Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment

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Introduction

John Ruggie took over as the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG) in 2005. Ten years earlier, in 1995, the execution of Ken Saro-Wiwa in the aftermath of massive protests against Shell and other oil companies in Nigeria had triggered what is now known as the “business and human rights debate” (Chandler 2003; Ruggie 2007: 839). When Ruggie became the SRSG, the general impact of this still young debate was rather small.

Furthermore, it was in considerable disarray after a failed attempt by a working group of the UN Sub-Commission on Human Rights to install a legally binding framework for corporate human rights responsibility. The Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms) turned into a projection board for the controversy at the heart of the debate and made the deep rifts between supporters and proponents painfully visible. When the Commission on Human Rights abandoned the Draft Norms in 2003, the policy debate on business and human rights was in a stalemate. In contrast, when the mandate of the SRSG expired a short eight years later in 2011, business and human rights had evolved into one of the most dynamic, relevant and

perhaps even most influential debates concerning corporate responsibility. As Scott Jerbi (2009: 301) comments: “Ruggie has been largely responsible for moving what was a stalled and divisive debate to a new phase of dialogue and activity inside and outside the UN system.” Thus after a decade of slow and stalling progress culminating in the failure of the Draft Norms, the debate had finally taken off. This is, by any means, a significant achievement. One may be critical or sympathetic toward the “Ruggie” process and its results, but one cannot but acknowledge the tremendous transformation the debate has undergone since John Ruggie took over.

This contribution engages with and critically assesses Ruggie’s work as the SRSG, particularly his two main publications, the “UN Protect, Respect and Remedy Framework” (Framework) and the “UN Guiding Principles” (GPs). The focus and aim of the paper is conceptual. Thus, I will not critique the process and mode of engagement chosen by the SRSG and his team – others are better positioned to do so. Rather, the paper assesses the conceptual basis on which its main insights are based – well knowing, of course, that the two perspectives – conceptual and procedural – cannot always be separated neatly. The paper adopts a normative perspective on the issue. Thus, its critique is derived from the standpoint of ethics – a perspective that some have argued is conspicuously underemphasized if not absent in the SRSG’s work (see, e.g., Arnold 2010; Cragg 2012; Bilchitz 2013; López 2013). Given this critique, exploring the role and contribution of ethics in the broader debate on business and human rights is one of the main concerns of this paper.

It is worth keeping in mind that the SRSG’s task was not to win an award for academic excellence but to produce tangible policy results. Policy-making is limited by different constraints and follows different rules than academic analysis. His mandate had to be informed by pragmatism and willingness to compromise. The boundaries of what was possible were set by the interests of a variety of involved stakeholders. These are limitations that a conceptual critique is not faced with, although, of course, there are other ones.

However, this must not mean that bringing the two perspectives together is futile. Conceptual critique is necessary to sharpen our views on the issues at hand. It may not stand a chance to gain sufficient traction in policy circles, but it is necessary to make visible the limitations of existing policies and, as such, to inform the dialogue which shapes perceptions and eventually triggers change and improvement. What some may perceive as academic hair splitting over a pronouncedly pragmatic policy framework is a necessary exercise to keep the debate open and moving it forward in a pluralistic manner.

The paper is structured as follows: the first section introduced the topic. The second section will outline what I perceive as perhaps the most significant of the SRSG's achievements in regard to the transformation of business and human rights in general. In the third section, I will then reflect on the SRSG's use of the duty- and responsibility-notions as well as on his decision not to pursue the treaty route. The fourth section will deal with the division of responsibility in the Framework and the GPs. The critique advanced in that section is threefold: it addresses the declared specificity of corporate human rights obligations, the allegedly economic nature of the company, and the conceptual relation between respecting, protecting, and realizing human rights. The fifth section will outline more generally the role that ethics can and does play in the broader debate on business and human rights. The sixth section concludes.

Shifting the burden of proof: from state-exclusivity to state-centrism

In the "post-Ruggie" era, not those who support corporate human rights obligations must defend their views, but those who do not. We are not asking anymore whether or not corporations have human rights responsibilities at all but rather how extensive they are. It is an era in which the burden of proof has shifted squarely onto the shoulders of the skeptics.

This is not exclusively the SRSG's achievement, of course. It was enabled by the work of many, who have relentlessly pushed the business and human rights agenda since very early

on. However, the SMSG was instrumental in bringing the debate from its niche into the open and generating the broad attention and support for the issue that had been missing in the past. One could, perhaps rightly, argue that we would have gotten there eventually even without the mandate – little strokes still take down oaks – but speeding up the process by ten or fifteen years seems significant enough; we are, after all, talking about human rights violations. Be it as it may, traditional statist views on human rights, which have dominated the human rights discourse for as long as it has existed, certainly provided little space for addressing potential human rights responsibilities of non-state actors such as companies. Not that they were blind toward corporate human rights violations. However, such violations were perceived predominantly, if not exclusively, as a failure of governments to protect their people from corporate abuse.

At least three dominant perceptions bolstered that overpowering role of the state in human rights thinking. First, the *political discourse* on human rights has been shaped by the historic focus on political and legal human rights instruments as a means to prevent the abuse of authority distinctly by governments (see Pogge 2002: 57-58; Risse 2012: 69). Second, the *legal discourse* on human rights has been driven by the assumption that only states, but not corporations have international legal personality and thus can be subjects of international (human rights) law (see Muchlinski 2001; Zerk 2006: 72-76). Third, in the *normative discourse* on corporate responsibility a rather philanthropic focus combined with a tendency to leave legal matters to the lawyers (see Paine 2002: 196) put human rights in a blind spot of the debate. This fed into the tendency to leave the dominant role of the state in the human rights discourse largely unchallenged. In fact, the idea of corporate social responsibility as a “fundamentally voluntary” affair beyond the law, which has informed conventional conceptions of corporate responsibility until very recently (see European Commission 2001; Commission of the European Communities 2006), largely obstructed the view on human

rights (obligations) as a relevant domain worth exploring by corporate responsibility theorists (Wettstein 2012a).

