

# **Chapter 6: Principles of global distributive justice and the HIV/AIDS pandemic: moving beyond Rawls and Buchanan.**

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This is chapter 6 (pp. 84-110) of AA van Niekerk and LM Kopelman (eds.): *Ethics and AIDS in Africa*, Cape Town: David Philip, 2005. 222 pp. (Republished in the USA by Left Coast Press, Walnut Creek, California, 2006). An earlier version of this chapter was published, with the same title, in *South African Journal of Philosophy*, 23(2), 2004: 59-82.

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## 1. Introduction

John Rawls's theory of justice (Rawls 1972) is indisputably the most renowned theory of justice associated with egalitarian sentiments developed in the course of the 20<sup>th</sup> century. Rawls is not a "strict egalitarian" in the sense of someone who argues for the absolutely equal distribution of burdens and benefits in a society. Rawls's theory is more guarded in its claims. His celebrated version of egalitarian justice is: "All social values...are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage". Injustice, in turn, "...is simply inequalities that are not to the benefit of all" (Rawls 1972: 62).

People have a great variety of needs, as well as a great variety of means and backgrounds in terms of which those needs might be addressed and achieved. Rawls's theory focuses on those needs that are essential to people for the sake of successful functioning as a species. The desirability of the most equal possible distribution of the goods fulfilling these needs is a much more pressing requirement of justice. The needs that are absolutely essential in society are, for Rawls, "primary goods". He defines primary goods as "things every rational man is presumed to want...the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth....These are the primary social goods." (Rawls 1972: 62) From "primary social goods", he distinguishes "natural goods". He writes: "Other primary goods such as health and vigor, intelligence and imagination are natural goods; although their possession is influenced by the basic structure, they are not so directly under its control." (Ibid.)

In egalitarian theories of justice, a case is made for as equal a distribution of certain primary and natural goods as is possible. At the same time, the most prominent egalitarian theories take care to avoid claiming that justice in fact requires that all possible societal benefits should be shared equally (Beauchamp & Childress 1994: 339). Although such equal sharing or distribution may sound attractive, such a requirement would fly in the face of real life where the equal distribution of benefits such as intelligence, personal drive or ambition and entrepreneurial skills – all characteristics that significantly contribute to personal fortunes – is clearly not attainable. However, that does not necessarily apply to health care, which is a social benefit that resides considerably more in our power to distribute equitably through external and potentially enforced or enforceable means.

Justice in the provision of health care is broadly what will concern me henceforth in this article. Before I say more about the specific problematic of the article, let me just note in passing that the Principle of Justice has indeed been elevated to one of the four main Principles of Biomedical Ethics espoused by Beauchamp & Childress in a book that has seen five editions<sup>1</sup> and that has attained an almost unprecedented status amongst the textbooks introducing students to the subject all over the world. In fact, the principle, together with Respect for Autonomy, dominates current debates in biomedical ethics. Moreno has pointed out how the Principles of Respect for Autonomy and Justice have in fact overtaken the traditional Hippocratic emphasis on Beneficence and Non-Maleficence as the more conventional principles of biomedical ethics (Moreno 2001). In view of this development, it was to be expected that Rawls's

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<sup>1</sup> My references will mainly be to the 1989 and 1994 editions.

theory of justice would have drawn considerable attention in attempts to give content to conceptions of justice in biomedical ethics.

What will, in particular, interest me in this article, is not so much the traditional applications of Rawls's contribution to issues of justice within single societies. I shall rather focus on the problem of the applicability of Rawls's ideas to the growing interest in developing what might now well be called a "global bioethics". Within the context of this general need for the development of "global bioethics", I shall, in the latter half of the article, specifically concentrate on the question as to whether Rawls's later work helps us to develop principles of distributive justice for such an alleged global bioethics. By "global bioethics" I mean the reflection that has in recent years gone into the question of the injustices pertaining to the massive inequalities of wealth and resources between countries of the developed and developing worlds, and its implications for efforts to provide health care services more equitably to the developing world, particularly in view of the catastrophic dimensions that infectious diseases and other health problems have attained in the developing world over the past few decades.

My plan of action is therefore as follows: Firstly, I shall briefly review the main tenets of Rawls's theory, particularly as it concerns health care as a very important societal need, albeit not a primary, but a "natural" good. In this respect, I shall draw on the work of Norman Daniels that has applied, with certain important revisions, Rawls's theory to the issue of the provision of just health care. Secondly, I shall briefly argue for the necessity of a global approach to biomedical ethics in view of the need for a more equitable provision of health care between developed and developing worlds, drawing on the important work that Solomon R. Benatar and others have in this regard. Thirdly, I shall discuss the main tenets of Rawls's *The Law of Peoples*, the book in which he extrapolated the implications of his theory of justice to the sphere of just international law. I shall also review Alan Buchanan's important criticisms of this Rawlsian enterprise.

Finally, I shall evaluate this debate, arguing that, although I largely agree with Buchanan's identification of the shortcomings in Rawls's *The Law of Peoples*, I would like to add two additional Principles of Global Distributive Justice (PGDJ) to two of those formulated by Buchanan. (I have a problem with Buchanan's third principle, as will be shown.) The relevance and applicability of the first of these additional principles (the need for special measures in cases of catastrophic occurrences) will be fully illustrated by a discussion of aspects of the current HIV/AIDS pandemic in (Southern) Africa. The other emerges from a second problem that I have with Buchanan's otherwise excellent analysis: his tendency, when formulating PGDJ, to concentrate the burden of responsibility implied by these principles entirely to the wealthy "peoples" (Rawls's term) or societies. I therefore argue that this principle involves the responsibility of poor societies to not only be on the receiving end of aid and to bask in continuous entitlements, but to also exert responsible policies that create sustainable conditions for the meaningful redistribution of global wealth and health. I also show how (also the lack of) responses to the HIV/AIDS pandemic on the level of public policy making in the developing world illustrate the relevance and applicability of this principle.

## **2. Rawls and the theory of just intra-societal health care**

The main tenets of Rawls's theory of justice are well known and hardly require extensive repetition.<sup>2</sup> Rawls's basic assumption is that a social arrangement is a communal effort to advance the good of all members of society. Inequalities of birth, natural endowment and historical circumstances are undeserved, and, in a society where the co-operative nature of action to promote justice is taken seriously, every effort should be made to make more equal the unequal situation of people who have been disadvantaged by the mentioned factors (Rawls 1972: 100-108). Advantages that people have over others that are the results of "accidents of biology and history" seem, for Rawls, arbitrary from the moral point of view, and should therefore as far as possible be redressed.<sup>3</sup> "The idea is to redress the bias of contingencies [i.e. the inequalities of birth and natural endowment] in the direction of equality" (Rawls 1972: 100-102).

Another central claim of Rawls (cf. the quote at the beginning of the chapter) is that all vital economic goods and services should be distributed equally, unless their unequal distribution works to everyone in the society's advantage. The distribution of these goods ought to be the result of a social contract to which all that are affected by its contents should contribute equally. How can this contract be set up in a way that will have an equitable outcome for everyone? It is in this respect that Rawls suggests the thought experiment of members of society freely negotiating the position of people accommodated by a future society behind a "veil of ignorance" (Rawls 1972: 136-142). The argument in this respect is that the veil of ignorance will guarantee a process of mutual bargaining that will accomplish two things. First of all, it will maximize the fulfillment of the essential needs of everyone. Behind the veil of ignorance, everyone has a maximum interest to maximize the primary goods available in society in order to protect future society members' vital interests in potentially adverse contexts. Put differently, behind the veil of ignorance there is no vital incentive to negotiate for luxuries that might well be forfeited when other essential needs crop up in real life. Secondly, because no participant in the negotiations behind the veil of ignorance has any idea of what his/her position in society is likely to be (Rawls 1972: 137), there is every incentive to ensure that the position of persons that will be worse off in the actual society will be as tolerable as possible. As Rawls formulates it: "The veil of ignorance makes possible a unanimous choice of a particular conception of justice. Without these limitations on knowledge the bargaining problem of the original position would be hopelessly complicated" (1972: 140).

