

---

# Commentary

## Putting Capitalism on Trial at the ICC

Walter Olson February 8, 2013

---

Sometimes you have to wonder whether the editors of the New York Times have a secret wish to sabotage the causes they promote.

Consider the International Criminal Court, the controversial tribunal set up as part of the United Nations human rights system. For years, the Times has promoted the ICC as a modest, last-resort, long-overdue prosecutor of such heinous offenses as war crimes and genocide.

For just as long, ICC skeptics have been warning that the Hague-based tribunal will not always stay confined to its original jurisdiction and will someday seek to prosecute a wider class of less obviously atrocious offenses. Some advocates might even try to turn the court into a roving tribunal mounting show trials against the hated Western power structure. The Times has always dismissed such worries as groundless paranoia.

So what turned up in the Times on Wednesday of last week? An op-ed demanding that the ICC be given broad new power to prosecute business people and corporations for taking part in “a vast and unregulated system of extractive capitalism.” “Treat Greed in Africa as a War Crime” blared the headline.

In the op-ed, Yale anthropology professor Kamari Maxine Clarke itemizes a varied list of offenders she seems to think should face ICC prosecution. Chocolate companies based in the West, for example, buy cacao from African farmers so poor that they have their small children work on the crop. The Chinese national oil enterprise plays footsie with the regime in Sudan so as to preserve its favored position. (Yes, in Times-land you can be a Communist state-owned enterprise colluding with another authoritarian government and still count as a representative of unregulated capitalism.) Professor Clarke also thinks the ICC should step in where a multinational enterprise did get punished for misconduct, but should have been punished more. Thus, in one widely noted case where a shipping firm allowed dangerous wastes to be disposed of improperly in West Africa, the firm paid more than \$200 million in fines and

compensation and two of its employees were sentenced to long prison terms, but critics say the penalties should have been set higher than that. So call in the ICC prosecutors!

Clarke appears to accept without question the various charges of abuse against global business that circulate among cause groups in what is called the human rights community. One complicating factor is that when such complaints are brought before legal systems that accord due process to both sides, we very often discover exaggerations, contradictions or downright inventions in the original sensational claims. Last week a Dutch court threw out much of a highly-publicized complaint charging Shell with oil pollution in Nigeria. At one point in discussing the chocolate controversy, Professor Clarke recites the contentions of a U.S.-based class-action law firm. Is it necessary to point out that such allegations, levied by firms that face little or no downward risk if their charges don't pan out, make a doubtful basis for criminal prosecution?

What is certain to happen, if the ICC gains an expansion of authority along the lines Professor Clarke recommends, is that more businesses will be hauled into the dock as a part of what has been called "lawfare," the use of human rights complaints to provide leverage in the pursuit of international politics. In one of the best-known episodes along these lines, activist lawyers went after Caterpillar Tractor for having sold tractors to the Israeli government, which thus supposedly made the company legally at fault for the bulldozer death of pro-Palestinian protester Rachel Corrie. The suit failed as a legal matter, but might have succeeded in raising the perceived cost of being an American firm willing to trade with Israel.

No doubt some Times readers nodded in approval at Professor Clarke's argument. But others, I suspect, passed the paper to colleagues with a comment like, "See, I told you the ICC was a bad idea."