Wrongful acts of International Organizations:

No effective remedy means no responsibility

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When discussing the law affecting international organizations and their actions, several conceptual questions come to mind. What exactly is their legal status? By which law – or set of laws – are they bound? Do they hold a special place among international legal persons? Are they to be treated in the same way as states, or by analogy with them, or are they something else entirely? These and other related discussions have been continuing for some years now, with a number theoretical advances but also with many unresolved practical disputes of various kinds.

This paper serves as an introduction to the work of a newly invigorated Committee for the Accountability of International Organizations within the International Law Association's American Branch. It will focus upon the complexity that lies behind the logical recognition that International Organizations have legal standing in the international arena *vis-à-vis* the practical problems that this represents.

We shall begin by addressing the question of whether international organizations may be considered as independent legal persons on their own, or simply the agents of states' sovereign acts. Whichever the case may be, they must be accountable for their acts according to some set of legal rules and before some court or tribunal. The issue of lack of fora for redressing internationally wrongful acts committed by international organizations will also be considered. It is impossible to speak meaningfully of law affecting international organizations unless there is a forum in which the legality of their actions can be adjudicated. For them to operate in a legal vacuum would be quite unacceptable as a matter of policy; states cannot so operate, so the organizations that states come together to create cannot so operate either. International treaties

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cannot be a method by which states act jointly to evade their international legal obligations. The case for the actions of international organizations to be subject to judicial adjudication is overwhelming.

The paper will conclude with a proposal on different ways in which internationally wrongful acts may be justiciable. Some novel modes for dispute resolution may be available, for example by resorting to alternative dispute resolution mechanisms such as those already outlined in certain agreements regarding peacekeeping operations.

I. The legal status of international organizations – where we stand today

The question of whether international organizations possess international legal personality made its appearance on the international legal agenda soon after establishment of the United Nations. One of the most renowned advisory opinions of the newly born International Court of Justice dealt with this issue back in 1948.

"*Reparations for Injuries Suffered in the Service of the United Nations*", Advisory Opinion rendered by the Court on April 11th, 1949 (hereinafter referred to as the "Reparations opinion") addressed a series of questions posed to the Court by the General Assembly[2] in relation to the murder of Count Bernadotte by a terrorist group in Jerusalem, while he was serving in his official capacity as a UN envoy to the Middle East. It was alleged at the time that the Israeli government was complicit in his killing.

The question arose as to whether the United Nations was able to bring an international claim in its own name against a State responsible for injury to its personnel and property. In other words, the General Assembly was asking the International Court of Justice if the United Nations "*possessed international personality*",[3] namely as an organization that could itself have legal rights (and responsibilities).

[2] For further information about the context in which these facts arose, please refer to UN document A/RES/258(III), available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/044/29/IMG/NR004429.pdf?OpenElement

[3] "Reparations for injuries suffered in the service of the United Nations", Advisory Opinion: I.C.J. Reports 1949, p. 178.

In order to answer the question, the Court first analyzed the constituent instrument of the United Nations Organization (that is, the United Nations Charter), in search of the characteristics that the creating States were planning on giving the nascent organization:

> "In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and **it could not carry out the intentions of its founders if it was devoid of international personality**. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, **have clothed it with the competence required to enable those functions to be effectively discharged**."[4]
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> (Emphasis added)

The Court went further to state that:

> "**[It] has come to the conclusion that the Organization is an international person**. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. […] **What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims**."[5]
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> (Emphasis added)

Although the focus of the ICJ at the time of rendering the Reparations opinion was set upon affirming the legal status of the United Nations as an entity with international personality sufficient to pursue legal claims claims, by explicitly stating this capability of the UN, the Court also admitted its corollary. That is, it also had to explicitly recognize that the organization was capable of incurring responsibility for its internationally wrongful acts, for it is hard to understand how one may exist without the other.