Health and health care, in the sense of "natural goods" can nevertheless be regarded as an essential need (i.e. a good that ought to be socially allocated and not gained by individual initiative).<sup>4</sup> Clearly not all health needs are equally basic or essential.

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<sup>2</sup> Apart from on Rawls's own work, I draw on the very useful brief exposition of Rawls's position provided by Beauchamp & Childress, 1989: 268-270 and 1994: 339-341.

<sup>3</sup> Rawls formulates two "principles of justice": 1. "Each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others" 2. "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all" (Rawls 1972: 60).

<sup>4</sup> Reasons for "what is so special about health and health care" are eloquently supplied by Daniels, 1985: 1-35. His conclusion is that "we should use impairment of the normal opportunity range as a fairly crude measure of the relative importance of health care needs at the macro level. In general, it will be more important to prevent, cure, or compensate for those disease conditions which involve a

Consensus must be reached in a society about which health needs are essential. Daniels, in his appropriation of Rawls's theory, shows that we have to work with a truncated scale of social goods. Arrangements are just when individuals are guaranteed a reasonable share of essential social goods. These goods constitute, for Daniels, "the relevant, truncated scale for purposes of justice". He argues that happiness is not the immediate object of justice. In the pursuit of justice, individuals maintain a responsibility for the choice of their ends. One could then argue that there is at least no injustice to refrain from providing people with means to reach "extravagant ends" (Daniels 1985: 38).

Health care refers to that category of needs necessary to reach our goals as members of our species, i.e. it belongs to that which is necessary to achieve, restore or maintain adequate ("species-typical") levels of functioning (Beauchamp & Childress 1989: 270). Daniels's application of Rawls's theory therefore implies that each member of society, irrespective of wealth or position, must be, for the sake of justice as fairness, provided with equal access to *adequate* (though obviously, in the light of limits on resources, not *maximal* or the *best available*) levels of health care.

Daniels explores what role health care could play in giving content to the liberal principle of "fair equality of opportunity" that Rawls also wants to accommodate in his theory (see Rawls 1972: 83-90). It is because meeting health care needs has an important effect on the distribution of opportunities of people in society that health care institutions ought to be regulated by a principle of fair equality of opportunity (Daniels 1985: 45). This principle is important because it guards against the futile goal of trying to eliminate or "level" all natural differences between people. It is true that we do not deserve the advantages provided to us by the "natural lottery", e.g. the social (rich parents) and genetic (IQ) advantages bestowed on us by birth. These advantages cannot wholly be allowed to determine opportunity; resources ought to be made available, e.g. through the educational system, to provide fair equality of opportunity (Daniels 1985: 46). Daniel's argument then is that, if it is important to use resources to counter the advantages of opportunity that some have because of the natural lottery, it is equally important to administer resources to counter the natural disadvantages that people have because of their suffering from disease. This does not entail the futile goal of trying to extinguish all differences between people. Writes Daniels: "Health care has normal functioning as its goal: it concentrates on a specific class of obvious disadvantages and tries to eliminate them. This is its limited contribution to guaranteeing fair equality of opportunity" (1985: 46).

Another valuable point made by Daniels in his appropriation of Rawls's theory for defining justice in health care, is to note that Rawls's contractarian theory requires a "thick veil" of ignorance in order to guarantee the impartiality of completely free and equal moral agents. However, in selecting principles to govern health-care resource-allocation decisions, Daniels makes the interesting and, to my mind, valid point that we need a "thinner" veil of ignorance. This is the case because we cannot assume that the negotiations behind the veil of ignorance might be led by the assumption that health care resources in real life will be unlimited. We must know something more about the society in which the participants in the original position will eventually live

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greater curtailment of an individual's share of the normal opportunity range" (Daniels 1985: 35). Or, put in other words, health is important because it is the absence of disease, and diseases are "deviations from the natural functional organization of a typical member of a species" (28).

– in particular its resource limitations (Daniels, 1985: 47). It would make no sense for individuals to negotiate behind the veil of ignorance for benefits in terms of health care that turn out, in real life, to be totally unaffordable. Health simply is one of those current-day societal advantages that cannot, in any society, be available without limitations<sup>5</sup>.

Daniels then goes on to identify four levels at which health care institutions ought to be provided in order to operationalize the original idealization under which Rawls's theory was constructed – this idealization consisting in the ideal to enable normal, fully functioning people to complete their normal lifespan. The four levels are: 1. Preventive health-care institutions that minimize the likelihood of departures from the “normality assumption”, 2. Institutions that deliver personal medical and rehabilitative services that restore normal functioning, 3. Institutions that offer more extended medical and social support services for people who are (moderately) chronically ill or disabled, including the frail elderly, and 4. Institutions that take care of people who are seriously ill in the sense that they cannot be brought closer to the idealization mentioned earlier (terminally ill people and mentally and physically disabled people) (Daniels 1985: 47-48).

These distinctions make a lot of sense. They not only show the variety of institutions that come into play in order to enable people requiring health care to restore their normal functioning. They also provide a scale of preference in the (hopefully exceptional and mostly avoidable) cases where rationing has to be considered. If Rawls's idea that health care ought primarily to restore “species-typical” functioning is to be taken seriously, this demarcation by Daniels at least shows at which level (4 above) rationing, if required, ought firstly to kick in. Whereas, as will soon be apparent, rationing is much less of an issue in the developed world, it is an almost daily occurrence in developing world settings, and has therefore to be taken into account as a possibility when levels of health care provision are considered.

### **3. The need for a global bioethics**

What has been discussed up till now, were the main tenets of Rawls's theory of justice and its applications to *intra-societal* health care provision. This discussion was necessary in order to be reminded of the broad outline of Rawls's theory of justice, as well as of how Daniels's work helps us to apply his broad theory to the issue of justice in the provision of health care. But the discussion up till now had mainly been concerned with health care provision *within a single society*. I have little to add to Daniels's excellent analyses in this regard. What intrigues me, however, is what the implications of the Rawlsian conception of justice might be for problems generated by globalization, and, in particular, how these bear upon the issues pertaining to health

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<sup>5</sup> The limitedness of health care resources is, in spite of the massive imbalances between the North and the South, nevertheless a world-wide phenomenon. It is, for example, estimated that, if “managed care” had not been established in the USA in the early nineties, medical costs would have gone completely out of control. “In the late 1970s and early ‘80s, medical costs were rising at a rate that straight mathematical projection indicated would eventually consume the entire gross national product” (Church 1997:36). The defenders of “managed care” point out that the system in the USA, with all its admitted shortcomings (e.g. the danger that it provides incentives to doctors to treat too few patients) has brought about a very significant decrease of medical costs. In the USA in 1996, medical costs rose by only 2,5%, compared to the 3,3% rise in consumer prices (Ibid.).

care provision on a global scale. I therefore now turn to the global dimensions of bioethics and the questions of justice raised by *inter-societal* health care provision. Before proceeding to the question of the specific relevance of Rawls's work for this aspect, I shall make a few brief remarks about (the need for) global bioethics, and the concomitant questions of justice raised by that need.

