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LEGAL ISSUES AFFECTING VOLUNTEERS

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Volunteers and volunteering lie at the heart of the Third Sector. Indeed, volunteering may be the most distinctive characteristic of the Sector. Similar to for-profit companies, “not-for-profit” organizations are generally permitted to make profits, though they are not permitted to distribute them. And, of course, many for-profit companies fail to make profits. Governmental agencies and departments engage in most if not all of the activities typically associated with the Third Sector – health, education, relief of poverty, science, art, environmental protection, consumer protection, human and civil rights, etc. It is infrequent, however, to find volunteers working for the government and very rare to find them in for-profit companies. By contrast, many not-for-profit organizations would be unable to function, or would function at a much lower level of effectiveness, if they did not have the energy, commitment, and talents of volunteers. Indeed, key to the success of nearly every not-for-profit organization is the voluntary service of its trustees or directors.

As is demonstrated by the wealth of papers on volunteering presented at this conference, a great deal of scholarly attention has been paid to volunteers. Strangely, however, virtually no attention has been paid to the legal issues affecting volunteers. This neglect becomes even more interesting upon closer examination, for numerous legal problems confront volunteers, yet the laws of virtually no country have given more than partial attention to these problems. The purpose of this paper is to suggest that every country with a significant Third Sector needs to examine its laws to remove inappropriate legal barriers to volunteering and to assure that individuals who volunteer receive appropriate and adequate protection under the legal system.¹

This paper first defines what we mean by a “volunteer,” and discusses various issues for including or excluding certain concepts in that definition. It then discusses a variety of legal issues affecting volunteers, including recognition of their legal status, the right to establish a contractual basis for volunteering, the application of various labor laws to volunteers, issues arising under social security and tax laws, questions arising with respect to liabilities of volunteers and liabilities caused by volunteers, and, finally, the desirability of special international volunteering laws. Due to the paucity of laws directly dealing with volunteers and volunteering, this paper is based more on analysis than examination of existing laws. On a number of issues, the authors have made clear recommendations, but on other they have simply sought to lay out relevant and competing considerations.

¹ The genesis of this paper lay in preparatory work done by the authors on behalf of the International Center for Not-for-Profit Law for a working conference of experts to analyze the legal issues affecting volunteers and to make recommendations. The authors are indebted to the participants in this conference, which was held in Warsaw, Poland, from 23-26 January 2002, for the numerous insights and ideas they contributed and to the researchers at ICNL who developed much of the background material for that conference. The authors would also like to express their appreciation to the United States Agency for International Development and the Stefan Batory Foundation in Poland, which provided funding for that conference.

DEFINITION OF VOLUNTEER

“A volunteer is an individual who provides services to or for the benefit of another by free choice and without compensation.”

To understand why we recommend this definition of a volunteer, both for legislation and for clarity of thought about good practices with respect to volunteers, it is necessary to examine its component parts one by one. As will become clear, there are a sizeable number of issues that must be dealt with and there is a certain amount of complexity involved in arriving at a clear and workable definition of a volunteer. That definition is extremely important, however, in crafting legislation that will protect volunteers or provide them with appropriate benefits without being either too narrow or too inclusive.

1. “an individual who” – This part of the formulation makes it clear that a legal entity or a public body cannot be a “volunteer. A for-profit company, of course, can make contributions of goods or money, but these are charitable contributions, not volunteering. Public bodies and not-for-profit organizers often offer needed services for free to poor or disadvantaged individuals, but they do so as part of their budgeted activities. In the case of public bodies, the individuals who actually provide such services are doing so as part of their job. A not-for-profit entity may have assistance from volunteers in providing services, but it is those individuals who are the volunteers, not the legal entity.

It is possible, of course, for a legal entity to make services available without charge, such as when a corporation releases its employees to help provide rescue and relief services in connection with a natural disaster. When the legal entity offers such services without charge and without remuneration, it would be possible to say that the legal entity was the “volunteer.” However, doing so would hopelessly confuse the analysis and resolution of legal issues affecting volunteers. Accordingly, when a legal entity provides services without charge or remuneration, it is preferable to regard those services as being offered by the individuals involved. If the individuals are required or paid by their employer to provide those services, those individuals are not volunteers. If the services are offered freely by the individual, he or she is a volunteer, not the legal entity or public body for which he or she customarily works.