The problem with such state-exclusivity in legal, political and normative discourses on human rights, of course, has been that not all governments are willing or even able to meet the expectation to protect human rights. In the process of globalization the power and reach of national governments has gotten increasingly constrained, while that of non-state actors, among them particularly large multinational companies, has dramatically increased. The result were what the SRSB called “governance gaps”, which left ample room for corporate human rights violations to go entirely unchallenged and often even unnoticed (see Ruggie 2008a: 3). But make no mistake, the SRSB has not abandoned state-centrism even against the background of this ongoing shift. Far from it, the Framework and the GPs still put governments at the center of attention. However, by complementing governments’ duty to protect with *direct* corporate responsibilities, which are thus *independent* of local laws and regulations (See Ruggie 2008a: 17), the SRSB does move decisively beyond the traditional view. Granted that the SRSB has stuck to state-centrism, but he has effectively abandoned *state-exclusivity* in human rights matters.

Leaving state-centrism untouched as a principle is partly what secured the GPs’ unprecedented, unanimous endorsement in the Human Rights Council and what made them politically viable; this was a precondition for transferring the burden of proof to the opponents of corporate human rights responsibility. Hence, at least from a pragmatic point of view, keeping governments at the center of the discourse is a sensible position to take. However, the danger inherent to this commitment is one of stripping corporate responsibility to its bare minimum in the process. The following sections will outline and engage with this insight in more detail. Specifically, I will look at the normative force of corporate responsibility in the Framework and the GPs (legal vs non-legal; duty vs responsibility) as well as its defined scope and nature (respect, protect, or realize?).

Responsibility, obligation, and the voluntariness-quandary

Treaty, or no treaty, that has been perhaps the most recurring and divisive question in the wider discussion surrounding the SRSG's mandate. The SRSG has been hesitant to endorse the idea of a treaty on business and human rights both during his mandate and after.¹ Still, the SRSG seems to move beyond the voluntarism that has informed previous soft law approaches in the business and human rights domain. However, the language adopted in the Framework and the GPs threaten to undermine the normative force of this position.

Treaty or no treaty?

The UN Draft Norms on Business and Human Rights were the starting and, initially, the main reference point for the SRSG's mandate. While the Draft Norms were not meant to be a treaty text per se, they did aim at installing a legally binding framework further down the road (see Weissbrodt and Kruger 2003; Ramasastry 2013: 168). Being the master mind behind the voluntary UN Global Compact initiative, few of us expected the SRSG to push for a mandatory framework similar to the Draft Norms back in 2005. We were right. However, we were wrong to think that his reluctance is based on doctrinal reasons; rather it is his pragmatism, which led the SRSG to believe that a treaty approach would lead the discussion astray, cost precious time and prevent swift action which could make a felt and immediate difference in victims' lives (see Ruggie 2013: xlv).

Thus, the SRSG is hardly a doctrinal voluntarist, but what he calls a principled pragmatist. Rather than believing in the dogmatic superiority of voluntary approaches per se, he believes in the small steps approach, focusing on "what works best in creating change where it matters most." (Ruggie 2013: xlii). For the SRSG, neither voluntary market-based approaches nor a grand legal framework on their own can do the trick; rather, he has advocated for a heterodox approach or a "smart mix" of voluntary and mandatory policy

measures, which would be “capable over time of generating cumulative change and achieving large-scale success.” (Ruggie 2013: xxiii) Hence, while the SRSG did not aim at “a legally binding instrument”, his idea and conception of a smart mix clearly contains “the expectation that legal developments would follow from such an effort.” (Ruggie 2013: xlvi)

Both the Draft Norms and the GPs do not neatly fit into the dichotomy of binding versus voluntary. It is one of the bigger achievements of the GPs to overcome the kind of voluntarism that characterizes the UN Global Compact and with it the business and human rights debate as it had prevailed since the mid-1990s.² The GPs assert human rights responsibilities for *all* companies: they neither depend on the consent of the companies (as in the UN Global Compact) nor on that of their home states (as in the OECD Guidelines). Companies are thought to be “bound” by the GPs irrespective of whether or not they opt in.³ However, this conceptual difference between previous instruments like the UN Global Compact and the GPs cannot hide the fact that the GPs do not offer or propose any real accountability mechanisms either. The accountability piece is left for the governments to figure out at the domestic level.

Thus, the smart mix idea sounds good on paper, but ultimately its realization depends on the political will of individual governments. And herein resides a rather basic problem: the GPs effectively hand the regulatory authority for any binding, enforced, or even merely monitored measures back to the governments, which have proven in the past that they are hardly willing to go it alone. In other words, the GPs fall prey to the very problem they were supposed to fix, that is, the problem of growing governance gaps between companies’ increasing sphere of activity and governments’ decreasing ability or willingness to regulate them. The SRSG, of course, is well aware of governments’ reluctance to enforce domestic measures in relation to business and human rights (see Ruggie 2013: xxvi). For many a government competing for foreign direct investment in the global market place, no mix is the smartest mix. Against this background it seems peculiar that the SRSG places the

responsibility for the binding part of the mix squarely onto the shoulders of precisely those governments. Accordingly, my perception is that, not surprisingly, in NGO circles the reference to the “smart mix” seems to be mostly used to remind governments to make use of mandatory measures today.

This contradiction does not necessarily have to take us back to the question of a legal framework. But one cannot help to believe that more would have been possible in terms of exploring and proposing alternative mechanisms to ensure some level of accountability at the global level. In addition, it would have been important that the GPs take a clear and more forceful position on promoting the use of binding measures at the domestic level.

Overall, perhaps the SRSB was right not to walk the treaty route. It is at least questionable if we would see the level of targeted activity both by states and companies that we are witnessing today in regard to the implementation of the GPs, had the journey gone in a different direction; though this is speculation, since little actual evidence is available yet on the impact of the GPs and not all would agree with this observation (see, e.g., Frankental 2014). Furthermore, having a treaty is one thing, enforcing it is quite another. The “treaty vs no treaty” discussion often falsely presupposes that a legal framework would be the end of the journey in business and human rights. However, it must be assumed that the debate over the set of institutions needed to monitor, enforce, and adjudicate corporate human rights behavior with respect to such a treaty would be led no less controversially. On the other hand the choice between soft-law and hard-law, as Justine Nolan (2013) shows, is not a binary one; the fact that soft-laws are not legally enforceable does not mean they cannot achieve a considerable level of binding force as well. Thus, one has to assume that some good will come out of the current activity and if so, we will have achieved much for those whose rights are violated. This being said, a binding legal framework for corporate human rights duties ought to remain the ultimate goal, for public naming and shaming, that is, “the courts of

public opinion”(Ruggie 2008a: 16) may not have produced the results we hoped for in regard to other initiatives in the past (see, e.g., Sethi and Schepers 2014).