Solomon R. Benatar (who has done seminal work in this area in recent years<sup>6</sup>), Daar & Singer, in a recent article (2003), point out how profoundly the world has changed since the birth of modern bioethics. These changes pertain to widening international economic disparities, the emergence of new infectious diseases, new consumption patterns, new wars, advances in science in technology, and many others. One of the important implications of these changes is that bioethics is increasingly challenged to not only interest itself in the "micro-level of inter-personal relationships", but to also concern itself with the "the meso-level of institutions and nations and [with] the macro level of international relations" (Benatar, Daar & Singer 2003: 108). If this happens, a "new mindset" could be promoted that is currently required to improve health and well-being all over the world. The authors emphasize the increasing complexity and interdependence of the world in which we currently live. This growing complexity indicates how narrowly health, human rights and economic opportunities are related. (I shall refer to supporting facts and statistics in the next few paragraphs.) It is a serious question whether the models in terms of which human flourishing has mainly been understood up till the present, particularly in the West, have adequately espoused the value of the dignity of all people and the need to promote that dignity through optimal development, particularly in less privileged environments and societies (Ibid.)

The economic and health-care inequalities between developed and developing countries are truly stupefying. The following facts and statistics are relevant in this regard and starkly illustrate these inequalities. Firstly, we may note the indefensible general income disparities between people in the developed and developing worlds. "At the beginning of the twentieth century, the income of the richest 20 per cent of the world's population was nine times that of the poorest 30 per cent. By 1960, it was 30 times as large.; and since then the gap has widened ever more rapidly to the point where at the end of the [20<sup>th</sup>] century the richest fifth had an income 80 times that of the poorest fifth...Today, 2 billion people live on less than US\$2 per day, and more than a quarter of the world's population lives under conditions of 'absolute poverty'" (Benatar, Daar & Singer 2003: 112). Sub-Saharan Africa generates no more than 1% of the total wealth produced in the world. In fact, in a recent issue of *Time* (3 May 2004: 14), it is reported that there has been a 15% drop in GDP per capita in Sub-Saharan Africa between 1981 and 2001. There has also been a 91% increase in the number of people living on less than \$1 a day in the same region over the same period.

Income disparities between richer and poorer countries are therefore, in spite of inflated political rhetoric at international level in favour of their reduction, as well as initiatives such as the New Partnership for African Development (NEPAD), increasing all the time. The buying power of all the countries south of the Sahara,

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<sup>6</sup> Cf. also Benatar, 2001 and 2002.



except South Africa, in total just about matches that of a country such as Norway<sup>7</sup>. African countries also carry extremely heavy debt burdens – often, as in the case of South Africa, incurred by an illegitimate previous regime. The debt situation in Africa is often described as “the modern (and much more sophisticated) form of slavery”.

Apart from the general disparities of wealth and income, we might next note the extraordinary – in fact stunning – inequalities between developed and developing worlds in terms of health care needs and provision. Life expectancy is, for example, generally regarded as a relatively trustworthy indicator of health status in a society. To illustrate the discrepancy between first and third worlds: in Canada life expectancy is 80 years, whereas in some African countries it is dropping beneath 40.<sup>8</sup>

Spending on health care is probably the most pronounced indicator of inequalities in this regard. The United States spends above 50 per cent (US\$ 1.2 trillion per year) of the total health care expenditure in the world (which is approximately US\$ 2.2 trillion per year). This USA expenditure is in fact on only 5 per cent of the world’s population. Compare that to the fact that government expenditure on health in Sub-Saharan Africa fell from 5.8 per cent to 1.6 per cent of GDP over the period 1980 to 1997 (Benatar, Daar & Singer 2003: 115). Furthermore, “Annual per capita expenditure on health care is less than US\$10 in many African countries, as compared with between US\$ 2000 - \$4200 in industrialized nations” (Benatar 2001: 90).

Not only is there no comparison between the available resources and actual spending on health care between the richer and poorer parts of the world. The inequality in terms of health care provision is succinctly illustrated by a comparison of health care research spending, as well as the priorities that are revealed in the patterns of research spending. Ninety per cent of global expenditure on medical research is on diseases causing 10 per cent of the global burden of disease. Of the 1223 new drugs developed between 1975 and 1997, only 13 per cent were for the treatment of tropical diseases so prevalent in Africa (Benatar, Daar & Singer 2003: 110).

It is indeed a serious ethical question whether these immense inequalities do not compel us to rethink the requirements for human well-being on a global scale. As Benatar argues elsewhere: “Perpetual economic growth for some cannot continue at the expense of others without sacrificing our humanity. The root causes of poverty should be openly acknowledged and studied more seriously, and powerful nations should be required to address these” (Benatar 2001: 91). Although the argument cannot be developed in full here, there is a distinct need to move away from a vision of society which is by and large constituted by individuals who live for the fulfilment of ends that are primarily individual. Our humanity is not only defined by individualist needs<sup>9</sup>. It is also, and, for some definitively, defined by our sense of belonging to a community. (Wo)man is (also) a social animal, as has been pointed out, for the first time, by Aristotle. The point about the communal dimension of the

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<sup>7</sup> Personal communication by Colin McCarthy of the Economics Department, University of Stellenbosch.

<sup>8</sup> In a recent lecture, Alan Whiteside projected that if the AIDS epidemic is not drastically curbed within the next decade, South Africa’s average life expectancy is expected to drop to 35.

<sup>9</sup> For a compelling argument against “atomism” and in favour of the idea that human personhood is constituted by communality, see Taylor 1985, on whose views I gratefully draw for the rest of this paragraph.

human personality is not only the empirical fact that people cannot physically survive on their own. The point is, more in particular, that people only develop their characteristically human capacities in society. As Charles Taylor formulates it: “The claim is that living in society is a necessary condition of the development of rationality...or of becoming a moral agent in the full sense of the term, or of becoming a fully responsible, autonomous being” (Taylor 1985: 191). Outside of society we cannot hope to develop those capacities that make us distinctly human.

It therefore is our dependence upon and our commitment to society that, in an important sense, constitute our moral sense. We are, much more than we would normally like to admit, the keepers of our brothers and sisters. What has happened in the contemporary world, is that our sense of “society” is almost daily transformed as a result of more effective mass communication, advanced means of transport, vanishing traditional (particularly economic) borders, enhanced international awareness and a growing international sense of moral duty and responsibility. We live, as has been argued, in an interdependent world where trade agreements, exchange rates, mobile money markets and international agreements increasingly determine our economic position. Particularly in a context where there is one super-power, closely associating with the eight or ten largest economies in the world, and where their combined buying and selling power dwarfs the economic leverage of the smaller and developing nations, it is imperative that a growing sense of global responsibility for the vulnerable “wretched of the earth” is cultivated. The need for such a responsibility is enhanced by the legacy of the historical colonialism and exploitation to which the developing world has been subjected in the past. As never before, the inequalities of the international situation call for a new international consensus on values that will facilitate the alleviation of the suffering of the destitute and the enhancement of developing nations’ capacity to transform the plight of their suffering masses.