It is to be noted that these findings were, at the time, only intended to be applicable to the United Nations Organization. Nevertheless, the Court set the bases for deciding upon whether other IOs possessed international personality by finding that they could be determined, on a case-by-case analysis of the specific IO's purposes and functions "*as specified in its constituent documents and*

[4] *Idem*, p. 179.
[5] *Ibid.*

developed in practice."[6] It is widely accepted nowadays that any international organization must be in possession of international personality in order to pursue its goals and objects. Otherwise, it would find itself in the helpless situation of being unable to discharge its mandate for lack of powers or lack of legal capacity to enter into contracts, treaties or other legal instruments necessary in order to discharge its duties. Without legal international standing, an international organization would not be capable of concluding arrangements regarding its headquarters with its host states, for instance. This would result in a legally absurd situation where the mere creation of such an organization would end up being rendered legally irrelevant by its own incapability.

Regardless, it has been argued that there may exist some IOs created with the intention of not being independent entities, but only to serve as means of operating to effectuate the collectivity of desires of certain States which would therefore be: (i) unable to operate on their own (*i.e.* all decisions would have to be taken by consensus and not just a majority); and (ii) not enjoying actual autonomy from their Member States in order to act on their own as international subjects.[7] In this respect, Antonio Cassese clarifies that, even in the very uncommon situation under which this situation may come to be, these organizations would be:

> "act[ing] on behalf of all the Member States. They [would be] organs common to all those States, with the consequence that acts they perform may be legally attributed to all such States. By the same token, any wrongful act perpetrated by one of the organs or officials of the organizations [would be] the responsibility of all member States."[8]

Whether this kind of international organization truly exists or is just a theoretical concoction remains to be seen. To date, every international organization has either asserted its own legal personality or, in a few exceptional cases, has been treated as an organ of another international organization. (Until 2009, the Global Fund to Combat AIDS, Tuberculosis and Malaria was not considered to have a legal personality separate from the World Health Organization.) The idea of an international organization as a mere amalgam of states' personalities is very seldom advanced in modern times. Even congresses and summits with sufficient durability to justify a secretariat, such as the Energy Charter Conference or the United Nations Conference on Trade and

[6] *Idem,* p. 180.
[7] For an exegesis of such a theory, *see* Antonio Cassese, *International Law*, Oxford University Press, Oxford, 2005, p. 137.
[8] Cassese, *op. cit.,* p. 138.

Development, are treated as independent entities capable of signing headquarters agreements as well as other kinds of legally binding instruments, including treaties.[9]

If we can say that international organizations possess legal personality under international law, then they are entitled to rights and bound by obligations, just as are all other subjects of international law. This much it is hard to dispute. What complicates this area of law, however, is the absence of fora within which to bring claims regarding the obligations and consequent liabilities of international organizations. From time to time one may hear the flimsy claim that international organizations operate within such a realm of good faith and honest dealing that, as a rule, the sorts of robust judicial process applicable to corporations or domestic government entities of equivalent size are unnecessary. That seems innately unlikely. Moreover while some states might elect not to submit to international judicial fora on the grounds that they have their own well-developed internal legal systems that regulate their conduct, international organizations have no such excuse. The more significant problem is that the international courts necessary to regulate the conduct of international organizations and to hold them accountable where they err simply do not exist. We shall discuss this more deeply in the sections to follow.

II. The concept of international responsibility

The notion of international legal responsibility is a contentious one. Even amongst academics, it has taken decades to achieve any kind of consensus; amongst the practitioners of the dark arts of *realpolitik*, it is an ideological convenience, to be set aside in favor of the concept of sovereignty whenever convenient. The International Law Commission engaged itself for the first time, in 1956, in the task of trying to codify the principles of international legal responsibility, in a set of draft Articles on State Responsibility for Internationally Wrongful Acts. Yet the idea was so controversial and politically loaded that the Commission achieved no results of significance for several decades.

More than 40 years and four Special Rapporteurs later, in 2001, the ILC's draft Articles were finally adopted by the General Assembly of the United Nations. By then scholars were opining that the principle of responsibility for internationally wrongful acts had long been widely recognized as part

[9] See for instance the news clip presented on UNCTAD's website, referring to the signing of a Memorandum of Understanding between UNCTAD and the Malaysian statutory body Yayasan Sabah, available at: http://archive.unctad.org/Templates/Page.asp?intItemID=4200&lang=1. (Visited on August 2012).

of customary international law, but had merely lacked adequate codification.[10] States could be legally responsible, but the challenge was to agree the principles governing that responsibility. While vague in many details, the ILC Articles went some way towards drawing some general principles from an unruly mass of case law arising out a variable collection of international courts and tribunals.