2. “Provides services” – This part of the definition makes it clear that one is not a volunteer when one provides goods or facilities without charge or remuneration. Providing such goods and facilities for, e.g., the relief of the poor, is unquestionably good and should be encouraged, such as by providing the

donor with a tax deduction. However, "volunteering" necessarily involves the provision of services by an individual.

It is worth noting that in many situations an individual will offer both services and goods, such as when an individual supplies the food she prepares freely for rescue worker at the scene of a disaster. In such cases, we should distinguish between the goods (or facilities) being furnished, for which she should receive a tax deduction (if appropriate record-keeping requirements are followed). This contribution should be distinguished from the provision of volunteer services, for which, as will be discussed further below, no tax deduction should be provided.

3. "To or for the benefit of another" – This part of the definition intentionally leaves open the question "another what?" In reality the recipient or beneficiary of services provided by a volunteer could be any natural or legal person, a public body, the public, or even the undifferentiated common interest, such as when a volunteer works to strengthen human rights laws or improve the environment.

Bilateral and unilateral volunteering relationships. It should be noted at this point that volunteering can be either bilateral or unilateral. When the recipient of volunteer services is aware of them and consents or encourages the receipt of them, that is a "bilateral" volunteering relationship. Such a bilateral volunteering relationship can be either formal, such as when there is a written agreement, or informal; it may be isolated, continuous, or episodic. The crucial fact is that the recipient is involved, in the sense that he, she, or it is aware of the services being volunteered and accepts them.

As the name suggests, a "unilateral" volunteering relationship exists when the recipient of the volunteer services is unaware of them. For example, a parishioner may spontaneously decide to weed the garden of her church. If and when the pastor or other leaders of the church learn of these volunteering services (and either consent to them or ask that they desist – not all of us are good gardeners!), the volunteering relationship becomes bilateral. Virtually all of the legal issues that arise, except for the issues of liability, do so in the context of bilateral volunteering relationships.

Citizen or volunteer? When a citizen decides to take individual action, say, to promote equal legal rights for women or better laws protecting children, does he do this as a citizen or as a (unilateral) volunteer? Although this is perhaps an interesting question for academic debate, the legal issues relating to citizen participation are beyond the scope of this paper. It can be noted, though, that it is essential in every democracy that there be adequate laws permitting

citizen participation and governmental transparency and accountability. Thus, there should be “government in the sunshine” laws, public budgets, freedom of information laws, laws assuring the independence of the media, etc.

Limiting protections and benefits. It should also be noted here that any special legal protections or benefits provided in legislation dealing with volunteers may, and perhaps should, extend those benefits and protections only (i) to services provided pursuant to formal, bilateral volunteering relationships, (ii) to services provided to certain kinds of recipients, e.g., public bodies or not-for-profit organizations, and/or (3) to services that fall under an accepted definition of “public benefit” services, such as care for the elderly or disabled.

Families and associations. An individual who renders services to a member of her family or to another member of an association to which she belongs or to the association itself should generally not be regarded as a volunteer by reason of such services, at least with respect to legislation conferring special benefits or protections on volunteers. There is certainly a sense in which a member of a cricket club who helps maintain the pitch, a boy scout leader taking his troop on a weekend outing, or a grandmother who offers to look after the children while the parents go on holiday is “volunteering.” The volunteering that raises most of the important legal issues (other than the liability issues) and is the appropriate subject for legislation extending special benefits or protections, however, is volunteering to help another who is not a member of one’s family or a member of the same association.