Bioethics therefore has to be reconceived on a global scale. Benatar et al. argue that the first requirement is the development of a “global state of mind” (2003: 129-133). The greatest moral challenge brought forth by globalization is the need to think of humanity in more communitarian terms. Ann Robertson has argued for a new moral language of public health which is informed by the realities of reciprocity and interdependence as we experience them in our time.<sup>10</sup> It even is a question whether too much must be made of reciprocity in this regard. The moral value of community relates back to what the French philosopher and ethicist Emmanuel Levinas calls the unconditional claim that other people make on me in space and time to be available to them and to have their interests (which include their health and general well-being) at heart, irrespective of the question whether they, in their conduct towards me, act reciprocally, i.e. whether they always act morally and take care of my interests. Levinas formulates it in the following way: “[The] intersubjective relation is a non-symmetrical relation. In this sense, I am responsible for the Other without waiting for reciprocity, were I to die for it. Reciprocity is *his* affair. It is precisely insofar as the relationship between the Other and me is not reciprocal that I am subjection to the Other...I am responsible for a total responsibility, which answers all the others and for all in the others, even for their responsibility. The I always has one responsibility *more* than all the others” (Levinas 1985: 98-99, his italics) Accountability towards and responsibility for the other, which also imply accountability and responsibility on

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<sup>10</sup> As discussed by Benatar, Daar & Singer 2003: 129-133.

a global scale, offer a powerful and defensible basis for morality, as well as a perspective that ought to be taken into account in the grounding of a global bioethics.

In addition it must be argued that enlarging our sense of responsibility for fellow human beings in the direst of needs not only requires a heightened sense of altruism. It indeed also implies a more enlightened sense of self-interest. As Benatar argues: “Crucial to a new approach will be the recognition that it is not merely altruism that is called for, but rather a long-term perspective on rational self-interest in an increasingly interdependent world.” (Benatar 2001: 91). Improving the health status of developing countries makes both moral and strategic sense. What is required, is the avoidance of unnecessarily pessimistic or optimistic caricatures about globalization<sup>11</sup>.

Realism that avoids these caricatures is called for. It is a realism that:

- accepts the inevitability of globalization;
- accepts that free markets are the basis of growth in the world economy, but that these markets are often, because of the growth of multinational conglomerates, not free;
- promotes international deliberation in which the nature of the inequalities are recognized and imaginative measures are constructed to alleviate the plight of the worst off, and
- promotes the strengthening of capacity in the developing world to better provide for its own needs.

We might conclude this section with a succinct claim by Benatar et al.: “A social democratic pattern of globalization is considered to require two types of enforceable international agreements: one set to regulate international competition among firms and states so as ‘to yield socially and environmentally desirable outcomes’<sup>12</sup>; another set to redistribute some of the economic gains from globalization towards those who are vulnerable and most in need...Striking a balance between optimism and pessimism will require a platform for dialogue among stakeholders, and a space where people can share different views about globalization. Bioethics offers such a space” (Benatar, Daar & Singer 2003: 135-136).

#### **4. Buchanan on Principles of Global Distributive Justice (PGDJ) in response to Rawls’s *Law of Peoples***

In his book *The Law of Peoples* (1999) Rawls extends his theory of justice to the international situation. Now the issue is no longer what justice means within an individual society, but rather what it means in the situation of the international or global community of states or nations (although, as will become clear, Rawls prefers not to use the terms “state” or “nation”). He argues that, instead of the individuals who, in the “original position”, bargain for a state of just distribution of advantages behind the “veil of ignorance”, the parties responsible for this bargaining in the global situation are the representatives of “peoples”. Rawls comes to the conclusion that the outcome of these negotiations will yield the following eight principles or “laws”:

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<sup>11</sup> For formulations of these caricatures, see Benatar et al. 2003: 134-135.

<sup>12</sup> A quotation from Sandbrook 2000.

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense, but no right to instigate war for reasons other than self-defense.
6. Peoples are to honour human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime (Rawls 1999: 37).

Particularly in view of principles 1, 4 and 5, this theory of Rawls has been suspected of betraying liberalism because it clearly recognizes and respects inegalitarian regimes that do not necessarily honour human rights and that defend their unjust actions in the name of self-determination and the duty of other peoples to not intervene in their internal affairs, very akin to the kind of strategies prevalent in pre-1994 South Africa or in current-day Zimbabwe. The criticism leveled at Rawls in this respect, and with which authors like Allen Buchanan and Darrel Moellendorf (1996) are sympathetic, is the claim that Rawls makes a mistake to fundamentally regard peoples, and not individuals, party to the law suggested by these principles. As Buchanan formulates it: “What this means is that there is a need for principles that track individuals across borders – principles that specify the rights that individuals have irrespective of which society they happen to belong to, and which reflect the independence of individuals from any particular society” (Buchanan 2000: 698). Personally, in view of principles 6-8 [“6. Peoples are to honour human rights; 7. Peoples are to observe certain specified restrictions in the conduct of war; 8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime”], I again am not entirely convinced of this criticism. The criticism seems to suggest that the duty to protect human rights, as called for in principle 6, is set to be at odds with 1 [“Peoples are free and independent, and their freedom and independence are to be respected by other peoples”], 4 [“Peoples are to observe a duty of non-intervention”] and 5 [“Peoples have the right of self-defense, but no right to instigate war for reasons other than self-defense”], and I do not see why that needs to be the case.

Why does Rawls use the term “peoples” and not “states”? “Peoples”, for Rawls, are groups that are united by “common sympathies and a desire to be under the same democratic government” (1999: 24). Of peoples he writes that they, like citizens in a domestic society, are “both reasonable and rational, and their rational conduct, as organized and expressed in their elections and votes...is similarly constrained by their sense of what is reasonable” (1999: 25). Buchanan points out that Rawls uses the term “societies” interchangeably with “peoples”, and understands “peoples” as groups with their own states. There are, however, two differences between peoples and states. Firstly, peoples do not have all the powers of sovereignty traditionally associated with states, and, secondly, whereas states have the right of noninterference in their internal affairs, peoples must meet certain minimal standards in their internal affairs – standards that Rawls might call human rights. (Buchanan 2000: 698-699). Rawls

claims that states do not have a moral character, whereas peoples do. “The term ‘peoples’, then, is meant to emphasize these singular features of peoples as distinct from states, as traditionally conceived, and to highlight their moral character...” (Rawls 1999: 27).

Buchanan argues that he not only agrees with Rawls’s critics that he (Rawls) has overlooked the need for international principles that apply to individuals as individuals, but that, in addition, principles are needed for determining relations between Rawlsian societies or “peoples”, as he calls them (Buchanan 2000: 700). Buchanan argues strongly in favour of the fact that there is a “global basic structure” which, like the domestic basic structure, is a subject of justice because it has significant effects on the prospects of individuals and groups. Buchanan also argues that the populations of states are not “peoples” in Rawls’s sense. They are rather sometimes conflicting collections of “peoples” as well as other groups, and they often only become “peoples”, in Rawls’s sense, after massive and unjustifiable coercion (Buchanan 2000: 700-701).

These last two mentioned facts explain, for Buchanan, two puzzling omissions in Rawls’s Law of Peoples: 1. “the lack of principles of international distributive justice” and 2. “the lack of principles addressing intrastate group conflicts”. (Buchanan 2000: 701). Buchanan goes on to suggest, in an involved argument that I shall not further pursue here, that “Rawls’s Law of Peoples, even if understood as supplying only that part of the moral theory of international law dealing with relations among states, is a set of rules for a vanished Westphalian world<sup>13</sup> and hence is of limited value for our world” (701).