Duty or responsibility?

Despite not going the treaty route, the GPs, as mentioned above, have overcome the paradigm of optionality that has characterized the policy debate on business and human rights since the mid-1990s. However, they have done so in a way that leaves plenty of room for interpretation. Most momentous in this regard is the distinction between the terms duty and responsibility. While the SRSG assigns a duty for the protection of human rights to states, he deliberately refrains from using the duty notion for corporations. Instead he assigns a *responsibility* to respect human rights to them.

It seems clear that the distinction between state duty and corporate responsibility is thought to signal different qualities and levels of expected commitment. However, the SRSG asserts that the use of the term responsibility as opposed to duty was merely “intended to signal that it differs from legal duties.” (Ruggie 2013: 91; see also Ruggie 2011a; Ruggie 2011b). The SRSG’s use of the two terms has been labeled “confusing” (McCorquodale 2009: 391), if only for the fact that both a duty and a responsibility can have legal or non-legal meanings (See, e.g. Klein 1995: 771; Hepburn 1995: 209; see also López 2013: 68). Thus, it is counter-intuitive at best and misleading at worst to limit the scope of duty to the legal and that of responsibility to the non-legal realm at the outset. Two arguments strike me as particularly relevant in this regard:

(1) By limiting the notion of responsibility to the non-legal and that of duty to the legal realm, the SRSG implies that there is no basis in international human rights law from which to derive corporate human rights responsibilities. Granted that this indeed represents the dominant view in human rights discourse, but it certainly is not uncontested: “It is at least a theoretical possibility that international law could impose some human rights obligations

directly on companies...” (Zerk 2006: 76) That idea has gained increasing momentum in recent years (Zerk 2006: 83). Particularly in regard to egregious human rights violations such as in instances of genocide, crimes against humanity, torture or extrajudicial killings, it is commonly agreed that international criminal responsibility applies not only to states but also to individuals and potentially also to corporations (see, e.g., Zerk 2006: 75-76; see also Ruggie 2013: xxxii). Some scholars have argued that, beyond such instances, customary human rights law more broadly implies direct corporate obligations (Deva 2013: 94) or that the state duty to protect per se implies a corporate responsibility to respect which is rooted in international human rights law (Bilchitz 2013: 112). As a consequence, the SRSG’s terminological separation of responsibilities and duties threatens to eliminate the nuances which an informed position on international law and corporate responsibility must observe (see Deva 2013: 93-95 for a more detailed account). More importantly, the use of the term “responsibility” with the connotation intended by the SRSG may unduly preempt the possibility for a more progressive interpretation of international law in regard to the inclusion of corporate responsibility for human rights.

(2) This distinction between the two terms would seem entirely arbitrary, unless we can point to deeper-seated differences between them at a normative or philosophical level. Thus, understanding the terms correctly, and, importantly, understanding how they relate to the law, presupposes that we dig deeper into their underlying philosophy. Frankena (1973: 71) outlines three basic meanings of the term responsibility: a) someone can be said to be a responsible person; responsibility here is used to express a positive judgment about the person’s character; b) someone may be perceived to be responsible for a crime committed in the past; c) someone may be held responsible for something still to be done. Responsibility here is interpreted as an obligation. This raises the question whether, from a normative standpoint, this third interpretation of responsibility understood as an obligation differs significantly from what we would call a duty. Answering this question, Frankena (1971: 47)

points out that “the terms ‘duty’, ‘obligation’, and ‘ought to be done’ are often used interchangeably, especially by philosophers [...]” Thus, for many a philosopher, the distinction between a duty and a responsibility in the Framework and GPs may seem rather peculiar.

However, while this view may be widely shared in the philosophical discourse, not all would or do agree with it. For example, for Feinberg, notably a legal philosopher, duties are much more specific than responsibilities in regard to the actions required for discharging them. Responsibilities are no less obligatory than duties though, but they leave considerable room for “independent judgment” regarding the “means to achieve” them (see Feinberg 1966: 141). Thus, in Feinberg’s view a responsibility, as opposed to a duty, “carries considerable discretion...along with it” (Feinberg 1966: 141) not in regard to whether or not a person is going to discharge it, but in regard to *how* a person is going about discharging it. As Iris Young (2006: 126) concludes, a responsibility leaves it “up to each agent to decide what she can and should do under the circumstances, and how she should order her moral priorities.” Acknowledging this alternative interpretation, Frankena outlines this perceived difference between duties or obligations and the wider expression “ought to do” (i.e. responsibility) as follows:

“[...] we tend to think that one person has a duty or obligation and another has a correlative right. The expression ‘ought to do’, however, is used in a wider sense to cover things we would not regard as strict duties or obligations or think another person has a right to.” (Frankena 1971: 47)⁴

Thus, this second take on the separation of duty and responsibility largely corresponds to the Kantian distinction between perfect and imperfect obligations (see Kant 1996: 31-32). Perfect obligations are obligations of justice; they correlate with rights and thus can be

claimed by the rights-holders and, correspondingly, are owed by the obligation-bearers. For perfect obligations, who owes what to whom can be fully specified. For example, my right not to be physically harmed ought to be observed by everyone. Thus, I can claim it from any potential perpetrator, who, in return, owes respect of my physical integrity to me. In contrast, imperfect obligations are obligations of beneficence. They are neither owed, nor can they be claimed. That is, they do not correlate with rights. As such, they leave, what Kant calls, considerable “latitude” for the obligation-bearer in terms of when to discharge the obligation, to whom, and to what extent. For example, my relative wealth may imply a duty of beneficence or charity to those who have little or nothing at all. However, this duty is too general and too unspecified to give rise to any claim-rights (Feinberg 1973; 1980: 153) for anyone. It is also unclear how much of my income I ought to donate, for what causes exactly, and at what time. In other words, I have considerable discretion in regard to how, when and to whom to discharge my obligation.

At a deeper normative level, the SRSG indeed seems to argue in the categories of perfect and imperfect obligations when distinguishing between duty and responsibility. A responsibility, for the SRSG, is a “standard of expected conduct” (Ruggie 2010: 12; Ruggie 2011a: 13); A standard of expected conduct is something we *ought* to do. However, while such conduct is expected of us, it is not *owed* to anyone in particular. It is not something that another person has a right to and, accordingly, that can be claimed from us – there is a difference between what we ought to do (expected of us) and what we must do (owed to others). Two implications may derive from the analogy between duty and perfect obligation and that of responsibility with imperfect obligation.