A member of a family or of an association who renders services to third parties, however, may be regarded as a volunteer. Further, if an individual provides services to a group of individuals that includes one or more members of her family or to an association to which she belongs as well as to third parties, she may properly be regarded as a volunteer, so long as she does not to discriminate in favor of a family member or another member of the association.²

4. “By free choice” – It is important that the definition of a volunteer emphasize the voluntary nature of the services involved. Thus, someone who is compelled or coerced to provide services for free is not a volunteer. For example, prisoners who are required to help put out a forest fire are not “volunteers,” nor (somewhat more controversially) is a high school student who is required to

² The fact that a person is providing extensive assistance or care to another member of his family, and thus may not be a “volunteer” in the ordinary or the technical sense of the word, should never be a ground for denying state benefits to that person with respect to such services (e.g., a monthly allowance for a relative who takes an elderly family member into her home).

complete a minimum number of hours “volunteering” for a community organization in order to be graduated. Further, services required by law, such as the obligation of parents to support their children, are not volunteer services.

5. “Without compensation” -- It goes almost without saying that you are not a volunteer if you are being paid to do what you are doing. It is essential, however, to differentiate between compensation and payment of expenses. The payment or reimbursement of reasonable expenses should not be regarded as compensation either under legislation relating to volunteers or for purposes of good practice guidelines.

A couple of practical questions deserve mention. What is “reasonable” and who will decide? If an internationally famous musician donates her services to raise money for AIDS in Africa, is it “unreasonable” that she is flown in first class, picked up at the airport by a limousine, and put up in a luxury hotel? Although for most of us such luxurious treatment would be completely out of the ordinary – and hence perhaps “unreasonable” in our cases – if this is the ordinary lifestyle of the famous musician, perhaps such treatment is not unreasonable in her case. What is “unreasonable,” in other words, will depend upon the particular facts and circumstances. As to who will decide, in almost all cases it will be the taxing authorities. It is generally well settled in income tax law that the payment of unreasonable expenses constitutes disguised compensation and will be taxed as such. In such a case, the individual would lose her status as a volunteer.

One other troublesome issue: What if the individual receives a daily lump sum amount to cover her expenses? This could simply be a way to avoid the administrative burdens of keeping detailed records of trivial amounts. If the per diem payment is substantially greater than the ordinary expenses for a volunteer would be, however, we might once again have disguised compensation that should be taxed as such – and the individual will once again no longer be entitled to be treated as a volunteer.³ A related question arises if the volunteer is reimbursed for expenses that are usually paid for by employees themselves, such as the costs of commuting and lunch. Paying “volunteers” for these expenses could be viewed as disguised compensation or they could be viewed as expenses of the recipient organization that are incurred in order to attract volunteers.

³ Under the U.S. Volunteer Protection Act, 42 U.S.C. §§ 14501-14504, a person is not a protected “volunteer” if she receives anything of value in lieu of compensation in excess of \$500 per year.

LEGAL ISSUES AFFECTING VOLUNTEERS.

At the present time the legal systems of many countries either impede volunteers and volunteering or fail to encourage and support them. In order to assure that volunteers and volunteering continue to play an important and growing role in modern societies, it is important that each country carefully review its legislation and (i) formally recognize and legitimate the status of volunteers, (ii) make changes to remove legal impediments to volunteering, and (iii) provide an enabling and protective legal environment for volunteering.

1. Minimum Wage Laws.

Currently many legal systems do not generally recognize or permit volunteering relationships. For example, the labor laws of many countries provide that every person who provides requested services to another must receive a "minimum wage." Literally applied, these minimum wage laws would make all formal, bilateral volunteering relationships illegal. Subject to the qualifications discussed below, it should be clarified in applicable legislation that volunteering is permitted by law and that it is not an employment relationship that is subject to the minimum wage laws.

Competing social policies are at play in connection with whether volunteers should be exempted from the minimum wage laws. Minimum wage laws are intended to protect workers from exploitation by employers. They require that a minimum amount of compensation – in many countries, a very minimal amount – be paid to anyone who is working for another. (They do not apply, of course, to self-employed workers, and hence would have no application to unilateral or occasional bilateral volunteering relationships.)

Unemployment is a chronic problem in most countries, and a horrendous one in many. Many individuals would rather have the most meager wages than have no work at all. Obviously, it is in the interests of employers, everything else being equal, to pay the lowest wages possible. Minimum wage laws, which generally receive strong support from labor unions, are intended to prevent wages from going below a level deemed necessary to provide the basic necessities of life.

