe the court cannot afford to lose him. But a decision by a judge — whether to have corn flakes or porridge for breakfast, whether to support Farage or Polanski for prime minister — is not always a judicial decision. However distinguished the panel members may be as judges, they cannot have taken a *judicial* decision without first hearing evidence and argument from both sides.

According to the news website Middle East Eye, the judicial panel's role was to provide the states parties with independent legal advice, based on the facts presented in the investigators' report, on whether Khan has committed serious misconduct, less serious misconduct or no misconduct at all. He has strenuously denied all allegations.

If that's correct, the question panel members should have asked themselves was: "if the allegations in the report can be proved, would they amount to misconduct?" In fact, the judges appear to have answered a completely different question.

As Middle East Eye reported on 21 March:

> The unanimous conclusion of the judges is that the findings of the report "do not establish any misconduct or breach of duty," according to two

> diplomatic sources who read the report and two other diplomatic sources briefed about it.
>
> "The panel is unanimously of the opinion that the factual findings by [the Office of Internal Oversight Services] do not establish misconduct or breach of duty under the relevant framework," the panel's report concluded, according to the sources.

The standard of proof applied was "beyond reasonable doubt", Middle East Eye added, without explaining why the criminal standard was used.

Fortunately, that was not the end of the matter. The judges' report went back to the state parties' bureau, a representative body comprising the president, two vice-presidents and 18 other members. On 23 March, the president issued a rare statement. Expressing concern at recent media reporting, Kaukoranta said:

> The disciplinary process before the bureau is ongoing and remains confidential. No decisions have been taken, and no weight should be given to or conclusions drawn from media speculations.
>
> Currently, the bureau is considering the investigative report of the Office of Internal Oversight Services together with the advisory report of the ad hoc panel of independent judicial experts pursuant to the bureau's responsibility as the competent decision-maker and consistent with the legal framework of the court.
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> The matters are complex and the bureau is working diligently to make its decision in a proper manner and without delay, with full respect for the due process rights and privacy of all persons affected.

Back in the dock

Last week, Matthew Dalton of the Wall Street Journal had another scoop. The bureau had voted on 1 April, he reported later that day, to move ahead with disciplinary proceedings.

Although the panel of three judges had found that evidence gathered by the UN investigators was insufficient to establish the truth of the allegations "beyond a reasonable doubt", Dalton reported, the investigators themselves found that there was a "factual basis" to allegations of sexual misconduct made against Khan by a female assistant and that witness accounts of the victim "lend support to her claims". According to a summary he had seen, the report also found evidence that Khan retaliated against two officials who first reported the woman's allegations to court oversight bodies.

Dalton also reported that officials from the prosecutor's office regarded the UN investigators' findings as "incompatible with continued confidence in the prosecutor's leadership". They also questioned the un-named judges' reliance on the criminal standard of proof.

Middle East Eye reported the following day that the bureau had voted by 15 votes to four, with two abstentions, to continue with the disciplinary process. The four countries that supported the judicial panel — and therefore Khan — were South Africa, Kenya, Senegal and Sierra Leone.

Khan's response

After his appointment in 2021, Khan aspired to the moral high ground. Referring to an independent report the previous year that had revealed widespread examples of bullying, sexual harassment, incompetence and inappropriate judicial inducements at the ICC, Khan said there were lessons to be learned:

> In terms of the working culture of the office, it should be absolutely unacceptable and offensive… to allow racism or sexism or sexual

> harassment or abuse to take place. And yet this is a finding that the independent expert reports have mentioned…
>
> We must make sure that this is a place in which the highest ethical and moral standards are not just spoken about when we're pointing the finger outside. It's something that we need to improve inside.

That being the case, you would expect Khan to resign in the light of the UN investigators' report — whether he accepts their findings or not — so that the ICC can move on and begin the challenging task of finding his successor.

Instead, the prosecutor issued a lengthy statement, arguing that the allegations of sexual misconduct against him were not included in the investigators' "137 actual findings" and doubting that the judicial panel would have found against him even on the balance of probabilities.

The statement was circulated on X, by his solicitor Tayab Ali, a frequent user of social media.

It said:

> It is alarming, and places the bureau outside of the law that governs it, if political representatives have sought to substitute their own assessment for that of an eminent independent judicial panel. That panel, comprising three highly distinguished international judges and appointed by the bureau itself, reviewed the entirety of the evidential record over a period of three months and reached a unanimous and unequivocal conclusion: that the material does not establish any misconduct or breach of duty of any kind.
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> That conclusion was reached applying the applicable standard of proof and the same legal framework used in comparable proceedings, as stipulated by the bureau itself. Given the paucity of the underlying

evidence, we are far from convinced that a lower standard of proof would have yielded a different outcome.

