



INTERNATIONAL NGOs: AN INTERNATIONAL CODE OF CONDUCT.

AN APPROACH PAPER.

By Frank Vibert

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Background

Over the last three years EPF has worked with various partners to discuss issues for democratic societies and for international governance raised by the role played by NGOs. In themselves, NGOs are neither good nor bad for democratic standards of governance – it all depends on how they play their role. What the discussions have aimed to illuminate is whether there are standards emerging from within the NGO movement itself, or from other sources, that can help define how that role should be played.¹

There are four main reasons for focussing on the questions of standards of behaviour. The first reason is to clarify how the norms of NGO behaviour fit within the norms of rule-based democratic systems of government. At the most general level the norms are those of free speech and right of peaceful association and assembly. The diverse, spontaneous and voluntary nature of the NGO movement exemplifies this aspect of democratic systems of government. However, more difficult questions are raised by the deep involvement of NGOs in both policy formation and policy delivery in modern systems of governance. Here the issue is not the general one about freedom of expression and association but the more precise one about how norms relating to regulatory governance impact NGOs.

Secondly, the related standards of governance – both in the private sector and in government have been changing quite rapidly and this presents a challenge to the NGO of the future. Currently, many of the large international NGOs ‘blend’ the roles they

¹ ‘NGOs, Democratisation and the Regulatory State’ (1) and (2), London: European Policy Forum, November 2003. ‘Governance and NGOs of the Future’, London: European Policy Forum, June 2005

perform. They are both advocates and doers. They both argue for a cause and they deliver practical services. They act both as ‘outsiders’ mobilising grass roots support against government and business and as ‘insiders’ acting in close conjunction with government departments, international organisations and multinational business.² The question is whether there are standards that will enable these different roles to continue to be combined or whether NGOs will increasingly be forced to choose between roles.

The third reason to look at standards is that there seems to be a gap in the development of standards at the international level. In a national context relevant standards often exist – for example those that govern not-for-profit organisations. At an international level, standards are much less clear. In relating to NGOs, each international organisation has tended to go its own way. Similarly, multinational corporations, often the target of NGO activity, have also tended to try to strike their own bargains with NGO interlocuters. NGOs themselves that operate across borders are beginning to develop their own standards, but it is not clear how well they tie into related norms of behaviour – either corporate or governmental.³

Finally, the emergence of internationally agreed standards could help all the actors involved – governments and international organisations, businesses and NGOs themselves – to develop more predictable and reliable relationships. NGOs operate in a more questioning environment and are very much aware that reputational risk applies to all actors including themselves. International organisations and governments offer a variety of practices from the funding of NGOs, to accreditation, to exclusion. A variety of treatments may well be desirable but it also reflects great uncertainty about what is or is not appropriate.

² An example of the insider role is provided by NGO standard setters registered under the WTO’s Technical Barriers to Trade (TBT) Code of Good Practice for Preparation, Adoption and Application of Standards.

³ A recent survey of the literature concluded ‘There is a gap in the current literature in relation to the transformations and new developments that civil society experiences as it enters the world of international policy making’. Tabbush, Costanza, 2005. ‘Civil Society in United Nations Conferences’. United Nations Research Institute for Social Development. p22

In order to explore the issues involved, the meetings and papers organised by EPF and its partners have focussed on standards in two related areas – standards of corporate governance and standards of regulatory governance. One reason for looking at these outside standards is that they provide operational benchmarks based on practical experience. It is relatively easy to express desirable qualities such as ‘transparency’ or ‘accountability’ or ‘due process’ or ‘duty of care’ in the abstract and in general terms. But in order to be operational these qualities have to be put into a practical and usable form. This is what these codes attempt to achieve. The other reason for looking at these other standards is that they place principles that might apply to NGO activities, or be developed by NGOs themselves, within the context of a family of standards that are recognised internationally.

The purpose of this paper is first to summarise the relevance of these standards for how NGOs play their own role, and secondly, to identify those elements that might be adopted by NGOs themselves alongside elements that are specific to themselves. Thirdly, the paper explores how these standards might be put to use in an international context.

1. Corporate Governance and NGOs

Standards of corporate governance have been transformed in recent years, in part because of well-known corporate scandals such as ENRON and the extra-territorial reach of the US congressional response in the form of the Sarbanes-Oxley Act. There are four features of recent developments that seem particularly relevant to the world of NGOs.