First, one could argue that discharging the corporate responsibility to respect human rights indeed leaves ample room for discretion, for example, regarding the proper measures to be implemented or regarding the reasonable degree of caution (i.e. due diligence) that is warranted in order to avoid infringing on anyone’s fundamental rights. From that perspective,

the term “responsibility” would indeed be appropriate. However, grappling with such room for interpretation does not seem unique or even specific to the corporate responsibility to respect, but holds for the state duty to protect human rights as well. That duty is not absolute either, but rather a matter of degree. For example, there is considerable room for interpretation in regard to how large a police force of a state must be in order to adequately protect its citizens’ right to physical security (see Shue 1980: 37-38). Thus, we can potentially make a case for using the term responsibility for the corporate responsibility to respect, but for the sake of consistency we would then have to use that same notion also for the state duty to protect.⁵

Second, granted that the responsibility to respect human rights leaves room for discretion at the implementation level, but defining it analogous to a duty of beneficence seems conceptually flawed. Non-violation of human rights is, by any means, a perfect duty. It is owed by all of us to everyone at all times and to the fullest extent. It is not merely a standard of expected conduct, but a duty justice. What decides over the use of the duty notion is not whether or not it is written down in positive law, but whether or not it *could be* turned into law. As a negative, perfect duty, the obligation to respect human rights most certainly fulfills the respective criteria connected to defining, assigning, and enforcing such a duty. The mere fact that positive law does not stipulate such a duty at the time being does not reduce its normative significance to that of a responsibility. In other words, it is not *de facto* legal codification which implies the adequacy of the term used, but the underlying normative concept which does or does not call for such codification in the first place.

These are important distinctions that the SRSG should have engaged with more diligently, for they undermine the very progress that he achieved in moving the Framework and the GPs beyond the kind of voluntarism that has been held against existing soft law initiatives since their very inception.

Respect, protect, or realize?

The Framework and the GPs are based on three pillars or core principles: the State duty to protect against human rights abuses by third parties, the corporate responsibility to respect human rights, and the need for improved access to remedies. The corporate responsibility to respect in particular is defined as a negative responsibility "not to infringe on the rights of others - put simply, to do no harm."⁶ This responsibility refers both to direct and indirect human rights violations, that is, to direct involvement of companies in human rights abuse, as well as to them being linked and associated with such abuse through its business relations. As such, it resembles the classic interpretation of respect as it informs human rights discourse in general (Ruggie 2013: 100).

Thus, the Framework and the GPs are designed by the SRSG to “rest on clearly differentiated pillars – or bases of obligation.” (Ruggie 2013: 124) Each one of them is an essential component of the Framework; together they form a “complementary whole” (Ruggie 2008a: 1). Thus, the division of responsibility between agents is understood as clear-cut rather than overlapping; their responsibilities are seen as complementary, rather than shared. In other words, the Framework presupposes a rather rigid separation a) of responsibilities as well as b) of different actors associated with them. The SRSG’s allocation of responsibilities to companies in particular raises a number of questions. Specifically, I see three problems with the logic of his argumentation which concern (1) the “uniqueness” or specificity of corporate human rights responsibilities, (2) the concept of the corporation underlying the SRSG’s argument, and (3) the actual separation of the three categories of responsibility, that is, of the responsibility to respect, protect and to realize human rights.

(1) Criticizing the UN Draft Norms’ expansive account of corporate obligation, the SRSG asserts that “as economic actors, companies have *unique* responsibilities”, which ought not to be “entangled with state obligations.” (Ruggie 2008a: 4; emphasis added) He points out that the difficult question concerning business and human rights is “what *precise*

responsibilities companies have in relation to rights.” (Ruggie 2008a: 16; emphasis added) “While corporations may be considered ‘organs of society’”, as he goes on, “they are *specialized economic organs*, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States.” Accordingly, the SRSG has focused on identifying “the *distinctive responsibilities* of companies in relation to human rights.” (Ruggie 2008a: 16; emphasis added) Thus, the SRSG seems to embrace what we could call a purpose-based account of corporate responsibility (see Hsieh and Wettstein 2014), setting out to deduct the “distinctive” or “unique” responsibilities of companies from their specialized economic role or purpose.

Judged by what the SRSG sets out to do, what he comes up with seems of rather general and unspecific nature. The responsibility “not to infringe on the rights of others” or, “put simply, to do no harm” (Ruggie 2008: 9) is far from unique to or even defining for economic institutions; rather, it is a universal duty which applies equally to any (moral) agent who is capable, in principle, of violating rights. It is an *agent-neutral* responsibility, which applies to every individual and every organized collectivity, irrespective of the social, political, or economic role it is designed to fulfill. From this perspective, the SRSG’s account of corporate human rights responsibility is, of course, not wrong, but it does not go far enough. Indeed, the difficult question that Ruggie identified, is not answered: what *agent-specific* human rights responsibilities beyond mere non-violation derive from the company’s specialized role and purpose in society?

Evidently, the societal purpose and function of the company is contested. Some argue the company ought to create essential goods and services; others argue it is designed to create wealth; others believe that the creation of jobs is essential for the company. However, most accounts of corporate responsibility agree that the corporation’s *raison d’être* is based on positive contributions of some sorts to society or some significant subset thereof. Donaldson (1989: 47/8), for example, has argued convincingly based on social contract theory that “the

principal, although not the sole, reason why members of society should want to have productive organizations rather than a state of nature is the enhanced contribution made possible by productive organizations, organizations in which people combine their labor with others to create a given product or service.” Thus, as he concludes, “The *raison d’être* for the productive organization turns out to be its contribution to society...” The rationale for the company’s initial creation, as Kline (2005: 12) concurs using similar language, is that it “will create something useful for the society.” Hence, it seems evident that an account of corporate human rights responsibility which builds on the specific purpose of the company would use its productive nature as a starting point. In other words, if we are to redefine corporate purpose in light of human rights responsibility, the (positive) duty to contribute to the realization of human rights, that is, a focus on their indeed unique capacities and capabilities to address pressing human rights problems, naturally moves to the very center of attention. Pharmaceuticals, food and beverages, the provision and maintenance of infrastructure, information and communication technology, for example, are areas closely connected to the state of human rights; and they are areas firmly controlled by private companies. It is increasingly, and sometimes painfully, obvious that a growing number of global human rights problems cannot be solved anymore by governments alone; they crucially depend on the participation and contribution of a variety of institutions, among them companies. Given the key position of companies in regard to the provision of such goods and services it seems peculiar that the GPs limit their human rights responsibilities to mere non-infringement.