By contrast, the investigators' report of the Office of Internal Oversight Services (OIOS), which was reviewed in full by the judicial panel together with all the underlying evidential material, did not make determinative findings of any misconduct or breach of duty within their 137 actual findings. It compiled material, including allegations, which required legal evaluation.

As the judicial panel made abundantly clear, there were no findings by OIOS against Mr. Khan. The judicial panel explained that a finding is not the repetition of an allegation or a reference to evidence or information; it is the result of subjecting that material to rigorous scrutiny and legal analysis. That is precisely what the judicial panel undertook.

Contrary to what is being reported, there are no witness accounts to corroborate these unsubstantiated allegations; to the contrary, the independent judicial panel identified contradictory evidence. Contrary to reports, neither the OIOS nor the judicial panel made any findings of retaliation against any staff.

It is also necessary to address the circulation by the Bureau of the "OIOS summary" document prepared months after the underlying report. That summary is not accepted by the prosecutor as fair or accurate. It does not reflect the definitive report and risks mischaracterising both the evidential position and the investigative conclusions.

There is a fundamental distinction between investigative material and a judicial determination. Any process which treats them as equivalent departs from basic legal principle. The panel's report, based on a

> detailed review of the evidence and resulting in a clear, reasoned, and unanimous decision, should properly have guided the bureau and led to the closure of this matter. An investigator's report does not have the same weight as a judicial panel finding in any rule-of-law system.
>
> If it is the case that this conclusion has instead been set aside, it raises cogent and troubling questions about whether political considerations have been allowed to displace legal judgment. Any such outcome would risk presenting what is, in substance, a political determination as if it were a factual one.
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> The prosecutor has consistently denied any wrongdoing or any misconduct of any kind. The prosecutor rejects any politicisation of this process and will take all necessary steps to vindicate the judicial panel's clear and unanimous findings, including by formally challenging any such decision before the Assembly of States Parties.

What next?

The prosecutor has a month to respond. If the bureau is unpersuaded, he says he will demand a vote from all 125 members of the assembly. They will no doubt expect to see the full UN investigators' report but they are likely to vote along political lines, as states generally do at international bodies.

Insiders believe Khan will eventually secure a majority and insist on returning to work. But at what cost to international criminal justice?

Update 0730

A reader has alerted me to a report published by the New York Times on 25 March. It says:

> According to the summary included in the judges' report, the UN investigation found evidence that Mr. Khan had "non-consensual sexual contact" with a junior employee, and that he retaliated against

two other employees who reported her allegations to the court after she confided in them.

The panel was made up of Paul Lemmens, a former judge in the Belgian Council of State and the European Court of Human Rights; Seymour Panton, retired president of the Court of Appeal of Jamaica; and Leona Theron, a judge of the Constitutional Court of South Africa.

They expressed frustration with the quality of the UN investigators' work, saying that their failure to make determinations about witnesses' credibility had left "the panel in a fog of factual uncertainty".

"They did not indicate which witnesses' testimonies were found credible, and which ones were rejected," the judges said. "They did not resolve narrative inconsistencies and discrepancies, did not weigh inculpatory against exculpatory materials, and did not thoroughly test witnesses' motive or bias."

The outstanding questions "do not disprove the allegations of misconduct," the judges said, but they limited the facts they could use to reach a judgment.

I was not aware of this when I argued earlier in this piece that not every decision taken by a judge is a judicial decision. The view I expressed — that the evidence gathered by the UN investigators should have been tested in some form of judicial process — is supported by the comments attributed to these former judges.

It is extraordinary that a court, of all institutions, should have adopted a procedure that is bound to obfuscate rather than elucidate.

Khan's claim that that the investigators' findings have been subjected to "rigorous scrutiny and legal analysis" is true as far as it goes. But what he

failed to add is that the former judges were unable to establish the facts on the only material they were allowed to see.

He will recall from his time at the Crown Prosecution Service that cases were regularly dropped or dismissed for lack of evidence. “Just because we can’t prove it,” he will have told complainants, “it doesn’t mean they didn’t do it.” That’s why juries find defendants “not guilty” — never “innocent”.

Instead of putting Khan’s future to a politicised vote, the states parties that make up the bureau should refer the two reports and Khan’s response to a panel that can examine the evidence and reach a conclusion. That’s what courts do.

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