Unfortunately, the temptations to both individuals and potential employers to evade the minimum wage laws are strong, and so-called "volunteers" are a frequent way in which such evasion is attempted. Consider the following cases:

- a. Individual A is encouraged to work as a "volunteer" in the secretarial pool of Company X. She is told that if her work is satisfactory after six months, she may be hired as a full-time employee.
- b. Individual B is encouraged to "volunteer" for Charity Y. It is not able pay her a salary, but it will offer her a "per diem" equal to 1/3 of the minimum wage to "cover her expenses."
- c. Individual C and his wife would both like jobs with Museum Z. The Museum would like to employ them both, it says, but does not have room in its budget to do so. If Ms. C would be willing to work at the Museum as a "volunteer," however, the Museum will hire C at the standard salary (which exceeds the minimum wage).
- d. In a country that requires hourly workers to be paid for overtime, an employer tells its hourly employees that they will lose their jobs unless they "volunteer" to work extra hours.

In each of these cases, individuals are keen to have some meaningful employment and the employer is seeking to get around the minimum wage laws by treating an individual as a "volunteer." These cases seem like obvious attempts to defeat the social policy of the minimum wage laws. To prevent just such evasions, the minimum wage law of the United States makes an exception from them for volunteers, but only "bona fide" volunteers. What constitutes a "bona fide volunteer" is decided by the Department of Labor and, if necessary, the courts, on a case-by-case basis.

As is often the case, there is a competing social policy that is brought into play by these examples. Volunteering in many countries has been viewed favorably as a way in which an individual without a history of employment can work her way into the job market. Consider the case of a homemaker who raised three children who are now grown and out of the house. She would like to get a job, but she has no specific skills or professional training and has not had a paying job for 20 years. She volunteers to run the office at her local church. Over the course of two years she acquires hands-on experience using computers, photocopier machines, telephones, and all of the administrative tasks of the church. She does such stellar work that the minister is able to recommend her to a local business man as an excellent candidate for office manager. He hires her and she, at last, has a paying job.

Is this an abuse of the minimum wage laws, or is this instead a classic example of how volunteers, working in the not-for-profit sector, can acquire skills and experience that enable them to become fully employed workers, contributing to the incomes of their families and paying taxes to their government? Most of us would probably choose the latter description and point to it as an additional reason to encourage volunteering. Clearly, though, there

are some difficult lines to draw here and each case will probably have to be judged on the basis of its particular facts and circumstances.

Moreover, to the extent that we permit and encourage volunteering as a way for people to work their way into the job market, the more difficult it is going to be to administer the minimum wage laws in a fair manner. At the same time, it would be impossible to determine at the outset whether someone who has taken a volunteer position, such as in the case above, will be able (and willing) to use her newly learned skills to get a paying job, so it would be impossible as an administrative matter to determine whether, when she goes to work at the church, she is intending to get a fully paid position. The secretary in the earlier example is clearly being exploited, but the woman working in her church is not. Finally, if laws failed to make an exception from the minimum wage laws for the classic volunteer – the person who is selflessly seeking to help others or to improve her community – would virtually eliminate volunteering.

2. Volunteering Contracts.

Disclosure. In connection with formal or informal bilateral volunteer relationships, the law should require the organizer of volunteer services to disclose to the volunteer as soon as reasonably practicable the legal rights, risks, burdens, options, and benefits of the relationship, including those borne or provided by the organizer. Disclosure should be required to be made in writing, including by email or bulletin board notice. Further, the organizer should be permitted to require a volunteer to sign and return a copy of the disclosure statement as a condition of providing volunteer services. If this is done, the signed disclosure statement then becomes the contract between the parties.

Any legal requirement for disclosures, either to volunteers or to third parties, imposes at least a minimal administrative burden on the organizer of those services. Accordingly, there should be an exception from the disclosure requirements for insignificant or *de minimis* volunteer services. And, of course, no disclosure can be required in the case of unilateral volunteer services. As soon as the recipient of unilateral volunteering services learns of them, however, it has the right to refuse them or, if it wishes to continue them, provide the appropriate disclosure and prepare an appropriate contract.

