



# THE LUTHERAN WORLD FEDERATION

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General Secretariat – Office for International Affairs and Human Rights

## **GLOBAL GOVERNANCE: INTERNATIONAL LAW ON HUMAN RIGHTS AND THE LIABILITY OF MULTINATIONAL CORPORATIONS**

International seminar organized by the EAD/Evangelical Academy Bad Boll, Germany, and IRENE, The Netherlands  
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## **HUMAN RIGHTS WITHIN THE WTO FRAMEWORK**

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### **A DIALOGUE OF THE DEAF**

#### **between the WTO**

The *Parties* to this Agreement... [recognize] that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...

**(Preamble, Agreement Establishing the World Trade Organization, done at Marrakesh, 15 April 1994)**

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question....

**(WTO Singapore Ministerial Declaration, adopted 13 December 1996)**

International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates....

We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.... We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements....

We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization....

We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines....

We instruct the Council for TRIPS ... to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1....

**(WTO Doha Ministerial Declaration, adopted 14 November 2001)**

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## and the international human rights mechanisms

[T]he realization of the human rights and fundamental freedoms described in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other international and regional human rights instruments is the first and most fundamental responsibility and objective of States in all areas of governance and development....

**(UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 1998/12: 'Human rights as the primary objective of trade, investment and financial policy')**

[T]he WTO contributes significantly to and is part of the process of global governance reform. This reform must be driven by a concern for the individual and not by purely macroeconomic considerations alone. Human rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors.

The Committee recognizes the wealth-generating potential of trade liberalization, but it is also aware that liberalization in trade, investment and finance does not necessarily create and lead to a favourable environment for the realization of economic, social and cultural rights. Trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression. ...

**(Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization (Seattle, 30 November to 3 December 1999) : . 26/11/99. E/C.12/1999/9)**

[T]he [WTO] has extended its purview to encompass additional areas beyond what could justifiably be described as within its mandate. Furthermore, even its purely trade and commerce activities have serious human rights implications. This is compounded by the fact that the founding instruments of WTO make scant (indeed only oblique) reference to the principles of human rights. The net result is that for certain sectors of humanity - particularly the developing countries of the South - the WTO is a veritable nightmare.

**(Preliminary report on 'Globalization and its impact on the full enjoyment of human rights', UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/13)**

[S]ince the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other;

**UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2000/7: 'Intellectual property rights and human rights')**

*The Commission ... Recognizes* that access to medication in the context of pandemics such as HIV/AIDS is one fundamental element for achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health ... *calls upon* States, at the international level, to take steps, individually and/or through international cooperation, in accordance with applicable international law, including international agreements acceded to, such as: ...

(b) To ensure that their actions as members of international organizations take due account of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and that the application of international agreements is supportive of public health policies which promote broad access to safe, effective and affordable preventive, curative or palliative pharmaceuticals and medical technologies....

**(UN Commission on Human Rights, resolution 2001/33: 'Access to medication in the context of pandemics such as HIV/AIDS')**

*The Sub-Commission ... Affirming* the fundamental importance of the delivery of basic services, particularly in the areas of health and education, as a means of promoting the realization of human rights ... *Calls upon* Governments and international economic policy forums actively to ensure that, in the formulation, interpretation and implementation of policies in relation to the liberalization of trade in services, the liberalization of trade in services does not negatively impact on the enjoyment of human rights by all persons without discrimination....

**UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/4: 'Liberalization of trade in services, and human rights')**

*The Sub-Commission ... Encourages* the Special Rapporteur on the right to food to explore, within his mandate, the implications for the realization of the right to food of liberalization of the international trade in agricultural products, particularly in the framework of the Agreement on Agriculture of the World Trade Organization....

**UN Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/5: 'Globalization and its impact on the full enjoyment of all human rights')**

## THE INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL TRADE REGIMES: A COMMON HERITAGE?

### Historical/political context

Great Depression; Second World War.

UN Charter, 26 June 1945

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED  
to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,  
and  
to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and ...  
to promote social progress and better standards of life in larger freedom, ...

Article 1  
The purposes of the United Nations are:  
To maintain international peace and security ...;  
To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...;  
To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; ...

Article 55  
With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:  
a. higher standards of living, full employment, and conditions of economic and social progress and development;  
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and  
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Universal Declaration on Human Rights (UDHR), 10 December 1948.