It is perhaps inevitable that the ILC's draft Articles contain such breathtaking platitudes. They begin by asserting that "*every internationally wrongful act of a State entails the international responsibility of that State.*"[11] In other words, states can be liable for legal wrongs: the most fundamental premise of any legal system is that wrongdoings have consequences. The document continues to identify two components present for an internationally wrongful act: (i) the action or omission must be attributable to the State under international law; and (ii) the act must constitute a breach of an international obligation of the State.[12]

Acts attributable to a State are those executed by the organs of such State[13] (even if these are in contravention of instructions or exceed authority);[14] by persons or entities exercising elements of governmental authority;[15] by organs placed at the disposal of the State by another State;[16] by persons acting under the direction or control of the State;[17] by persons exercising elements of governmental authority in the absence of default or the official authorities;[18] by insurrectional

[10] As Cassese puts it, before the obligation set upon States under Article 33 of the UN Charter for the peaceful resolution of disputes, "*customary rules provided that if a State violated an obligation imposed by an international rule, it bore international responsibility for such violation. Consequently, it had to make reparation for the breach; by the same token, the injured State was entitled to resort to self-help. Hence it could take forcible action (armed reprisals, war) or non-forcible measures (economic sanctions, suspension or termination of a treaty, etc.) designed either to impel the delinquent State to remedy the wrong, or to 'penalize' that State.*" (Cassese, *op. cit.,* p. 242).

[11] United Nations International Law Commission, *Articles on State Responsibility*, 2001, UN Document A/56/10, article 1.

[12] United Nations International Law Commission, *Articles on State Responsibility*, *op. cit.,* Article 2.

[13] *Idem,* article 4.

[14] *Idem,* article 7.

[15] *Idem,* article 5

[16] *Idem,* article 6

[17] *Idem,* article 8

[18] *Idem,* article 9

movements that later on become the new government of the State;[19] or conduct acknowledged by the State as its own.[20]

In 2011 the ILC presented the General Assembly with a draft of its work on the Responsibility of International Organizations. The instrument was adopted by the Assembly on December 9th, 2011.[21] Although the document is similar to the Articles on State Responsibility in several respects (particularly on basic definitions concerning responsibility and attribution), the 2011 draft Articles contain a remarkable limitation. Article 43 provides that only other international organizations and States may be considered as injured by internationally wrongful acts of International Organizations.

This assertion is bizarre on its face. Foremost, it is simply false. It is already well established from the jurisprudence of administrative tribunals convened to hear complaints on the part of their employees that international organizations can be liable to employees for mistreating them. But the effects of decisions made by international organizations go far beyond their own employees. Decisions made by international development banks may affect entire countries. Decisions by UN or other internationally organized peacekeeping missions may cause direct death or injury. Some international missions administer territories or even run countries; recent examples include Bosnia and Herzegovina, Kosovo and East Timor.[22] The idea that their actions, if unwise or even grossly abhorrent, might not engender international responsibility in accordance with some set of legal standards seems odd indeed. Moreover it runs against the currently accepted idea that individuals are, on their own, subjects of international law. If individuals can be prosecuted by international

[19] *Idem,* article 10
[20] *Idem,* article 11
[21] United Nations General Assembly, *Responsibility of International Organizations*, 2012, UN Document A/RES/66/100.
[22] In Bosnia and Herzegoiva, UNMIBH was set up in 1995. It "*exercised a wide range of functions related to the law enforcement activities and police reform in Bosnia and Herzegovina. The Mission also coordinated other UN activities in the country relating to humanitarian relief and refugees, demining, human rights, elections and rehabilitation of infrastructure and economic reconstruction*." (http://www.un.org/en/peacekeeping/missions/past/unmibh/, visited on August 2012)
In Kosovo, UNMIK was established in 1999. The Mission's mandate includes "*help[ing] ensure conditions for a peaceful and normal life for all inhabitants of Kosovo and advance[ing] regional stability in the western Balkans.*" (http://www.unmikonline.org/Pages/about.aspx, visited on August 2012)
UNTAET, the UN Mission to East Timor, whose officially known as UN Transitional Administration in East Timor, was established in 1999 "*to administer the Territory, exercise legislative and executive authority during the transition period and support capacity-building for self-government*." (http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm, visited on August 2012)

tribunals for violations of laws imposed upon them by international treaties, why can they not also be the beneficiaries of international treaties, asserting rights against international organizations?