The SRSG’s limited account of corporate human rights responsibility is based on and derived from social expectations. Irrespective of the reservations that have been voiced regarding social expectations as a conceptual and normative basis of human rights responsibilities (see, e.g., McCorquodale 2009: 391-392; Deva 2012: 109-110) it seems that if we take them at face value, it is anything but obvious that a minimalist account of corporate human rights responsibility as mere non-infringement should result. According to the 2009

Edelman Trust Barometer (2009: 3), two-thirds of 25- to 64-year-olds around the world believe that businesses should step up and partner with governments and other institutions in order to proactively address global issues. Furthermore, as the report stated, “virtually no one believes that business has no role in addressing these challenges” (Edelman 2009: 3). López concurs that “It can be said that limiting the formulation of corporate responsibilities to ‘respect’ rights does not necessarily hold in many parts of the world, where businesses are also expected to contribute positively to the realization of rights.” (López 2013: 67). For Donaldson (2014), not only society in general, but also most experts on corporate responsibility “agree that [these] duties include not only refraining from depriving people of the objects of their rights directly but also, at least in some instances, helping protect people from being deprived of their rights.” In other words, also from the perspective of social expectations, most people seem to associate the responsibilities deriving from the company’s unique economic role and position with positive contributions to human rights improvement rather than merely with negative impacts and non-violation of human rights.

(2) While it makes sense to evaluate the unique responsibilities deriving from the institutional purpose of the company, the SRSG’s narrow economic account of the corporation seems outdated. At its core it is akin to the neoclassical concept of the corporation as espoused by the likes of Milton Friedman (1962; 1970). Granted, of course, that the SRSG’s view on the corporation includes human rights responsibilities, but it does so based on purely instrumental grounds. This reasserts, rather than relativizes the primacy of profits and shareholder value.⁷ As opposed to such narrow economic views on the company, business ethics scholars in particular have argued since at least the 1970s (see Carroll et al. 2012) that the nature of business is not merely economic, but inherently social (see, e.g., Ulrich 2008: 377). The very idea of business, as Richard DeGeorge (2010: 5) claims, is a social question, “one that must be answered in a social context.” The social responsibility of companies, then, is not to be understood as merely referring to external effects of business activity, but as

deriving from its purpose as a social institution; and as social institutions, they are not merely providing goods for payment, but must be guided by “a vision of real-life practical values”, that is, by an “idea of value creation which aims to make a genuine contribution to the quality of life in society.” (Ulrich 2008: 410-11) Correspondingly, a focus on the social function of a global player in the food industry for example, would suggest a responsibility to make meaningful contributions to the improvement of the general food supply in countries where a substantial part of the population suffers from under-nourishment, rather than an exclusive focus on “selling luxury goods to the moneyed class.” (Ulrich 2008: 411) From that perspective, limiting companies’ responsibilities to “do no harm” seems to miss the very point of companies as social institutions (see DeGeorge 2010: 173-4).

Interestingly, the SMSG’s own reliance on social expectations as the grounds of corporate human rights responsibility seems to imply an image of companies as social, rather than merely economic institutions. Nevertheless, the SMSG is quick to point out that a wider social role for companies risks to undermine the company’s own economic purpose and possibly its commercial viability (Ruggie 2010: 14). This kind of mainstream economic argument is well known and has been used frequently in opposition to the idea of corporate responsibility in general. However, while the argument serves as a reminder that positive responsibilities of business cannot be limitless, it does not in and of itself rule out such responsibilities within the bounds of “reasonableness” (see Miller 2005: 102; Ulrich 2008: 140).

While an understanding of companies as social institutions points to positive responsibilities in the realm of human rights *realization*, more recent developments in the field of business ethics may imply responsibilities even in the realm of human rights *protection*. Under the banner of “political CSR”, a number of scholars (see, e.g., Matten and Crane 2005; Scherer and Palazzo 2007; 2011) have advanced the idea of companies as political actors, deeply involved in the governance of the global market place. The mere idea

of companies as political institutions is not new. In 1946 already, Peter Drucker advanced a political understanding of the large corporation as an “[...] Institution which sets the standard for the way of life and the mode of living of our citizens; which leads, molds and directs; which determines our perspective on our own society; around which crystallize our social problems and to which we look for their solutions.” (Drucker 1993: 6). Similarly, Dow Votaw (1961), in the early 1960s, argued that the corporation needed to be understood as a political institution based on its influence on and over society:

“Only if we have a thorough familiarity with the corporation as a political institution, as well as an economic and social one, can we hope even to recognize the effects that it has had and will have on the rest of society.” (Votaw 1961: 106)

Corporate political power has hardly decreased since. If anything, it has become more pervasive (see, e.g., Korten 1995; Derber 1998). If we acknowledge the enormous political power of some companies and of business as a whole, it seems that an adequate account of responsibility that matches this reality must extend far beyond merely doing no harm.

(3) Finally, doubts must be raised generally about the separation of duties at the core of the Framework. It seems that the fault line between the different categories of obligation is neither easy to define conceptually nor is it clear-cut in practice. The line especially between respecting and protecting human rights is notoriously blurred, not only from a moral, but, as Nolan and Taylor (2009: 443) have argued, even from a legal perspective. The distinction between respecting and protecting, in their view, gets “tenuous and murky” especially in the domain of social and economic rights. After all, what does it mean, for example, for a healthcare company to respect the right to health in the face of an epidemic in the developing world? Does the company respect the right to health by standing by and watching the disaster unfold? Or does respect, in such a situation, demand more than

mere non-infringement? The very notion of respect may be at stake here: at what point does indifference toward a person in need (without violating that person's rights) express actual disrespect? And at what point does such an understanding of respect turn into actual human rights protection? We do not need to address these questions here, but only recognize that they beg for no simple answers. Their relevance for the Framework and the GPs is uncontested: social and economic rights are as much a part of the Framework and the GPs as civil and political rights. It is one of the real strengths of the GPs that they are not based on "a limited list of human rights" as the UN Draft Norms were. Instead, all human rights are *per se* seen to be relevant for corporate conduct (Ruggie 2008a: 4). However, precisely in the domain of social and economic rights the very concept of non-violation is getting increasingly elusive. The violation of such rights often occurs as a result of structural processes, which make it difficult if not impossible to assign blame to specific actors (see, e.g., Young 2006: 114).