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,  
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,  
Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,  
Whereas it is essential to promote the development of friendly relations between nations...

General Agreement on Tariffs and Trade (GATT), 30 October 1947

“To a great extent, the rationale for the creation of the GATT in 1947 was to prevent a repeat of the trade wars of the 1930s, not to mention the world war that followed.” [Hoekman & Kostecki, The Political Economy of the World Trading System 2 (1995)]

## CONCEPTUAL CONNECTIONS / DISCONNECTIONS

“Human rights and liberal trade rules (including WTO rules) are based on the same values: individual freedom and responsibility (e.g. to adjust to competition); non-discrimination; rule of law; access to courts and adjudication of disputes; promotion of social welfare through peaceful cooperation among free citizens; parliamentary approval of national and international rules.”  
[Petersmann, E-U, *The WTO Constitution and Human Rights*, Journal of International Economic Law (2000) 19]

- *The principle of non-discrimination*  
(‘Most favoured nation’ and ‘national treatment’ principles vs. human rights concept of non-discrimination)
- *‘Deregulatory’ roles of international trade law and international human rights law*  
(Neither regime exclusively deregulatory. Active government intervention also required.)
- *The ‘trickle down’ theory: Increased international trade increases social welfare*  
(‘Trickle down’ theory vs. reality of rising inequalities.)

## DIVERGING PATHS

- *International Trade Organization (ITO) to GATT to WTO*
  - Emphasis in draft ITO Charter on objective of full employment
  - GATT as a provisional agreement, and as an *ad hoc* institution
  - Establishment of WTO in 1995, with GATT as centrepiece of the ‘WTO agreements’
- *Tariffs to TRIPS*
  - Original focus of GATT on reduction of tariff barriers
  - Subsequent shift of emphasis to non-tariff barriers, and to new fields (TRIPS, TRIMS, GATS, Agreement on Agriculture etc.)
- *Isolationism of WTO law, policy and practice*
  - ‘Social Clause’ debate; Singapore Ministerial Declaration
  - Isolationism in dispute settlement
  - Role of developing countries
- *Isolationism in international human rights discourse*

## HUMAN RIGHTS: RELEVANT PRINCIPLES

- *Obligation*
    - Human rights law is binding international law (treaty law and customary law).
    - Brings the force of legal obligation to objectives that might otherwise be treated as mere policy options.
  - *Universality*
    - All people are entitled to all human rights. No-one's basic human rights should be abrogated in the process of economic globalization.
    - Overwhelming majority of the international community are party to the major international human rights treaties (e.g. ICESCR 145 states parties – including over 110 of the WTO's approx. 140 members; ICCPR 147 states parties).
  - *Indivisibility*
    - Human rights include economic social and cultural (ESC) rights as well as civil and political (CP) rights, and these categories are and always have been indivisible components of the structure of modern international HR law.
    - 'Right to development': defines development in terms of the realization of all human rights – CP and ESC rights.
  - *Progressive realization of ESC Rights*
    - Art. 2(1) ICESCR: obligation to take steps with a view to achieving progressively the full realization of the rights in the ICESCR.
    - Retrogression = violation.
  - *International cooperation*
    - Art. 2(1) ICESCR: also emphasizes that international cooperation an important element of the state obligation to take steps for the progressive realization of ESC rights.
    - Implications for the formulation of national positions in international economic forums?
- Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. (UDHR art. 28)
- States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development... As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.  
(Declaration on the Right to Development, art. 4(1) and (2))
- *Primacy?*
    - *Jus cogens* / Peremptory norms?
    - Vienna Declaration and Programme of Action: "protection and promotion [of human rights] is the

first responsibility of Governments”.

- Primacy vs. relevance

## **HUMAN RIGHTS ENTRY POINTS IN THE WTO**

- *Preamble to the Agreement Establishing the World Trade Organization*

The *Parties* to this Agreement... [recognize] that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...

- Close connection between WTO objectives in preamble and human rights obligations (especially ESC rights).

- *GATT article XX: General exceptions*

Some of the article XX ‘general exceptions’ with greatest potential relevance to human rights relate to measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ...
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- ...
- (i) involving restrictions on exports of domestic materials necessary to ensure the essential quantities of such materials to a domestic processing industry during periods when the domestic price for such materials is held below the world price as part of a government stabilization plan...;
- (j) essential to the acquisition or distribution of products in general or local short supply....”