Buchanan shows quite compellingly how Rawls negates the relevance of what Buchanan calls the “global basic structure” in his Law of Peoples. By “global basic structure” Buchanan means “a set of economic and political institutions that has profound and enduring effects on the distribution of burdens and benefits among peoples and individuals around the world” (Buchanan 2000: 705). There is such a structure, as is increasingly argued in a growing international literature.<sup>14</sup> Among the elements of this structure count: regional and international economic agreements, international financial regimes, the increasingly global system of private property rights, and others (Buchanan 2000: 706).

Rawls seems to ignore the existence of such a structure. He claims, for example, that “many societies with unfavourable conditions don’t lack resources. Well-ordered societies can get on with very little; their wealth lies elsewhere; in their political and cultural traditions” (Rawls 1993: 76) And elsewhere: “I would further conjecture that there is no society anywhere in the world – except for the marginal cases – with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered” (Rawls 1999: 108). He refers to Japan as an example of a resource-poor country that is “well-ordered”, and to Argentina as a “resource rich” country that “has serious difficulties”. But that clearly shows that by “resources”

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<sup>13</sup> Buchanan refers, in this respect, to the international legal system that grew out of the Peace of Westphalia in 1648 that ended the Thirty Year European War.

<sup>14</sup> Cf. footnote 11 of Buchanan (2000: 705-706) where a review of this literature is provided. Cf., for example, the works of Gilpin (1987), Hout (1996) and Wallerstein (1974 and 1991).

he means no more than minerals and land – entities that have been proven inadequate in themselves for attaining success in the contemporary global economy.

It is hard to believe that someone who takes careful cognisance of the conditions of success of modern economies and the concurrent inequalities in the current world, as partially indicated earlier in this article, could claim what Rawls is in fact claiming. Take, as example, a country such as South Africa, which is by far the most prosperous in Africa - a country rich in some natural resources (like minerals) although poor in others (such as water). Of South Africa might, in addition be claimed that, although its policies on HIV/AIDS have in the past been disastrous (we turn to these later), it is, economically speaking, arguably the best run (Rawls would say “ordered”) country on the African continent today. That does not, however, mean it that is able to escape the paralyzing manifestations of poverty that seem to be enforced by the global structure on all countries in the developing world.

Poverty can be well demonstrated in the fields of income levels, employment, basic infrastructure, housing and education, expressed in terms of literacy. South Africa, in spite of its current sound economic policies fares quite badly on all of these scores, though it, admittedly, does considerably better than many other countries in the developing world. A few statistics on each of these areas support my claim.

As far as income disparities between rich and poor are concerned, South Africa still has one of the worst records in terms of social indicators. For many years the country’s “Gini coefficient” – a figure between 0 and 1 indicating the rich-poor divide – was the highest in the world (in the vicinity of .65); it has, in recent years, been overtaken by one or two South American economies. About half (44%) of South Africans are regarded as poor. “Poor” in this context refers to an *annual* income of below ZAR10 000 (US\$ 1428) per household of 4.5 people.

Unemployment – a second important indicator of poverty - in South Africa is rife; fewer than 30% of poor working age adults are working in the formal sector of the economy. The same goes for the availability of basic infrastructure in South Africa, although it must be admitted that things in this regard have improved markedly over the past 10 years since democratisation. On the housing front, it is estimated that between 5 and 6 million South Africans live in informal settlements or shanty-towns. Lastly, economic development and wealth creation is to a significant extent dependent on literacy, particularly in view of the need to be able to do skilled, let alone high-skilled labour – so essential for creating economic growth and welfare. The reader is in this respect reminded of the disturbing information on literacy levels in South Africa that I provide in chapter 4.

I therefore tend to agree with Buchanan’s claim that the mere occurrence of “being well-governed” is not, in itself, a guarantee for a decent and worthwhile life for all its members. “A well-governed society might [yet] be seriously disadvantaged by the global structure...The chief point is that, like a domestic global structure, the global basic structure in part determines the prospects not only of individuals but of groups, including peoples in Rawls’s sense. It is therefore unjustifiable to ignore the global basic structure in a moral theory of international law – to proceed either as if societies are economically self-sufficient and distributionally autonomous (so long as they are well-governed) or as if whatever distributional effects the global structure has are

equitable and hence not in need of being addressed by a theory of international distributive justice” (Buchanan 2000: 705, 706).

It therefore makes perfect sense to consider a full range of alternative conceptions of justice for the global basic structure, particularly conceptions of justice that require greater equality. Buchanan argues persuasively that parties who represent peoples would choose principles of justice for the global basic structure (708). This will happen for two reasons. Firstly, such parties will have a serious interest to ensure that the distributional effects of the global basic structure will not impede the capacities of the societies that they represent to achieve their own conception of justice and the good. Secondly, “because the parties in the domestic original position are represented as ‘free and equal’, they will avoid principles that might turn out to assign them to an inferior status. Similarly, the parties to the choice of the Law of Peoples would be concerned to choose principles that would ensure fundamental equality for their societies vis-à-vis other societies.” (Buchanan 2000: 708).

It is therefore clear that Rawls, although he takes care to propose a law of peoples that recognizes and affirms the equality of peoples, and although he remains concerned about such societies’ right to non-interference from others, overlooks one salient possibility. This is that the global basic structure – the nature of which has been described – has the undeniable possibility of undermining the equality of peoples unless it is regulated by principles of distributive justice (Buchanan 2000: 709). Rawls believes that parties who choose the Law of Peoples would not choose such principles because doing so would pose the distinct possibility of imposing liberal principles on non-liberal societies who are nevertheless well governed and ordered – the so-called “decent” societies<sup>15</sup>. Buchanan claims that, in spite of the fact that Rawls formulates principle 8 (“Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime”) of his Law of Peoples, this duty seems to resemble the “imperfect duty of charity rather than a duty of justice”. This is because “there is no indication that this duty of aid is to be understood as the collective responsibility of the society of peoples and no mention of a right on the part of the ‘burdened’ societies’ to receive it.” (Buchanan 2000: 710). It is in setting up these kinds of reproaches against Rawls that it seems to me as if Buchanan is going too far and is reading way too much in what Rawls says. I cannot see why Rawls’s formulation (as quoted) could not be interpreted as a straightforward duty of justice. Why must what Rawls formulates as principle 8 (“Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime”) only be seen as a duty of charity and not a duty of justice? If I have a duty to provide for my child’s education and I am financially and socially in a position to do so, surely my child – the receiver of this benefit – can claim as his right, in terms of the demands of justice, that he receives this education from me?

However, even if Buchanan is right and the duty to which principle 8 refers is not a “duty of justice”, but “merely” a “duty of charity”, he seems to be inclined to disparage the moral worth and force of charity. I argued in section 3 that bioethics ought to exploit its global dimension and implications precisely on the basis of the rediscovery of a global *sensus communis* and the mutual care and responsibility that

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<sup>15</sup> See Rawls 1999: 64-67 for his “two criteria for decent hierarchical societies”.

privileged societies ought to take for the less privileged nations. I see no self-evident reason why the acceptance and execution of a “duty of charity” has less of a moral force than the acceptance and execution of a “duty of justice”. For these reasons, I do not accept Buchanan’s criticism of Rawls’s principle 8 (“Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime”).