The SRSG denies any responsibility for companies in cases "in which they were not a causal agent, direct or indirect, of the harm in question." (Ruggie 2008a: 20) But precisely such lines of causation are increasingly obscure under today's structural conditions (Scheffler 2001). Therefore, the nature and essence of structural injustice, as Young (2011: 101-104) explains, cannot be adequately captured by the theories of complicity as they inform the business and human rights agenda. Under such circumstances, "do no harm" loses much of its normative appeal to guide corporate conduct. In a time in which the anatomy of harm is changing fundamentally and its attribution to specific actors becomes increasingly difficult if not impossible, such models systematically fail to allocate responsibility for the most pressing global (human rights) problems (Green 2005: 118). As a consequence, companies get off the hook, while human rights problems remain unsolved. All we can hope for, then, is corporations' goodwill beyond the call of duty: human rights realization turns into a matter of corporate benevolence.⁸

In response to these transformations, Iris Marion Young (2006) called on us to change the way we think about responsibility. Rather than clinging to the liability model which has informed much of the moral and legal discourse on responsibility in the past, we should adopt an idea of political responsibility. While the “old” liability model is backward-looking and blame-oriented, a political understanding of responsibility is forward-looking and partly disconnected from the condition of causation. For an agent to bear at least some responsibility for righting global injustice, it is less important that that agent was involved in causing the injustice than that it is capable of taking effective steps toward its remedial (see Green 2005: 125). Or as Amartya Sen puts it:

“...if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non-obligational concerns may overwhelm the reason for the particular action in question, but that reason cannot simply be brushed away as ‘none of one’s business.’ Loosely specified obligations must not be confused with no obligations at all.” (Sen 2004: 340-41).

By definition, structural injustices demand for collaborative solutions and remedies. They require that different actors from all sectors work together in novel and innovative ways. Strikingly, there is little to no reference in the SRSG’s reports to the capacity of businesses to contribute to such collaborative solutions. Positive responsibilities are per se looked at as a potential danger to replace state activity and thus to undermine state responsibility and accountability (see, e.g., Ruggie 2010: 14). Little is said, however, about corporations’ positive potential to *leverage* state capacities and responsibility within effective models of collaboration, or about corporations’ possibilities to support and promote responsible regulatory and public policies and to contribute to (rather than to replace) the provision of

public goods and services. Collaboration implies that such corporate contributions occur not beyond but together with the contributions of governmental agencies and other institutions. Corporate responsibility, then, is not a substitute for state responsibility, but, to the contrary, geared toward strengthening it.⁹

Such models of collaboration are inherently dynamic. They are defined not by separate, but by *shared* responsibility. Thus, the real challenge at the heart of business and human rights is not how to divvy up responsibility, but indeed how to *share* it between different agents and agencies without, however, conflating and undermining their assigned roles and purposes. The challenge is to cope with this new constellation in the global age, rather than to undo it through creating artificial dichotomies where none exist. In other words, the challenge at the heart of business and human rights is one of thinking responsibility anew, and with it the possible contributions of specific agents which are obligated by it.¹⁰

On the ethics of business and human rights

Amartya Sen (2004: 321) characterized human rights as “quintessentially ethical articulations, and they are not, in particular, putative legal claims [...]” In essence, this implies that we cannot deal with human rights properly if we do not understand the moral (and political) philosophy underlying them. Given this fundamental role of ethics and philosophy for human rights, it seems peculiar that philosophers and ethicists have not been involved more extensively in the “Ruggie process”. I will leave it open whether this criticism addresses primarily the Ruggie process itself or rather said philosophers and ethicists. As mentioned earlier, the SRSG did get criticized for not sufficiently engaging with ethics or “moral normativity” (Bilchitz 2013: 109) in his reports. Of course, this does not mean that the SRSG’s work is void of ethical implication. Far from it; whenever we theorize about international law, as Childress (2012: 1-2) points out correctly, “we draw on ethical discourse to create an ethic of international law... Even if scholars do not make the question of ethics

explicit in their analyses, it is nonetheless implicit in what the scholarship seeks to do.” The SRSB too has been engaged decisively in shaping such an ethic during the course of his mandate; ethics is implicit at many points throughout his work – all the more reason to have a closer look at it.

We can only speculate about the SRSB’s reasons for omitting to address ethics head on. Two possible rationales come to mind. First, he might avoid ethical argumentation based on purely pragmatic considerations. Such considerations are based on the view that a discussion on ethics is of little use in the given context. Second, he might avoid ethics not merely due to pragmatic considerations but based on a deeper underlying concern or unease about the role of moral normativity in the global context. I will call the first concern the “pragmatist’s” concern and the second one the “skeptic’s” concern.

The pragmatist’s concern

The SRSB described his approach to the mandate as “principled pragmatism” (see, e.g., Ruggie 2010: 3; 2013). He is principled in the sense that he is committed “unflinchingly” to the principle of promoting and protecting human rights as they relate to business. He is a pragmatist insofar as he focuses on “what works best to create change where it matters most” (Ruggie 2010: 3), that is, on “maximizing tangible results for affected individuals and communities” (Ruggie 2010: 3). Thus, as a pragmatist, the SRSB is interested in moving the process forward, in having a real impact on the ground and he is less interested in doctrinal conversations about the “right” approach to ethics and values and the like. Such conversations, such is the pragmatist’s concern, would be a stumbling block, a hindrance in creating momentum for the cause; for the pragmatist, ethics stands for incommensurable positions, disagreement over ideologies and dogmas, and, as a consequence, stalling progress or worse, parties walking away from the project. This is partly confirmed in the SRSB’s book, which addresses the criticism of some “friends in the academic world” who “did not fully

appreciate when noting my failure to provide a robust moral theory...” The reasons for not doing so, according to the SRSB’s short remark on this criticism is “straightforward”; In order for the Human Rights Council to endorse the GPs, they “needed to be carefully calibrated: pushing the envelope, but not out of reach.” (Ruggie 2013: 107) It is thus not surprising that the Framework and the GPs appeal to interests, rather than to morality to get companies (and governments) on board with it. They stress the business rather than the moral case for respecting human rights. They threaten with the court of public opinion and with the revocation of the social license to operate, should businesses fail to respect human rights and, doing so, they tap into a growing awareness among companies regarding the business potential of the “market for virtue” (Vogel 2005). Thus, from a pragmatic point of view, the SRSB has done everything right. The buy in of businesses and governments for something as controversial as corporate human rights responsibility has been astounding.