III. Access to justice in respect of internationally wrongful acts

Article 7 of the Universal Declaration of Human Rights, adopted by the General Assembly on December 10th, 1948[23] and since recognized as codifying rules of customary international law,[24] guarantees the principle of judicial equality. By this principle, every subject of the law has "equal standing": a sort of protean principle of legal impartiality. Article 8 of the same instrument confers the right upon every person to an effective remedy for acts committed in violation of his rights. Article 10 provides for the right of every person to a fair and public hearing in the determination of his rights and obligations. [25]

It is therefore something of an irony that these principles, by now regarded as fundamental characteristics of any sophisticated system of jurisprudence, were created under the auspices of an international organization (the United Nations) yet have been so slow to evolve in the application to international organizations themselves. As things currently stand, the conditions under which individuals, States and other entities affected by the acts of international organizations may assert claims that those organizations have breached international are limited indeed. At least in terms of a forum before which complaints can be raised, international organizations often operate in a legal black hole. The rights of equal standing, effective remedy and public hearing are conspicuous in their absence.

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[23] United Nations General Assembly, *International Bill of Human Rights*, 1948, UN Document A/RES/217(III) [A-E]

[24] Christian Tomuschat, *Human Rights: between idealism and realism*, Oxford University Press, Oxford, 2008, p. 37.

[25] The relevant articles read as follows:

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Imagine that one alleges one has been the victim of negligence, or deliberate harm, by a UN peacekeeping mission. For example, the United Nations Kosovo Force (KFOR) has been accused of hosting Roma refugee camps on radioactive depleted uranium dumps, causing cancer and other ailments.[26] Such an action, committed by any branch of the security forces other than those under the service of the United Nations, would surely engender both domestic and international legal responsibility for negligence, dereliction of the duty of care and even wanton injury to innocent civilians. Where one's complaint is against the United Nations, where is one to bring a claim? The answer is that virtually no options present themselves. The general rule is that international organizations benefit from legal immunities: they cannot be sued in domestic courts. As a rule, this principle is vigorously enforced by the domestic courts themselves.[27] So far, no international tribunals have elected to hear complaints against international organizations either. The International Court of Justice has no jurisdiction to entertain complaints about the acts of international organizations. In theory the UN General Assembly could refer the question of the legality of an international organization's actions to the ICJ for an opinion.[28] But such an opinion is not binding and does not result in the payment of compensation. Moreover the need to obtain a numerical majority of the members of the UN General Assembly to vote in favor of such a referral makes the political threshold to be overcome in advance such a claim so high that in practice none but the most politically loaded of international organizations' acts will ever come before the Court. In the 67 years of the ICJ's history, an adjudication of liability for the alleged wrongdoing of an international organization has never been referred to the ICJ in this way.

Individual litigants have also sought to raise the culpability of international organizations before the European Court of Human Rights (ECtHR), but these efforts have likewise been rejected. In *Behrami v. France and Saramati v. France, Germany and Norway*[29] allegations were made of wrongful detention, and of personal injury caused by negligence for which it was asserted that personnel of the United Nations Interim Administration Mission in Kosovo were responsible. Neither UNMIK nor the United Nations are parties to the European Convention on Human Rights.

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[26] Kosovo Medical Emergency Group, *Toxic Waste Poisons Children of Mitrovica, Kosovo*, available online at http://www.toxicwastekills.com/index.html, visited on August 2012.

[27] See, for instance Brzak v. United Nations, Annan, Lubbers *et al.* Docket N° 08cv2799.

[28] According to Article 65 §1 of the ICJ Statute, "*The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request*."

[29] *Behrami v. France and Saramati v. France, Germany and Norway*, European Court of Human Rights, Grand Chamber, Decision on Admissibility, May 2nd, 2007.