The Principal-Agent Relationship

The first feature of relevance is that the new corporate governance standards place a renewed focus on trying to tighten up principal agent relationships. In the corporate world ‘the principal’ comprises the shareholders (or according to some accounts, a wider group of ‘stakeholders’) and management constitutes ‘the agent’. At the root of many examples of corporate wrongdoing is the divergence between the interests of the shareholders and the interests of the management. The new standards aim to help

convergence in part by setting more stringent standards for financial and other reporting that enables shareholders to know more accurately what is going on. The protection of shareholder rights is another long-standing part of the equation.

The question of who constitutes the ‘principal’ and their relationship with management is increasingly important in the world of NGOs because many of these are now run by professional managers. Moreover, when NGOs claim to be ‘representative’ in some way, the question of who is being represented is a question about who is ‘principal’. The distinction between a restrictive definition of a ‘principal’ (the shareholder or member) and broader definitions of ‘stakeholders’ (the labour force or beneficiaries) is relevant too. International NGOs often take the form of federations or confederations of national member-based organisations and can thus be said to have multiple principals. Most NGOs that are in the business of ‘doers’ are likely to see themselves as answering to at least two principals – their supporters or members and the targets of their activities. The chain of relationships is thus at least as complicated as in an international business.

Gatekeepers

The second relevant feature concerns the role of ‘gatekeepers’. In the corporate world the interests of shareholders are in theory protected by a number of ‘gatekeepers’ that act as standards setters and monitors of management behaviour and who also bear a responsibility to shareholders. The classic ‘Gatekeepers’ are the non-executive board members, accountants, auditors and lawyers. The startling element in recent corporate scandals has been the failure of these gatekeepers. New rules, for example on the role of non-executive directors, aim to address these failures. Incentives are key. Managers need freedom to manage. At the same time, the gatekeepers cannot align their interests completely with management if they are to be able to blow the whistle when needed. They are under a responsibility to ‘report up’ to a higher level of authority (inside and outside the company) any suspicions of management wrongdoing.

The business world has also produced independent ‘gatekeepers’ such as rating agencies and a specialised business press. Recent scandals have focussed attention also on why these dogs did not bark until the corporate burglars had done their looting.

Gatekeepers are relevant also to the world of NGOs. Those who support NGOs may do so for altruistic or ethical reasons and be less concerned about balance sheets and performance indicators than a ‘rational’ self-interested and financially motivated shareholder in a company. However, NGOs also need consistent and loyal support and this is more likely to be forthcoming if those who fund or support NGOs receive assurance that they are being managed in a way to meet their stated objectives.

Where multiple principals are involved, a greater variety of gatekeepers may be needed, and a more diverse composition of a Board. Managers of NGOs also need the services of gatekeepers in order to have an independent measure of what they are doing. An effective system involves identifying who is acting as gatekeeper, what standards they are operating to, and what incentives motivate them. In addition to the traditional gatekeepers such as auditors, and in the same way as in the business world, the NGO world is also beginning to produce independent gatekeepers that monitor NGO activities.

Responsible reporting

Timely reporting that gives an accurate reflection of the current condition of a company, and material information, known to management about its future prospects, is a staple of the publicly listed company. Here too there is an attempt to tighten standards. Part of this response seems to involve a convergence on ‘principles’ based standards with less reliance on ‘rules’ based standards. This shift recognises the judgemental nature of important balance sheet items and that rules obeyed in a purely mechanistic way may not provide a true picture. Another component of the shift to a principle based approach is the recognition that company reporting should cover more than standard balance sheet items and include other operating information that a third party may need in order to gain a rounded view of the organisation.

This broader concept of responsible reporting is also relevant to NGOs because the scope and ambition of their activities is unlikely to be captured by their balance sheets – important as those are in their own right.

Flexibility and ‘Comply or Explain’

A final element in recent debates about corporate governance relevant to the world of NGOs is the need for flexibility. Companies differ widely in their activities and a ‘one size fits all’ approach is not always going to be appropriate. Accordingly, the approach being adopted on a number of issues to do with corporate governance involves a so-called ‘comply or explain’ route. Under this approach a company may depart from a norm but is under an obligation to say why it has done so.