Apart from concerns of justice and charity, a powerful case can, of course, also be made for principle 8 on the basis of mere prudence. If large-scale infections occur in a developing country with the overt possibility that the infections might spread to a richer, developed environment or even country, it seems to be in the interest of the rich country to help the poor one, not primarily in order to achieve “justice” or to dish out charity, but because it becomes in the interest – health wise, economically, and otherwise - of the richer country to improve the situation in the poorer country. Pure prudence seems to suggest as much. It is interesting to note that the public health movement in the world gained momentum the moment it became common knowledge that disease is spread through microbial organisms that ignored geographical borders. People now realized that those from poor neighborhoods, for whom they felt little charity earlier (let alone concerns of justice) have become a threat to their own well-being if they are not assisted; prudence prescribed aid.<sup>16</sup>

Buchanan goes on to suggest that, although he does not see it as his task in the article that I am discussing to provide a theory of global distributive justice, the parties formulating the Law of Peoples would come up with at least three types of principles of global distributive justice – principles that go beyond the duty to aid burdened societies. These three principles, according to Buchanan, would be: 1. A principle of global equality of opportunity; 2. A principle of democratic participation in global governance institutions (the United Nations is presumably intended), and 3. A principle designed to limit inequalities of wealth among societies (Buchanan 2000: 711 ff.). In the next section, I evaluate these suggestions and add, discuss and illustrate two of my own

## **5. Two new principles for distributive justice for the Law of Nations**

I think that a very strong case can be made for the first two of these suggested three principles. The global basic structure mentioned earlier is certainly something that has both the potential and actual effect of impeding equality of opportunity between peoples. The growth of the “Asian Tigers” over the past few decades has shown that imaginative investment from the side of the developed world can precipitate significant economic growth and a turnaround in the standard of living of people in societies earlier subjected to abject poverty. Combined with the prevalence and nurturing of a positive work ethic and enhanced levels of productivity, these societies have shown that the promotion of equality of opportunity can have extremely positive results. Argued purely on the basis of the demands of justice, such equality of opportunity would undoubtedly have to be demanded by parties bargaining behind the imagined veil of ignorance when setting up a law of peoples, since the parties would not be aware of the position of relative prosperity that their society would have in the real world.

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<sup>16</sup> This point was suggested to me by Loretta Kopelman.



As far as the principle of democratic participation in global governance institutions is concerned, it is as easy to agree with Buchanan. There seems to be no justifiable grounds for excluding developing nations from such institutions, unless the cynical consideration of access to and possible utilization of weapons of mass destruction is regarded, in isolation, as sufficient ground for exclusive access to these institutions. There is, for example, no justifiable reason why no country in Africa has a permanent seat on the Security Council of the United Nations; in fact, the rationale for “permanent seats” in itself seems to be a consideration that is increasingly losing its validity on the grounds of justice.

Whether it would be wise to accept a principle that would limit a society’s acquisition of wealth, is more dubious as far as I am concerned. It is true that that is not strictly what Buchanan’s formulation of his third suggested principle requires; it only requires that limits be set on the extent of the inequalities between societies. But could that mean anything but putting a stop to a prosperous society’s wealth accumulation as soon as it lurks too far ahead from others at a certain historical juncture? What remains of incentives to produce wealth if a certain level of wealth acquisition inevitably will result in a program of redistribution in favour of societies that fall behind for whatever reason? Would the prudent way to go not rather be to maintain all possible incentives that can be morally justified, and to maintain help to lagging societies, irrespective of the size of the lag?

This brings me, finally to the question of whether Buchanan’s three proposed principles exhaust what is required for the parties formulating the Law of Nations to formulate in terms of principles of distributive justice. I am of the opinion that two principles might well be added to the first two suggested by Buchanan (I am, as argued, doubtful about the third).

The first principle that I would like to see added would be a principle necessitating aid by wealthy, relatively unaffected peoples to support peoples in cases of social catastrophes. This principle – let’s call it PC (the principle regarding catastrophes) - can formally be stated as: “Justice in international relations requires that the burden of catastrophic events be distributed equitably between affected and unaffected peoples”. Note that this principle does not require the *equal* sharing of such burdens, but only its *equitable*, i.e. just, fair or reasonable sharing. That implies that a considerable share of the burden of catastrophes *will* be carried by the nation, country or people (for the purpose of the current discussion, I shall use these terms interchangeably) primarily affected. The principle merely points out the injustice of such entities carrying the burden of catastrophic events *alone*, or being subjected to an unjustifiable exploitation of their plight by unaffected entities.

The term “equitable” also has a bearing on the extent of help that might be expected from countries or peoples. It seems to me that the weight of the burden to be carried under normal circumstances cannot be the same for the rich and the poor countries. In other words, there rests a heavier duty on the richer countries to aid in the case of catastrophes hitting poorer, developing countries or nations than the other way round. This is simply the outcome of the expected ability to and resources available for help. Of course, when catastrophes hit the rich world, the principle still applies. The idea of “equitability” in the sense of fairness or reasonableness nevertheless also applies in

order to help ensure that aid from poor to rich in these circumstances does not precipitate a comparable catastrophe in the economically more vulnerable societies. It is too ambitious to try and give more content to the concept of *equitable sharing of burden* apart from considerations emanating from the actual cases to which the principle is set to apply.

The next crucial term requiring definition is “catastrophe”. By “catastrophe” I mean an adverse event

- that occurs in the existence of (a) nation(s) or country(ies) in such a way that it is a demonstrable threat to the health (in the earlier sense of people’s ability to function effectively as a species) of a significant number of people (i.e. significant relative to the size of the country’s population),
- whose impact is enhanced by the nature of the social and economic vulnerability to which the nation(s) are subjected due to their historical circumstances,
- that threatens to consume a disproportionate amount of the affected country’s available resources and
- that has the potential to destabilise not only the country(ies) concerned, but also (at least) the region, if not the world as such.

Catastrophes, particularly in the form of pandemics of infectious diseases, can of course hit more than one country/people at the same time, hence the need for the plural. Note furthermore that this principle calls for the transfer of benefits in the form of money, goods, aid workers and the like only in situations of catastrophe. It does not call for a “general transfer of wealth” from richer to poorer countries. The latter issue, to my mind, sufficiently addressed by Rawls’s principle 8 (“Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime”), as argued above.

I shall now discuss the HIV/AIDS pandemic as a good illustration of what I mean by the kind of catastrophe to which the principle discussed above applies. I stress that this principle goes beyond the 8<sup>th</sup> principle formulated by Rawls (see last paragraph). The issue is by far not only that privileged peoples have a duty to assist other peoples living in unfavourable conditions in order to restore, for them, “a decent political and social regime”. The need is for a principle that addresses the occurrence of real *catastrophes*. In such circumstances, the normal patterns of provision, trade, business and development aid must be eligible to be overturned in order to restore a semblance of normality of the affected societies.

The first requirement of a catastrophe is that it “occurs in the existence of (a) nation(s) or country(ies) in such a way that it is a demonstrable threat to the health (in the earlier sense of people’s ability to function effectively as a species) of a significant number of people (i.e. significant relative to the size of the country’s population)”. It is self-evident that HIV/AIDS is a catastrophe in this sense. I shall not here repeat the horrific statistics about the nature and scope of the pandemic. Readers are advised to remind themselves of the facts and figures identified and discussed in chapters one, two and four of this volume.