Organizers of volunteer services. The term “organizer of volunteer services” or “Organization” is used in this paper because often the party that organizes volunteer services is not the party that receives the benefit of them. For example, a charity might recruit volunteers to take food to homeless people or a state body might recruit volunteers to help provide relief services to flood

victims. In other circumstances, of course, the party organizing the volunteer services is the recipient and beneficiary, such as when a church recruits a parishioner to teach Sunday school or when a hospital recruits volunteers to assist with patient care. In many cases it is not entirely clear whether the benefit of the volunteer services is being received by the organizer of them, by another, or perhaps by both. For instance, in the cases just mentioned, who is getting the benefit of the volunteer Sunday school teacher's services, the church, the students, or both? Who is getting the benefit of the hospital volunteers, the hospital, the patients, or both? Fortunately, it is irrelevant for legal purposes how these questions are answered. What is clear, however, is that the party that organizes the volunteer services has whatever responsibilities to the volunteers that the law chooses to impose.

Written contracts. If a volunteering relationship is going to involve the rendering of significant services or extend for a significant period of time, it is a good practice to have a formal written agreement that sets forth the services that will be rendered by the volunteer and the rights, duties, liabilities, and responsibilities of both parties. In common law jurisdictions it is generally permissible to establish such contracts, subject to any overriding labor laws, but in many civil law countries contracts for services, especially for full-time services to be rendered on the premises or under the direction and control of another party, are governed by the Labor Code. In civil law countries, therefore, it would be generally desirable to amend the Civil Code to permit contracts for volunteer services and to exempt such contracts from the Labor Code.

The key questions with respect to volunteering contracts are (i) what provisions, if any, should be required and (ii) what provisions, if any, should be prohibited. Any other provisions mutually agreed by the parties should be allowed.

The threshold for requiring a formal volunteering agreement should be higher than the threshold for requiring disclosure, simply because it will usually involve a greater administrative burden, one that should not be imposed unless the services are significant or will continue for a lengthy period. Further, the recognition of formal, bilateral contractual volunteering relationships should not, as a matter of law or good practice, prevent, limit, or discourage the existence of informal, bilateral or spontaneous, unilateral volunteering not governed by a written contract. What thresholds are appropriate for required disclosures to volunteers and third party recipients and the requirement of a formal volunteering requirement must be set by each country in light of its particular needs, traditions, and circumstances.

Terms of the Contract. The volunteer and the organizer should be free to provide any lawful terms and conditions for the volunteering relationship that are mutually agreed to, such as –

- What services are desired and expected from the volunteer;
- When and how the volunteer will have access to the premises;
- Whether the volunteer will have the use of an office, a computer, or other equipment;
- Whether the volunteer will be reimbursed for reasonable expenses; and
- Whether the volunteer will have the right to receive a certificate of services rendered or a letter of recommendation.

The more difficult questions involve questions of what provisions should be required or prohibited in a volunteering contract. With respect to all of these issues, some of which are listed below, there are competing social considerations and each legislature will have to make some difficult policy choices in light of its countries needs and traditions. Many of these involve deciding whether to make exceptions to the laws that ordinarily apply to paid workers. For example, should the organizer of volunteer services have the same responsibilities and liabilities to a volunteer for workplace safety that it does to paid workers? On the one hand, the law should not permit or encourage Organizations to provide less than minimally safe conditions for the performance of services. On the other hand, if the organizer fully and adequately discloses to the individual the nature and extent of any risks and the volunteer consents to assume them, why should that not suffice?

Again, should a volunteer receive the full protection of, and the organizer have potential liability for, any laws preventing discrimination on the basis of age, gender, race, religion, and so forth that apply generally to all employees or potential employees. For example, if an Orthodox Jew volunteers to teach an Old Testament class at a Roman Catholic school, must the school disregard the individual's religion in deciding whether to accept the services? On the one hand, it seems wrong for an institution that is organizing the provision of significant services to be able to engage in discrimination. On the other hand, just as individuals are generally free to choose their friends and social relations as they wish and without liability for discrimination on any basis, should not similar rules apply to anyone being asked to receive the services of a volunteer?