This approach also seems relevant to the world of NGOs since their activities also vary widely and so too does their internal organisation.⁴ There also needs to be a way of recognising that some international NGOs operate in a hostile environment in some countries and may need to avoid disclosure of members or sources of financial support. The ‘comply or explain’ standard means that reasons should be given where disclosure does not take place.

2. Regulatory Good Governance and NGOs

In the same way that recent developments in corporate governance seem to be relevant to the world of NGOs, so too do recent developments in the field of ‘good governance’ in the area of government regulation and rule-making.⁵

Rules about regulatory good governance are relevant in general because many international NGOs aim to influence the regulatory and international rule making functions of governments, whether it is in respect of trade policy, or the environment, or

⁴ The need to recognise the functional variety of NGOs in considering their accountability is examined in a recent paper by Erik B. Bluemel. ‘Overcoming NGO Accountability Concerns in International Governance’. (Brooklyn Journal of International Law 31 (Winter 2005))

⁵ Prof. Claudio Radaelli, ‘Governance 2010: The Implications for NGOs’, in ‘Governance and NGOs of the Future’, London: European Policy Forum June 2005 pp. 15-50

other areas of concern to them. Qualities that are sought in standards that apply to regulatory governance, such as transparency and due process, are in part a protection for citizens against arbitrary acts by governments. But they are also a protection against the powers of special interests, whether business lobbyists or NGO groups, that might try to influence policy behind the scenes.⁶ In addition, NGOs are increasingly formally incorporated into official decision-making processes. All this means that NGOs in their turn have to take into account in their own operations the standards that apply to the making of regulatory policy. In addition to this general relevance there are three more particular aspects that appear pertinent.

The Evidence base for policy making

Many of the procedures that have recently entered the mainstream of regulatory governance are about strengthening the evidence-base for policy making. Techniques such as Impact Assessment (cost/benefit or cost effectiveness analysis) or performance audit are essentially ways of marshalling information, analysis and learning lessons in a more rigorous form than has been customary.⁷ They also provide ways for improving the transparency of government processes because they expose the reasoning behind decisions.

This new attention to methodological rigour has important implications for NGOs. This is because it places an onus, or 'duty of care', on NGOs to be able to underpin their own goals with supporting evidence. There are three, very different, types of consequence for NGOs of the need to provide evidence to underpin their activities. First, NGOs come under greater pressure to show through, for example, independent performance auditing, that they are accomplishing the goals that they claim. For some NGOs the need to supplement a report on their activities by reports on the effectiveness or impact of their activities is a source of considerable difficulty. Secondly, NGOs that aim to influence the evidence gathering side of public policy-making will themselves have to be able to bring

⁶ For a discussion of standards of behaviour that might apply to business and NGO lobbying from the perspective of the lobbyists see 'Towards Responsible Lobbying'. Accountability and The Global Compact. (UNGC) Sept. 2005.

⁷ 'Governance in the European Union – From Ideology to Evidence' by Frank Vibert, London: European Policy Forum, January 2001

evidence to the table in order to show that they are credible interlocutors. Thirdly, NGOs that are advocacy NGOs will also come under a perceived ‘duty of care’ to back their advocacy with relevant evidence. Assertions alone are not enough. The fact that they may advocate important values does not by itself justify or bring about a place at the table.

Values

Typically, public policy-making involves both evidence and value judgements. The new techniques of regulatory governance involve a greater, albeit not a complete distinction, between the two. Blending the two elements together in a traditional ‘muddling through’ process no longer seems adequate.

This distinction is relevant to the world of NGOs because a number of NGOs aim primarily to advocate the salience of certain values. These NGOs want a particular value to rise in public priorities compared with other values. Other NGOs may be more concerned about ‘doing’ rather than advocacy and may, through the experience they gain, have important evidence to offer others about what works and what does not.

Many NGOs will wish to straddle this divide. They will want both to bring experience - based evidence to the table as well as shape the politics of applying value judgements to the evidence. The former leads them to want to operate within institutional processes; the latter may attract them to demonstrate on the streets.⁸ There is a question as to whether a single organisation can continue credibly to do both. But, on the assumption that they can combine both, as many NGOs hope, they may still need to distinguish more between the two roles.