- Potential relevance of some of the Article XX exceptions to human rights concerns.
- BUT restrictive interpretations.
- ALSO high potential for misuse for protectionist purposes
- AND in any event result in the imposition of trade sanctions (with negative effects for population in target country)

- *GATT article XXI: Security exceptions*

- Allows measures which a country considers necessary relating to its essential security interests, concerning fissionable materials, or traffic in arms, ammunition etc.
- Also provides an exception for measures taken pursuant to a country's obligations under the UN Charter for the maintenance of international peace and security (i.e. trade controls mandated by the UN Security Council).
- BUT also results in the imposition of trade sanctions (with negative effects for population in target country).

- *Definition of ‘like product’: PPMs issue*

- Processes and production methods (e.g. slave labour) to be taken into account in determining whether 'like product', or only physical characteristics?

It is often claimed that the GATT prohibits members from regulating access of imports based on the manner in which those products have been produced, even if such regulations are applied equally to domestic products. However, this view is inconsistent with a close analysis of the jurisprudence, despite its presence in two notorious panel rulings, which were not adopted as legally binding by the GATT membership. The correct reading of the GATT text would permit a country to impose conditions on imports related to the labour practices involved in their production.  
**Howse, R. and Mutua, M. *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000) p.5**

- *Agreement on Trade-Related Intellectual Property Rights (TRIPS)*

- Article 15 (1) (c) ICESCR: Right to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" = a human right to intellectual property?
- Cf. Article 15 (1) (b) ICESCR: Right to "enjoy the benefits of scientific progress and its applications".
- UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2000/7

...since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.

**UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2000/7**

- Concerns regarding effect of TRIPS (on food security, access to pharmaceuticals, traditional knowledge and cultural values) closely related to human rights issues.
- Review of article 27.3(b) (containing requirement for WTO members to provide IP protection for new plant varieties)

→ See resolutions 2000/7 and 2001/21 (on 'Intellectual property and human rights'), UN Sub-Commission on the Promotion and Protection of Human Rights; report by the High Commissioner on Human Rights on 'The impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on human rights' (E/CN.4/Sub.2/2001/13).

- *General Agreement on Trade in Services (GATS)*

- GATS covers all services (including services directly relevant to realization of key human rights such as health and education), EXCEPT those supplied "in the exercise of governmental authority.
- BUT if supply of service "in the exercise of governmental authority" is done on a "commercial basis" or "in competition with one or more service suppliers" (i.e. private sector suppliers of that service), GATS obligations would still apply (i.e. MFN, national treatment, regulatory transparency, specification of 'market access' commitments, progressive liberalization).
- Mode 3: establishment of 'commercial presence' / foreign direct investment
- GATS exceptions (public morals/public order, health, privacy): close connection to human rights interests, BUT interpreted restrictively.
- Possibility of making 'unbound' commitments (i.e. no commitments) with respect to Mode 3 in service sectors vital to national interests and promotion of human rights.

→ See resolution 2001/4 (on 'Liberalization of trade in services, and human rights'), UN Sub-Commission on the Promotion and Protection of Human Rights

- *Agreement on Agriculture (AoA)*

- 'Non-trade concerns': food security - submission by Mauritius

Article 20 [which lays down the principles on which future negotiations on the AoA should be conducted] should be read in conjunction with other parts of the Agreement on Agriculture, mindful of various international commitments. In this context, the following are particularly relevant: the **International Covenant on Economic, Social and Cultural Rights** which emphasises the importance of adequate food supply alongside the continuous improvement of living conditions ....

...The need to improve the standard of living of people is inscribed in the International Covenant on Economic, Social and Cultural Rights of 1966 Article 11, given hereunder, is pertinent to the issues being considered:

- The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, **including adequate food**, clothing and housing, and to the **continuous improvement of living conditions**. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
- The States Parties to the present Covenant, recognizing the fundamental right of everyone **to be free from hunger**, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) **to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;**
  - (b) **taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."**

**Note on Non-Trade Concerns:** Submission to Special Session of the WTO Committee on Agriculture, G/AG/NG/W/36/Rev.1, 9 November 2000

- 'Development Box' proposal: Would allow development policies of least developed countries (LDCs), net food-importing developing countries (NFIDCs) and other developing countries in support of the viability of small scale subsistence farmers, rural poverty alleviation, product diversification, and improvement of export competitiveness.