The second criterion of a catastrophe delimited above is that it is an event “whose impact is enhanced by the nature of the social and economic vulnerability to which the nation(s) are subjected due to their historical circumstances.” There can be no doubt that this criterion applies to the situation in the whole of the developing world, including, and in particular, South Africa. I shall not here repeat, but I remind the reader of what was stated earlier in this article (section 3) about the levels of poverty as well as about the position of women vis-à-vis the AIDS pandemic in a country such as South Africa (note, in particular the section on “Women’s vulnerability” in chapter 4).

The third criterion of a catastrophe that I formulated above is that it is an event which “threatens to consume a disproportionate amount of the affected country’s available resources”. Few issues illustrate this danger better than the debate about the honouring of patent rights for AIDS drugs in the developing world, particularly antiretroviral drugs that can prevent mother-to-child transmission. The overriding figure to be kept in mind in this debate is that Africa has 10% of the world’s population, earns 1% of the world’s income, and carries 70% of the world’s HIV/AIDS burden. The other highly relevant figures are that government expenditure on health in Sub-Saharan Africa fell from 5.8 per cent to 1.6 per cent of GDP over the period 1980 to 1997 (Benatar, Daar & Singer 2003: 115), and that annual per capita expenditure on health care is less than US\$10 in many African countries, as compared with between US\$ 2000 - \$4200 in industrialized nations (Benatar 2001: 90).

To insist, under these circumstances, that patent rights for the manufacturing and distribution of anti-retroviral drugs should be honoured at all costs, is morally indefensible. In fact, the issuing of compulsory licenses that could facilitate to make these drugs much more affordable to countries in the developing world could indeed be seen as one way in which the aid required by the formulated principle PC could be made available to countries challenged by the HIV/AIDS catastrophe. The following arguments can be forwarded in this regard:

Firstly, HIV/AIDS represents, not only a *national emergency* for the countries in Africa and elsewhere in the developing world, but indeed an *international emergency* of enormous scope and with clearly devastating potential and actual effects. Not since the Black Death of the fourteenth century or the Spanish Influenza Epidemic of 1918 has the world encountered a comparable health crisis. This is exactly the kind of emergency that the existing TRIPS agreement provides for in order to justify compulsory licensing in the countries concerned. The necessity to save as many lives as possible, or to ameliorate the suffering of millions whose lives cannot still be saved, is a moral duty overriding all other duties in these catastrophic circumstances. Desperate circumstances warrant measures that would, under normal circumstances, be morally and legally more spurious. In addition, the AIDS pandemic ought to be seen as nothing less than an international disaster in response to which those who have been less harmed by it, have a moral duty to come to the aid of the real victims, without any concern about the financial costs incurred by such aid.

Secondly, pharmaceutical companies would not be unduly financially harmed or disadvantaged by the developing world’s “free riding” (Brock 2001: 37) on its intellectual property by manufacturing and/or parallel importing/exporting of generic equivalents of HIV drugs. Two arguments are relevant here. The *first* has to do with

the *extent of the profits* that multinational pharmaceuticals make. The second has to do with *where they make those profits*. As regards the first, Resnik, in spite of his concerns about a unilateral forfeiture of upholding intellectual property rights by the developing countries, quotes staggering figures about the size and scope of the companies' profits. The pharmaceutical industry is without any doubt one of the most profitable businesses in the world. "In 1999, the top ten pharmaceutical companies had an average profit margin of 30%, and the pharmaceutical industry average an 18.6% return on revenues...a 10% profit margin is considered to be excellent in most industries. In the United States, prices of prescription drugs have risen at a rate far greater than the inflation rate: the average cost of filling a drug prescription rose from \$34 in 1990 to \$61.33 in 1999. Pharmaceutical sales in the US rose from \$59 billion in 1990 to \$91.8 billion in 1999." (Resnik 2001: 13)

The *second* argument in this regard is that the profits that multinational pharmaceuticals make in the third world, is hardly significant in comparison with what they make in the first world. Schüklenk and Ashcroft, in this regard, argue "The pharmaceutical industry, by any standard amongst the most profitable industries, makes its profits not in developing countries where the vast majority of people is unable to purchase its products, but in developed countries. IMS health, a leading global provider of market research, business analysis, forecasting and sales management services to the global pharmaceutical industry predicts that the global pharmaceutical market is worth \$406 billion in 2002. Of this sum only \$5.3 billion is contributed from African countries." (Schüklenk & Ashcroft 2002: 190-191)

A third argument against honouring the patent rights of pharmaceutical companies states that third world countries cannot abide by the often occurring philanthropic practice of hand-outs by these companies. The argument runs that these deeds, laudable as they might seem *prima facie*, are not necessarily motivated by duty, but only by charity. Charity, it is then argued, "involves the liberty to divert one's giving elsewhere if it suits one, and to arrogate to oneself the right to desist if the recipient is 'ungrateful' or 'undeserving'" (Schüklenk and Ashcroft 2002: 186). In addition it is argued that charity on its own is a rather unstable basis for international aid programmes. On the one hand, as argued earlier, there is nothing wrong with charity as such. The global community that we ought to aspire to become requires that charity should be a strong motivational force for mutual benevolent interaction. On the other hand, we should take the point made by Schüklenk and Ashcroft in the last quote seriously. Charity has the potential to not only morally degrade the receiver of aid by fostering dependence and an attitude of humility towards the giver, but also to disempower the receiver to co-operate in setting the terms and to negotiate the terms of receipt. Charity can thus be supererogatory and can foster an attitude of paternalism, although, as I argued, this need not necessarily be the case.

The fourth argument is more radical and concerns the historical relationship between developed and developing world. A statement by Dan Brock is pertinent in this regard: "The enormous income inequalities between developed and poorer developing countries, which make it impossible for the latter to afford the prices of patent protected pharmaceuticals, are in my view...one of the most serious injustices in the world today. If that is correct, then pharmaceuticals are unaffordable in the developing world largely because of unjust global inequalities in income and wealth. When developing countries choose not to respect product patents as their only

effective means of making available pharmaceuticals necessary to save lives and protect the health of their citizens, doing so is arguably a step towards greater justice between the developed and the developing world; this may be a case where two wrongs do make a right, that is where existing global injustices make not respecting product patents, which in the absence of those injustices would be wrong, all things considered, morally justified.” (Brock 2001: 37).

To sum up: the above arguments, individually and collectively, propose that the AIDS crisis represents so serious a situation that commercial concerns, particularly pertaining to intellectual property rights, cannot be held on a morally equal footing with the urgency of, at almost any cost, saving lives or relieving the suffering caused by the pandemic. In the words of Peter Piot, UNAIDS’ Executive Director, “in the North, in return for innovation, intellectual property is protected and profits are made. This has benefited both Northern shareholders and society. But it doesn't work for the South, where 95 percent of the world's population of 36.1 million [the figure is much higher in 2004, AAvN] with HIV/AIDS lives” (quoted by Schüklenk & Ashcroft, 2002: 184).

The last criterion for a catastrophe that I distinguished is that the event in question has to have the potential to destabilise not only the country(ies) concerned, but also (at least) the region, if not the world as such. From all that has been shown and argued above, it is clear that HIV/AIDS must be seen as an occurrence that can play exactly this kind of destabilising role, particularly in Africa, but also in the larger world. What happens to a society where the average life expectancy drops to 35? What happens when, as current projections show, we are in this country prone to handle no less than 2 million orphans by the year 2010 if some major intervention does not occur in the mean time to curb the further spread of the infection? What happens to public health services when it becomes in its entirety consumed by AIDS management? What will the reaction be in the populace at large? These questions, rhetorical as they are, envisage real possibilities for a country such as South Africa, and clearly indicate the devastating destabilising potential that the pandemic has for us.