Greater importance of due process

A third element that is important in the new standards of good governance is the increased attention given to ‘due process’. In general ‘due process’ is seen as part of

⁸ Jeremy Hobbs ‘The NGO of the Future’ pp 51-55 and Simon Wilson ‘Reflections on NGOs of the Future’ pp 57-62 in ‘Governance and NGOs of the Future’, London: European Policy Forum, June 2005.

being accountable. More specifically many regulatory bodies are aware of the fact that the main challenges to their decisions come through judicial review. They could be more concerned about this form of check on their activities than about the risk of political intervention in what they do. They may help defend themselves against the risk of any subsequent challenge in the courts by following procedural standards close to judicial standards in their own activities.

Emphasis on ‘Due process’ again implies standards of civility, reasoning, opportunities to give evidence and to rebut evidence, and expertise at the service of a court or regulator rather than at the service of advocacy. For NGOs a respect for due process may sometimes appear at odds with their need to maintain contact with and to motivate their grass roots support. On the other hand, NGOs also make use of the techniques of judicial review to press their own causes. Due process is, however, not a one sided technique. Those NGOs that wish to influence the evidence gathering side of regulation and rule-making and to insist on the observance of due process by others may increasingly need to show a preparedness to be judged by these same standards.

3. Elements for Adoption by NGOs

There are limits to the ‘read across’ from corporate and regulatory governance to NGO governance because NGOs have their own special features. Their role as ‘voluntary’ organisations distinguishes them from the government sector and their ‘not for profit’ status distinguishes them from business. But it is difficult to argue from this that the standards that apply to them should be any less exacting. Some are indeed careful not to make exaggerated claims about whom they represent and not to claim that they represent civil society as a whole. But most claim to operate in ‘the public interest’; many are important and influential interlocutors of companies, governments and international organisations; many aim to influence public opinion or governments more generally, and some claim to be ‘representative’ of a broader public opinion. Given these roles and claims, it is in NGOs’ own self-interest to be able to show that they operate to high standards. Moreover, many NGOs have developed into highly professional agencies with

their own management demanding efficiency and cost effectiveness in what they do. Because of the importance of what they do, they themselves do not wish to be seen to be operating to less exacting standards.

Annex A sets out a number of possible standards drawn from corporate governance and regulatory best practice that might apply to international NGOs. The standards are divided into those that might apply to the internal governance of NGOs, those that might apply to NGO relationships with the external world (for example, governments, international organisations and businesses) and a more general category of standards for responsible reporting that are relevant to any NGO that wishes to provide a rounded view of its organisation and goals. The standards that are described, cross refer, where appropriate, to relevant benchmarks in the related worlds of corporate and regulatory governance.

4. Possible Uses of Standards of Best Practice

Many NGOs are aware that they now operate in a more questioning environment and are more exposed to reputational risk. As a result several efforts are underway in different parts of the world of international NGOs to develop models of self-regulation drawing on experience in national contexts.⁹ There is much to be said for these efforts arising within the NGO movement itself. Governments are also aware of the need to proceed cautiously because they do not want to damage the spontaneous character of NGO activities. There is much to be said too for the emergence of a variety of approaches. The sheer diversity of NGOs suggests that general rules could be difficult to develop and apply.

Nevertheless, there are two compelling reasons to widen efforts underway so as to include the views of all participants in the international policy dialogue. The first reason concerns the credibility of self-regulation. Business, governments and international organisations are well aware that in the past NGOs have often acted opportunistically in

⁹ Self-regulatory regimes exist in about 40 national jurisdictions. For a review see Robert Lloyd. 'The Role of NGO Self-Regulation in Increasing Stakeholder Accountability'. July 2005. One World Trust. London.

dealing with international organisations and multinational corporations, acting as actual or would-be partners the one moment and fierce critics of practices and reputation the next. Self-regulation originating entirely from within the NGO movement itself may therefore lack credibility. In other areas where principles based approaches to international standards have developed, such as in the case of regulatory best practice, it has been found useful to have some kind of monitoring and peer review system to see whether the principles are being observed and indeed are proving to be worthwhile in practice. A similar approach may be desirable in the case of NGO standards.