3. Volunteering by Minors.

In general, the law should not forbid minors from volunteering. There are special problems, however, because of the possibilities of abuse or

exploitation of children. Child labor laws wisely prohibit children from working for pay before a certain age, and so-called "volunteering" by children should not be permitted if it amounts to evasion of these laws. Further, it is always possible that the parents or guardians of a child will abusively require a child to provide services that the child would otherwise not wish to perform. As with possible evasion of the minimum wage laws, these problems can probably be dealt with effectively only on a case-by-case basis.

There is also the problem of legal capacity. If a child wants to engage in significant or lengthy volunteer activities, the law should ordinarily require that there be a formal, bilateral volunteering contract. Under laws that are fairly universal, a child below a certain age (e.g., 14) lacks the legal capacity to enter into that or any other contract. Parental or guardian consent will overcome that difficulty, and it should be provided in accordance with general legal rules.

Finally, the conditions and laws under which volunteering by children may take place must be determined in a manner consistent with international conventions for the protection of children, at least in those countries that are States Parties to those conventions.

4. Unemployment Benefits and Volunteering.

An especially difficult and perplexing problem is posed by the unemployment benefit laws found in a number of countries. Universally under such laws, a person who is working is not entitled to unemployment benefits. One of the great challenges for those who administer unemployment benefit programs is to detect and eliminate the rather numerous instances in which individuals sign up for unemployment benefits and then get a job which they do not disclose to the unemployment office.

In some countries unemployment benefits are denied to individuals who are working as volunteers. In some cases this may be necessary in order to prevent abuse. For example, an employer might tell a valued employee that it can no longer afford to pay her wages, but if she "loses" her job and signs up for unemployment benefits, the employer will take her back as a "volunteer" and pay her a per diem which, of course, will be far less than her current wage. In a country like Germany, where an unemployed worker receives 60-67% of her former wages for 32 months and 53-57% for an unlimited time thereafter, such an arrangement would not be too bad for the worker and would offload the employer's wage cost onto the state budget.⁴

⁴ The Federal Labor Office in Germany has 90,000 employees and an annual budget of \$52 billion. *The Economist*, June 29, 2002, p. 33.

An arrangement like the one described is, of course, a violation of the minimum wage laws as well as the unemployment benefit laws. Rather than having a flat prohibition on paying any unemployment benefits to volunteers, as France does, however, it might make more sense to catch and punish instances of abuse on a case-by-case basis. At a minimum, there should be an exception for truly uncompensated volunteering in a public benefit activity, such as caring for orphans or the elderly.

5. Health and Retirement Benefits.

It is almost universally true that volunteers do not earn credit under social security and retirement programs. Whether they are entitled to health benefits from the state depends upon whether the health system is based on employment (or being a member of the family of an employee) or is extended to all citizens.

It might at first blush seem that this problem could be solved if an Organization receiving the benefit of services from a volunteer were to provide benefits such as health and retirement benefits funded at its own cost to long-term volunteers. Unfortunately, without special legislation, the voluntary provision of health, pension, accident, or other benefits, by insurance or otherwise, would probably be considered to be compensation, thereby depriving the individual of status as a volunteer and subjecting her to taxation.

In order to deal with these problems, and as an incentive to volunteering, countries should consider adopting legislation that would permit and encourage Organizations receiving the benefit of volunteer services, or at least those engaged in public benefit activities, to provide health and retirement benefits to volunteers. Such benefits should not be subject to taxation on a current basis and should not affect the status of an individual as a volunteer. Countries should also consider adopting legislation that would include volunteers engaged in public benefit activities full time and for long periods in state-funded social security systems (e.g., health, retirement).

6. Taxation.

The general rules of taxation should apply in determining whether a volunteer is taxable on any cash or other item of value received in connection with rendering services. A volunteer should not be taxable with respect to reasonable expenses paid or reimbursed by the Organization with respect to the services rendered by the volunteer. In accordance with general rules of taxation, an individual is not entitled to a deduction under the income tax law for the

value of services rendered as a volunteer.⁵ A volunteer may, however, be entitled to a deduction under the income tax law for the value of reasonable expenses relating to the services rendered by the volunteer, if the Organization did not pay or reimburse these expenses.