The above serves as the justification of my proposal of a principle of distributive justice for the global basic structure necessitating aid by wealthy, relatively unaffected peoples to aid peoples in cases of natural and social catastrophes.

The last principle that I would like to propose, is one that recognizes that all responsibility for attaining more equity between societies in the face of the global basic structure does not lie with the richer, developed societies. It is a principle that requires societies in need to formulate and adopt policies that will optimize both the effect of aid received from more wealthy societies, and of efforts internal to a society to improve its level of wealth and health.

Formalized into a principle of distributive justice, this principle – call it PP (the principle regarding appropriate policies) – should read as follows: “Justice requires that efforts at an equitable distribution of burdens at the level of international relations be met with policies from the beneficiaries that, as far as possible, sustain the benefits attained from these efforts”. The principle elevates to the level of justice the expectation and practice that require that just acts not be met by dismissive, irresponsible reactions that nullify the good established by the act. In other words, it

elevates reciprocity of beneficial acts to a requirement of justice. As such it seemingly contradicts the denial of the importance of reciprocity that was, as shown earlier in the article (section 3), argued by Levinas. The contradiction, however, is only seeming and not serious, since Levinas's argument was one that tried to ground morality, not justice. When we are dealing with justice, we deal with relationships in which there are at least two parties and where actions are interactive. Particularly at the level of international relations, which constitute the context of the current argument, justice cannot mean a responsibility that resides, in its entirety, with the benevolent party. Too often we see circumstances where, for the sake of justice, good is done by the rich for the poor, only to be met by selfish, irresponsible and thoughtless acts of negligence or squander which nullify the justice-enhancing effects that could have been achieved by the good that was done. The suggested principle is intended to provide for the avoidance of such situations in the pursuit of justice.

How this principle comes into play, can be illustrated with specific reference to what, for many years, occurred in the (mis-)management of the HIV/AIDS pandemic at the level of public policy-making in, specifically, South Africa. The story of public policy on AIDS in South Africa has been a tale of neglect and denial<sup>17</sup>, resulting in the disastrous statistics mentioned in earlier paragraphs. In this regard, one is saddened by the sustained signs of reluctance by the South African government to launch, with vigour and conviction, not only a program for rolling out antiretroviral drugs in the public health sector, but also to embark on a full-fledged program of prevention of the unprecedentedly fast spreading HIV/AIDS pandemic. Justice for all victims require that policies be set in place to optimize help from whatever available quarters, and to facilitate circumstances and infrastructure that could optimally create conditions for curbing the seemingly uncontrolled spread of the infection.

Examples<sup>18</sup> of steps that could be taken by developing countries in respect of the HIV/AIDS pandemic and the need for affordable drugs that would prove their *bona fides* in creating the conditions to optimize the effects of aid programmes include:

- The creation of an international fund, supported by governments, international agencies and multinational corporations of all kinds, from which the provision of affordable drugs to the developing nations is subsidized, or alternatively,
- Significant tax reductions for pharmaceutical companies who cut prices of drugs for developing countries below agreed margins. Either of these measures ought to be explored in order to facilitate the provision of essential AIDS drugs either free of charge or at actually affordable prices to the developing world.
- If free or affordable drugs turns out to be unattainable, other venues for acts of co-operation that will help the companies to drastically cut prices ought to be explored. In this, the developing countries can indeed help, for example by:
  - providing a guaranteed market which will facilitate the production of a drug at significantly reduced costs,
  - assisting with the developing of research protocols with recruitment of subjects, obtaining valid informed consent, monitoring of data, etc.

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<sup>17</sup> For a comprehensive discussion of the extent of this denialism, which space does not at the moment allow me to repeat, cf. Van Niekerk 2003: 161-168.

<sup>18</sup> I am indebted to Resnik (2001: 31-32) for many of these ideas.

- Developing nations can also significantly assist drug companies in developing give-away programs by providing an efficient, reliable and fair system for distributing these medicines – a very severe obstacle to the success of these programs when attempted in a hostile host environment.
- Developing countries could also buy drugs directly from pharmaceutical companies in order to take advantage of bulk buying and sell them at discounted price or provide them free to the very needy.

In this way, content can be given to the last suggested principle of distributive justice in the international relations between unequal societies that seek more justice in their mutual relationships, particularly in the face of global catastrophes, the danger of which is seemingly growing. Rawls's *The Law of Nations* has stimulated much needed reflection on this matter. I hope to have, also drawing on and responding to Buchanan, added one or more useful idea to this reflection.

Let me summarize what I have done in this article. My main aim in the article was to focus on the problem of the applicability of Rawls's ideas to the growing interest in developing what might now well be called a "global bioethics". Within the context of this general need for the development of "global bioethics", I specifically concentrated on the question as to whether Rawls's later work helps us to develop principles of distributive justice for such an alleged global bioethics, drawing on and critically evaluating Alan Buchanan's critical discussion of Rawls's *The law of peoples*.

I started out by briefly reviewing the main tenets of Rawls's theory of justice, particularly as it concerns health care as one of our "primary needs". In this respect, I drew on the work of Norman Daniels that has applied Rawls's theory to the issue of the provision of just health care. Secondly, I argued for the necessity of a global approach to biomedical ethics in view of the need for a more equitable provision of health care between developed and developing worlds. Thirdly, I discussed the main tenets of Rawls's *The Law of Peoples*, the book in which Rawls extrapolated the implications of his theory of justice to the sphere of just international law. Allen Buchanan's criticisms of this Rawlsian enterprise were critically reviewed. My main aim in the article was to evaluate this debate, arguing that, although I largely (but not wholly) agree with Buchanan's identification of the shortcomings in Rawls's *The Law of Peoples*, two additional Principles of Global Distributive Justice (PGDJ) ought to be added to the two formulated by Buchanan with which I agree. (With one, suggested by Buchanan, I do not agree.)

I then formulated and discussed my suggested two principles. The first (PC) is: "Justice in international relations requires that the burden of catastrophic events be distributed equitably between affected and unaffected peoples". I discussed the implications of this principle, and complemented it with an extended definition of the concept of "catastrophe". Drawing on each component of that definition, I illustrated how the HIV/AIDS pandemic is the best current example of an international catastrophe, and how that calls for the implementation of the formulated principle.

I then formulated the second principle for distributive justice for the law of peoples. This principle is: "Justice requires that efforts at an equitable distribution of burdens at the level of international relations be met with policies from the beneficiaries that,

as far as possible, sustain the benefits attained from these efforts". I ended by showing how this principle is being neglected by the denialism of, for example, the South African policy-makers' lack of a responsible response to the HIV/AIDS pandemic over the past decade, and by making suggestions how this denial and neglect might be rectified in the area of the provision of antiretroviral drugs to prevent mother-to-child transmission of HIV.

My main conclusion is that Rawls's work does indeed help us to formulate principles of distributive justice for the law of peoples, although neither he nor Buchanan came to the complete formulation of such principles. The article reflects my effort to engage in such an exercise.<sup>19</sup>

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<sup>19</sup> I would like to express my sincere gratitude to Hennie Lötter as well as two anonymous referees for their perceptive and helpful criticisms of and comments on the original draft of this article. I also very sincerely thank Loretta Kopelman who made valuable comments on the version of the article that has become this chapter. My assistant, Liezl Dick, provided valuable support in proof-reading the manuscript.



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