However, the point about ethics and instrumentalism is a different one. First, it is arguable that the changes needed in order to turn business into a force of respect, let alone protection and realization, of human rights, are of fundamental nature. A quick fix will not do; this is not about addressing symptoms, but about changing the logic of doing business in a fundamental way. Here is where pragmatism necessarily reaches its limits. You cannot alter the current business logic by catering to the interests on which that logic rests. You cannot change the mode of doing business by promoting a business case that hinges on *that* very mode of doing business. “In order to respect human rights”, as Karp (2014: 64, emphasis added) points out correctly, “one needs to *care* about each individual human being as such [...]” (Karp 2014: 64) Thus, respecting one’s rights has less to do with negative non-violation than with positive recognition, and it has less to do with one’s own interests than with genuine care for the other’s inherent moral worth: “To recognize another person with regard to a certain feature, [...] you do not only admit that she has this feature but you embrace a *positive attitude* towards her for having this feature.” (Iser 2013; emphasis added) This is important

not merely for the sake of moral philosophical purity, but for the sake of consistency of action over time. As such, respect is not merely connected to action, but to virtue and character. It ensures that non-violation of human rights is not merely coincidental, a more or less random outcome of activity and conduct which is neither aimed at nor in any morally significant way shaped by the recognition of the other as an end in him or herself. In other words, it ensures that non-violation is not purely instrumental, directed by the pursuit of one's own goals and projects, rather than by the concern for the moral autonomy and worth of the other.

Thus, at the core of respecting other people's rights is one's own moral integrity and authenticity. It is here that the responsibility to respect connects to corporate culture as a crucial, perhaps the key driver in achieving progress in business and human rights. Corporate culture is where the rubber hits the road in terms of corporate responsibility: here is where stated policy commitments are either practiced or ignored, where foundational values are lived, rather than merely proclaimed, where mechanistic compliance is replaced by something akin to a "corporate conscience" (see, e.g., Paine 1994; Goodpaster 2007). Culture represents the corporation's character; it is what sustains virtue over time. Building responsible business cultures is perhaps the most essential task for a corporation on the business and human rights journey. While the SRSG does recognize the importance of corporate culture, it is surprising that he devotes so little space and thought to this task in his reports. The talk of transforming business cultures remains empty and hollow as long as we do not have the conversation about the values on which such cultures ought to be built. Instrumentalism and the business case put profits first – the concern for human rights alone does not change such priorities. And as long as this is the case, human rights concerns will take a back seat whenever they conflict with business concerns. This may work out well as long as the belief in the harmony between ethics and business is upheld. But once businesses start to realize that the reality is more complicated, the business case for human rights responsibility might not take us very far anymore.

Second, as mentioned above, the SRSG's shying away from the conversation about ethics and values does not mean that the Framework and the GPs are somehow value neutral. "There cannot be a view from 'nowhere'" in our theorizing on international law and governance, as Childress (2012: 2) rightly notes; "it is always a view from 'somewhere', and that somewhere implicates ethics and ethical discourse." Indeed, instrumentalism contains an ethic as well. It contains an ethic that turns out to be rather problematic especially in connection with an unflinching concern for human rights. The ethics contained in and underlying instrumentalism is one rooted in social Darwinism. It is the ethic of favoring the strong over the weak and, thus, it is in many ways the antithesis to the fundamental role and purpose of human rights (Wettstein 2012b). Making human rights concerns dependent on the push back from the public (the courts of public opinion) implies favoring vocal stakeholders over less vocal ones. The expectations of marginalized (in business and in society) groups will more often than not gain little traction in the courts of public opinion and thus provide little "incentive" for companies as a yardstick for their conduct – especially so, if such expectations conflict with other, perhaps also legitimate, expectations of more powerful groups. In case of trade-offs, the instrumental logic must, by matter of contradiction, favor those stakeholders with the largest impact on the company's bottom line (see, e.g., Jensen 2002: 235). And that is why there is a fundamental conceptual mismatch at the heart of the business case argument for human rights responsibility: while instrumental reasoning is geared to cater to the powerful, the very purpose of human rights is to protect the powerless (see Wettstein 2012b for a more detailed discussion). Thus, the very foundation of the instrumental logic is in fundamental contradiction to human rights thinking.

The skeptic's concern

Underlying the pragmatist's concern is often a deeper seated skepticism about ethics as such. Ethical justification in a multi-cultural, global context is a complex affair; it is rife with

pitfalls and the charge of moral imperialism is never far when claims of universalism are invoked. Such concerns are certainly not unjustified and, unfortunately, have often enough turned out to be true. However, the role of ethics, well-understood, precisely is to uncover, rather than to buy into such moral imperialism.

It seems interesting that our increasing sensitivity toward ethical dogmatism and the cultural imposition of values is often paired with a striking relative obliviousness about the imposition of values implicit in economic models and structures:

Western perspectives on doing business in a global context have been criticized for betraying a Western *ethical* bias; however, the Western *economic* bias that pervades the cultural foundations of market capitalism is less often challenged... Therefore, when we grapple with ethical problems of doing business across borders, ... we examine cross-cultural ethics, or how ethics and law need to adapt to accommodate the smooth functioning of market capitalism as we know it. We less often explore cross-cultural economics; that is, how the global market system itself may need to adapt to accommodate cultures that may not share certain ethical tenets about human nature fundamental to Western free market capitalism....Western theories of human nature on which the founding doctrines of free market capitalism are based suppose that people are naturally prone to act in their own narrow self-interest. These conceptions presuppose a highly instrumental form of reasoning, in which little is done for its own sake but everything is done for the sake of gaining some other sort of extrinsic advantage.” (Michaelson 2010: 242-3).