- *Dispute settlement mechanism*

- WTO law should not be interpreted in 'clinical isolation' from other areas of international law

It is clear from the provisions of the DSU [Dispute Settlement Understanding] and from existing WTO jurisprudence that the WTO is not a closed system that is impervious to other sources of international law. A number of factors support this conclusion. First, the existence of environmental, health, social, security and other exceptions to WTO obligations links the WTO with other systems of law and policy. ...

Second, ... Article 3.2 of the DSU requires the WTO agreements to be interpreted in light of customary rules of interpretation, and the Appellate Body has stated that these agreements must not be interpreted in clinical isolation of public international law. This reference to the massive body of rules existing in public international law cannot be denied.

Third, it can be argued that Article 31 of the Vienna Convention ...in certain cases *requires* any interpretative body, such as panels and the Appellate Body, to use or to take into account outside legal materials when interpreting WTO obligations.

Fourth, the WTO Agreement preamble commits WTO Members to the "optimal use of the world's resources in accordance with the objectives of sustainable development". The objective of sustainable development can only be understood in light of contemporary law and policy that defines and supports this goal. ...

Finally, if interpreted and developed in isolation from the rest of international law, the WTO would risk formal "conflicts" with other international rules, contrary to the general international law presumption against conflicts and for effective interpretation of treaties. It seems clear that this first approach cannot be sustained.

Marceau, G., *A Call for Coherence in International Law : Praises for the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement*, *Journal of World Trade* Vol. 33 No. 5 (1999)

- NGOs may submit *amicus curiae* briefs to Dispute Settlement Panels and the Appellate Body, introducing *inter alia* relevant aspects of international human rights law.

A panel has the discretionary authority either to accept and to consider or to reject information and advice submitted to it, whether requested by a panel or not.

**WTO Appellate Body report on *US-Shrimp*, para 108-10**

We are of the opinion that we have the authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so.

**WTO Appellate Body report on *US-British Steel*, para 42**

- *New possibilities in the Doha Ministerial Declaration?*

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**(WTO Doha Ministerial Declaration, adopted 14 November 2001)**

## **AN ALTERNATIVE APPROACH TO INTEGRATING HUMAN RIGHTS IN THE WTO: HUMAN RIGHTS AS THE PRIMARY OBJECTIVE OF INTERNATIONAL TRADE POLICY**

- Primary entry point presently (potentially) available for human rights in the WTO is through exceptions provisions (especially article XX). Assumes a subordinate role for human rights, in which human rights serve solely as justifications for trade sanctions → counterproductive effects in human rights terms.
- Alternative view: Human rights law, especially economic, social and cultural rights, should provide the foundation, guiding principle and measure of success of economic law and policy. "Human rights as the *primary objective* of trade, investment and financial policy" (UN Sub-Commission on the Promotion and Protection of Human Rights resolution 1998/12)
- Breaking down 'isolationism' and 'frontloading' human rights: Taking human rights obligations into account in the processes of international trade policy formulation.

... the WTO contributes significantly to and is part of the process of global governance reform. This reform must be driven by a concern for the individual and not by purely macroeconomic considerations alone. Human rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors.

The Committee recognizes the wealth-generating potential of trade liberalization, but it is also aware that liberalization in trade, investment and finance does not necessarily create and lead to a favourable environment for the realization of economic, social and cultural rights. Trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression. ...

**Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization (Seattle, 30 November to 3 December 1999) : . 26/11/99. E/C.12/1999/9.**

- Requires coherence at the national level, between applicable human rights obligations (under treaty and customary law) and national policy positions in international economic forums, negotiations and relationships; and decision-making processes which promote such coherence.
- Developing countries need to reflect on how human rights principles can be utilized by them in economic negotiations from the perspective of their own self-interest (e.g. submission by Mauritius in agriculture negotiations).
- Coherence in WTO Dispute Settlement: Continuing to reduce the 'clinical isolationism' of WTO law by taking relevant human rights obligations into account in dispute settlement. Role of NGOs in submission of *amicus curiae* briefs.

## **CONCLUSION**

Within the international trade forums, and particularly the WTO, human rights principles should no longer be seen as the enemies of effective international trade policy, but rather as the guiding principles for international trade policy that actually serves the need of the world's peoples, rather than the greed of a privileged elite.