Under general rules for taxation, the organizer of volunteer services should not have to recognize as income the value of services received from a volunteer. The organizer is generally allowed to reflect the reasonable expenses paid or reimbursed relating to the services rendered by volunteers as part of its operating expenses both for tax and financial reporting purposes.

Gratuitous services are generally not subject to the value added tax.

7. Liability.

Most countries have not dealt with the question of whether volunteers can create liabilities with respect to third parties or whether the entity organizing the volunteer services has liabilities to the volunteer. The general rules on tort (delict) and contract liability applicable to employees should generally apply to volunteers and to those who organize their services. Thus, if an organizer of volunteer services through its negligence causes harm or injury to a volunteer, it would be directly liable to the volunteer. Such a volunteer would generally not be covered under any workers' compensation law. Further, an organizer of volunteer services may be liable to third parties for negligent torts committed by a volunteer in the course of rendering volunteer services just as it would if the individual was an employee.

For example, if a volunteer were driving a bus to carry school children on a study outing and negligently ran into an automobile, the school would typically be liable for any damage or injury caused to the car and its driver and passengers. An organizer of volunteer services may also be liable to a third party if the organizer has failed to exercise due care in retaining or supervising the volunteer.

In the area of contracts, the law of agency and apparent authority should come into play. For example, suppose a volunteer has been placed in charge of a soup kitchen and agrees with the landlord to extend the lease for five years. Even if the volunteer had no actual authority to extend the lease, if the landlord

⁵ It would be possible, of course, and perhaps desirable, to allow a volunteer to deduct an amount equal to the minimum wage times her hours of volunteer labor, so long as the organizer of the volunteer services kept accurate and reliable records of the volunteer services performed.

reasonably believed that she did, the operator of the soup kitchen should be bound by the lease extension.

An employer generally protects itself against possible liabilities to third parties by taking out liability insurance or bonding employees who handle money. Under most insurance laws, however, the employer, who does have an "insurable interest" in employees, would probably not be regarded as having such an interest and thus would not qualify for such insurance.

It is important to point out that, in the absence of special legislation, volunteers will be personally liable to third parties for any torts committed by them and that volunteers may be liable to the organizer of the volunteer services if it has caused harm to that Organization. For example, in the case above involving the bus driver, the school would have a cause of action against the volunteer driver to recover any damages it had to pay because of the accident with the automobile. And, the operator of the soup kitchen may have an action against the volunteer manager of the soup kitchen if it suffers loss because of the extension of the lease. Of course, in many, and perhaps most, cases the volunteer will be unable to satisfy any judgment, and a lawsuit against her would accordingly be fruitless.

In the United States, the most litigious society on earth, volunteering occurs on a massive scale. According to Independent Sector, between 1980 and 1995 the number of volunteers in the U.S. rose from 80 to 93 million. Further, in 1995 a record 90% of individuals volunteered when asked.⁶ Even if these numbers are not entirely reliable, it is clear that volunteering occurs on a large scale in the U.S.

Due to fear that volunteering will be discouraged if volunteers are held liable, every State in the U.S. has laws protecting some kinds of volunteers (e.g., volunteer firefighters, directors of not-for-profit organizations) from liabilities, although the laws differ greatly. In 1997 the federal government was persuaded to enact the Volunteer Protection Act ("VPA"),⁷ which provides immunity from liability for volunteers serving not-for-profit organizations or governmental entities for harm caused by their acts or omissions if (i) the volunteer was acting within the scope of her responsibilities at the time, (ii) as appropriate or required, the volunteer was licensed, certified, or authorized to act, and (iii) the volunteer was not operating a vehicle, aircraft, or boat for which state law required a license and insurance.

⁶ Non-Profit Risk Management Center, "State Liability Laws for Charitable Organizations and Volunteers," p. 4 (2001).

⁷ 42 U.S.C. §§. 14501-14504.

The VPA preempts state laws to the extent that they are inconsistent with it, but it does not preempt state laws that provide greater protection from liability for volunteers. The VPA specifically does not preempt conditions in state laws that (i) make immunity available only to not-for-profit organizations that adhere to appropriate risk management procedures, (ii) state laws that make not-for-profit organizations liable for the acts and omissions of its volunteers to the same extent that employers are liable for the acts and omissions of its employees, or (iii) state laws that make immunity available only to not-for-profit organizations that provide third parties with a financially secure source of recovery, such as liability insurance.