The second reason concerns the legitimisation of standards of behaviour. Within the conventions of rule-based democracy there are limits to the extent of self-legitimation. In the context of international organisations the relevance of democratisation is a disputed area of governance. Nevertheless, all parties and not just NGOs have an interest in what standards of behaviour are developed and how they relate to other conventions recognised by democratic societies. The development of internationally recognised standards that produce more reliable and consistent rules of engagement affects the legitimate interests of all actors – international organisations, business as well as NGOs themselves. Moreover, the validation of rules applying to NGO behaviour might well be enhanced if the effort to draw up codes of conduct extend beyond the NGO community itself and relate clearly to other already accepted and relevant international standards such as those applying to corporate governance and regulatory best practice.

In order to preserve a voluntary rather than a mandatory, prescriptive approach, the development of the standards of best practice discussed in this paper might be approached in the following way:

(i) Standards might relate to international NGOs and should not be seen as replacing or over riding national approaches to those NGOs operating locally or nationally. Experience of different approaches in different national jurisdictions will in turn benefit the development of international standards by showing what works well or not.

(ii) Standards might be seen as an attempt to define ‘best practice’, including best practice in self-regulation, and not as standards that are to be legally binding. This will allow for easier updating. Best practice can also be seen as a way for NGOs to help themselves rather than something that is forced upon them.

(iii) In order to provide flexibility and real world applicability, standards need to be ‘principles based’ rather than constitute a prescriptive rule book.

(iv) Because of the wide variety of NGOs and the wide variety of circumstances in which they operate, the general approach to standards should centre on disclosure. In turn, disclosure should incorporate a ‘comply or explain’ principle. This will allow NGOs to say why a particular standard is not applicable to their particular situation. (For example an international civil rights NGO operating in a hostile state might need to conceal the details of its membership and supporters);

(v) Standards should not be seen as ‘accreditation’ but as a way of providing interlocutors with assurances about who they are dealing with and the ‘terms of engagement’. This ‘know your partner’ approach avoids the creation of privileged relationships or ‘insiders’ and ‘outsiders’ in the NGO world.

(vi) Any standards of international best practice should not be seen as imposed from above on an arbitrarily defined category of NGOs but standards that NGOs might themselves decide to respect on a self-selecting basis.

If agreement can be reached on this general approach and a consensus formed around the standards of disclosure set out, the remaining question concerns how to provide some form of international legitimation and validation of standards of best practice. What emerges from the discussion above is for a system of ‘self-regulation plus’. This means that suggestions for an international code, whether drawn from this paper or from other sources, should have the following features:

- They should be validated as the relevant principles in some way by other key actors in the international system including international organisations;
- They should be ‘nested’ alongside other related international codes;
- They should be accompanied by some kind of review system that monitors their observance.

Attachment: Annex A. International NGOs: Possible Principles of Best Practice.

Annex A. POSSIBLE PRINCIPLES OF BEST PRACTICE

INTERNAL GOVERNANCE

Clarity About Principals

Managers and members: Disclosure of membership structures and relationship with managers. Identification of senior managers and role. Identification of principals.

Management duties and responsibilities: Definition of management duties, responsibilities and reporting lines.

Reporting

Financial disclosure: timely financial disclosure to cover sources and uses of funds, assets and liabilities.

Gatekeepers

Boards, trustees and advisers: Disclosure of board structures, including role of trustees and advisory bodies, their duties and responsibilities.

Auditors, accountants, and lawyers: Role and structuring to be disclosed. Relevant accounting standards to be specified. 'Reporting up' responsibilities to be identified.

Independent performance audit: Description of duties, responsibilities and reporting lines. Disclosure of reports.

EXTERNAL GOVERNANCE

Evidence based standards

Disclosure of submissions to official bodies and identification of sources of evidence (primary or secondary).

Due process

Disclosure of any formalised relationships with official bodies (eg membership of an advisory committee) incl. financial support.

Notification of contacts: disclosure of contacts that are material to the aims of the NGO.

Disclosure of any agreements or understandings with external parties (eg with multinationals).

BROADER RESPONSIBLE REPORTING

Statement of strategies, objectives and resources: Sufficient to inform third parties about principle aims of organisation, how implemented and who the stakeholders are.

Key performance indicators: Disclosure of what management looks at in measuring the organisation's progress and general condition.

Other 'Particular matters': Any other disclosures that an NGO may need to provide in order to offer a reliable, fair and balanced picture of the organisation.