As mentioned earlier, the Framework too builds on a rather narrow economic concept of business corporations and it presents this view as an uncontested, universally shared fact. Interestingly, despite the extensive writing, both critical and non-critical, on the Ruggie

process and the GPs, there has generally been very little push back on this particular point. However, it seems that what constitutes business is not set in stone either and varies from society to society (DeGeorge 2010: 5). Against this background, the universalism contained in mainstream business models would be open to the same critique, even more so, since the logic on which such models are based is not at all neutral in regard to values either, but promotes a particular, at its core Darwinian point of view. Hence, it seems rather peculiar that the promotion of that kind of ethic as universal seems to raise less concern than an ethic that emphasizes dignity and our shared humanity as values of universal appeal. It is within such normative assumptions underlying economic thought that cultural and indeed *moral* imperialism does take place and it has done so throughout the neoliberal era at least since the mid-1970s.

In sum, our fear of invoking ethical reasoning in the global context is informed by a fundamental misunderstanding about the role and nature of ethics. The role of ethical deliberation is not to enable and promote, but to *uncover* and *critique* moral imperialism – for example, by shedding light on the values inherent to economic thinking and subjecting them to systematic critique (see Ulrich 2008). Ethics, well-understood, requires a deeper engagement with the normative and cultural foundations of human rights responsibility and it is this engagement alone that can prevent the imposition of culturally biased views on others.

Conclusion

In the time span of less than a decade, the business and human rights discourse has moved from the rugged and murky waters of the Draft Norms process to the seemingly clear and smooth (main-)stream of the Ruggie process - and beyond. The SRSG was asked to provide a focal point for the debate after the Draft Norms impasse and he has done so. Indeed, the SRSG's achievements – some of which I have outlined above – are significant. However, the very success of the Ruggie process implies also its biggest risk or danger: in the past three

years in particular the debate has zoomed in on the GPs while many of the topics in the broader realm of business and human rights have fallen off the margins of an increasingly narrow debate. In other words, the debate has experienced considerable mainstreaming. Within this process, attention has shifted from foundational to rather technical implementation questions; critical scholarship, especially with a normative angle, seems to have become increasingly rare.

The very idea of business and human rights is built on challenging mainstream views and established doctrines; it is part of its agenda and of its identity – an identity that dates back pre-Ruggie. We will be well-advised to nurture this critical identity also post-Ruggie, for the moment that foundational scholarship starts to vanish in the debate is the moment when the debate will stop to evolve qualitatively. Against this background, let us hope that the SRSG was right when, upon stepping down from his mandate, he proclaimed not the beginning of the end, but the end of the beginning in business and human rights. Perhaps after the Draft Norms quarrels in 2005 it was necessary to steer the business and human rights vessel from those rough waters into a smoother stream, from rugged to Ruggie. Looking ahead, however, let us not forget to keep making waves. For a ship that travels too smoothly will hardly shake things up in a significant enough way to leave a truly lasting impact.

Notes

1 Ruggie is not against the use of legal instruments in business and human rights. In fact, he has always emphasized that “International legal instruments must and will play a role in the continued evolution of the business and human rights regime.” (Ruggie 2013: 125) However, he does not believe in one overarching treaty on the matter. Rather, he sees a role for legal instruments “as carefully crafted precision tools” addressing specific subject areas and governance gaps in the business and human rights realm (Ruggie 2014). He has stuck to this position also in regard to Ecuador’s recent proposal in the UN Human Rights Council to get new treaty negotiations underway, citing practical challenges and perhaps fearing that such negotiations could be an “excuse” for states to stall the GP implementation process (see Ruggie 2014; Ruggie 2008b).

2 See Ramasastry (2013: 162-172) for a short history of attempts to install a binding human rights framework for companies and the subsequent focus on voluntary measures.

3 A similar argument was made by Ryder (2010: 47) with respect to the OECD Guidelines, which similarly do not depend on companies opting in. However, they do depend on the consent of the respective government.

4 As opposed to this interpretation by Frankena, Feinberg’s (1966) typology of duties does include certain duties which do not necessarily correlate with other people’s rights, such as duties of status, duties of obedience and duties of compelling appropriateness.

5 In fact, as McCorquodale (2009: 391) reports, the Human Rights Council’s 2009 resolution, which endorsed the SRSG’s Framework, did use the term “Responsibility” for both states and corporations.

6 A negative duty, in a nutshell, is a “duty to ensure that others are not unduly harmed (or wronged) through one’s own conduct” (Pogge 2002: 130). A positive duty, on the other hand,

is a duty to “benefit persons or to shield them from other [than one’s own, FW] harms.” (Pogge 2002: 130). Ruggie asserts that the responsibility to respect includes... positive action. However, this does not turn the responsibility itself into a positive one. It remains negative, that is, a responsibility not to harm others; but it is an active negative responsibility, which requires specific action, as opposed to a passive negative responsibility, which requires mere forbearance (see Wettstein 2012c).

7 See below for more extensive elaboration on this point.

8 Somewhat symptomatically, it is in these terms that the SRSB interprets positive corporate responsibility beyond the responsibility to respect: “Clearly, companies may undertake additional commitments voluntarily or as a matter of philanthropy...But what it is desirable for companies to do should not be confused with what is required of them.” (Ruggie 2009: 16-17)

9 Similarly, O’Neill (2001: 194) argues that corporate power can be used to support and strengthen reasonably just states. Global justice, in her view, must be built by a diversity of agents with varying ranges of capabilities. The ideological separation of states as primary agents and non-state actors as secondary agents of justice obstructs the view on the variety of contributions such actors are, in fact, able to make. On the connection between global justice, human rights, and corporate responsibility, see Wettstein (2009).

10 Some scholars have advanced such models of shared responsibility. I have mentioned Iris Marion Young’s (2006) social connection model, which ascribes responsibility along the parameters power, privilege, interest, and collective ability rather than as a function of causal involvement. Similarly, Michael Santoro’s (2000: 143–158; 2009: 14–17; 2010) “Fair Share Theory of Human Rights Responsibility” proposes responsibility as a function of an agent’s potential to have a positive impact on the situation, its relationship to the victims and its ease in withstanding potential retaliation by a perpetrator. Hsieh (2004: 650–651) proposed a

“principle of limited scope” with similar aim. The SRSG’s reports do not take note of such proposals.

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