The limitations on liability under the VPA do not apply if the volunteer's misconduct constitutes a crime of violence, a hate crime, a sexual offense, a violation of state or federal civil rights laws, or it was committed under the influence of drugs or alcohol or it constituted an act of international terrorism. In a lawsuit with multiple defendants, each volunteer is liable for non-economic loss only in direct proportion to her responsibility for the harm. Furthermore, the VPA does not provide protection to the not-for-profit organization or governmental body that organizes the services of a volunteer.

The VPA does not immunize a volunteer from liability to the not-for-profit organization for which she was volunteering if she has caused it harm. Further, a volunteer remains fully liable for her willful or criminal misconduct, gross negligence, reckless misconduct, or flagrant disregard for the rights and safety of the person harmed. Punitive damages cannot be assessed against a volunteer unless there is clear and convincing evidence that she acted willfully, criminally, or in conscious, flagrant disregard of the rights and safety of the person harmed. In addition, the volunteer remains liable for negligent torts where the volunteer has not satisfied the three conditions set out above.

This brief summary of the Volunteer Protection Act provides some sense of how complex it is and hence of how many different issues must be considered in seeking to relieve volunteers from exposure to liability. On a broader scale, it raises a serious question whether volunteers should be exempted, even partially, from the ordinary rules of tort and contract liability. Many volunteers and not-for-profit organizations serve highly vulnerable groups who are not able to select their caregivers. Any law that reduces the incentive of volunteers to act responsibly and with due care increases the likelihood that volunteers will act improperly. For example, they may take unreasonable risks or accept responsibilities for which they are not adequately trained.

According to the Non-Profit Risk Management Center in the U.S., the evidence that is available shows that volunteering was rising steadily even during the period before the enactment of the VPA, whose advocates argued that enactment of it was necessary to prevent a decline in volunteering. Furthermore, since the enactment of the VPA there is no evidence of a decline in lawsuits against volunteers.⁸ In short, a strong argument can be made that legislation like the VPA is not necessary to protect and encourage volunteering, and that the traditional rules for imposing tort and contract liability are appropriate even as applied to volunteers. What can be encouraged wholeheartedly, however, is the adoption of legislation that makes organizers of volunteer services liable for the acts and omissions of their volunteers on the same basis that employers are liable for the acts and omissions of their employees, for this is not clear under the laws of many countries.

8. International Volunteering Programs.

Since President Kennedy first called for the creation of a "Peace Corps" in the early 1960's, there has been a dramatic increase in the number and extent of programs designed to encourage individuals to provide free services to those in need, especially in developing countries. The Peace Corps continues to attract men and women of all ages who are willing to live and work overseas, often in very primitive conditions, to help the poor of the world improve their situations. The United Nations Volunteer Program offers similar opportunities, as do programs of a number of European countries. Often with government funding, programs like Doctors Without Borders and the ABA Central and East European Law Initiative (ABA-CEELI) have attracted medical and legal professionals to offer their time for several months or years at a time to work on health and law reform efforts in developing and transition countries.

With respect to these laudable programs, as in many other contexts, we should not object too strenuously if the individuals involved are called "volunteers." In nearly every case they are giving up other opportunities to work that would pay them much more, and they are signing up for these programs of their own free choice and because they sincerely want to help others. The fact that they are paid a modest amount over and above their expenses may take them technically out of the category of "volunteers," but what they are doing deserves much praise and encouragement. If calling them volunteers attracts more people to these programs, it is an entirely laudable misuse of the term.

⁸ *Op. cit. supra*, note 4.

Conclusion.

This paper has sought to demonstrate that there are a surprising number of legal issues affecting volunteers, and that many of these issues are quite subtle and complex. Most countries, however, have given little or no attention to these problems. Some existing laws discourage or even prohibit volunteering. Other laws should be adopted in order to encourage and protect volunteers. Volunteering plays an essential and growing role in the development of civil society around the world. It is time for legislatures and parliaments to give systematic attention to developing an enabling and protective legal environment for volunteers and volunteering.