Nevertheless UNMIK was composed of foreign troops seconded to the United Nations mission, and some of these countries' troops were alleged to have participated in the wrongdoings in question. Hence the victims brought suit before the ECtHR on the ground that by reason of UNMIK's immunity from suit, it was their sole right of legal recourse for the wrongs they had suffered and that were attributable to the treaty signatories of the European Convention.

The ECtHR considered at some length whether it had jurisdiction over the claims, and ultimately concluded that it did not. The Court found that "*the UNSC retained ultimate authority*"[30] over the actions of UNMIK, and hence its acts could not be attributable to the states that sent troops to do perform its functions. The Court also noted that "*UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, 'attributable' to the UN.*"[31] Accordingly the Court had no competence *ratione personae*.

The Court was not impelled to reach this conclusion. It could have found its member states concurrently liable with the United Nations. Alternatively it could have concluded that in contributing to a United Nations force against which no judicial recourse exists, the member states had violated their own obligations under Article 6 of the European Convention (the right to a fair trial). Even if the acts of UNMIK were attributable to the United Nations, it was open to the Court to conclude that in creating and contributing to an institution such as UNMIK, the Court's member states were obliged to safeguard due process. One can only speculate as to why the Court declined to follow either of these lines of judicial reasoning. The reasons may best be understood as politics, or concerns over docket pressure. Nevertheless the *Behrami and Saramati case* is of importance precisely because it illustrates the injustice of the legal vacuum within which international organizations operate. In *Behrami* the Applicant's children had been killed and maimed. No judicial recourse was held to exist. One is left with a sense of disgust at the outcome. UN peacekeeping, governance and stabilization missions scour the planet. We do not know how frequent such outrages are perpetrated in the name of international organizations, because there is no forum before which to air them.

IV. The right to reparations as a consequence of a breach of international law

[30] *Behrami v. France and Saramati v. France, Germany and Norway*, *op.cit.,* § 140.
[31] *Idem*, § 143.

The right of the victims of breaches of international law to adequate reparations for wrongful conduct is embedded in a general principle of international law that has been widely recognized since at least 1927. In the *Chorzów Factory* case, the Permanent Court of International Justice concluded that "*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*".[32] Likewise, in the *Reparations for Injuries* case, the ICJ asserted *"[…] 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'"*.[33] The principle of the right to reparations has also been embedded in several treaties and other international instruments; in particular those dealing with the protection of human rights.[34] In the current state of affairs, something has gone profoundly wrong.

Ad hoc methods of dispute resolution between an international organization and those whose actions it affects are in principle possible. However in practice they are never implemented. One scholar has observed, "*in the context of a UN deployment of personnel to a country, the settlement of disputes would be governed by the S(tatus) O(f) F(orces) A(greement). The model treaty for the UN to apply with host States provides for a 'standing claims commission' to settle such disputes of a private character. No such standing claims commission has ever been established*."[35] Several agreements between IOs and States (regarding mostly headquarters agreements) include arbitration or other alternative dispute resolution clauses for the settlement of legal disputes

[32] Permanent Court of International Justice, *Judgment No. 17,* September 13th, 1928 (Series A, No. 17), p. 47.
[33] Permanent Court of International Justice, *Judgment No. 8,* July 26th, 1927 (Series A, No. 8), p. 21 *in "*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion": I.C.J. Reports 1949, p. 184*.*
[34] Some examples of human rights instruments containing reparations provisions are: the Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art. 14) and the Rome Statute for an International Criminal Court (art. 75); the European Convention on Human Rights (art 5(5), 13 and 41); the Inter-American Convention on Human Rights (arts 25, 68 and 63(1)); the African Charter on Human and Peoples' Rights (art. 21(2)); the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of November 29th, 1985; the Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of December 18th, 1992; the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of May 24th, 1989, just to cite some of them.
[35] Andrew Clapham, *Human Rights Obligations of Non-State Actors,* Oxford University Press, Oxford, 2006, p. 115.

between the IO and the contracting State.[36] If such alternative mechanisms were to include individuals as possible claimants, they might resolve the problem this paper describes. Alas, permitting recourse to arbitration on the part of individual claimants is virtually non-existent. There is no *a priori* reason why this need be so. Bilateral investment treaties have incorporated provisions permitting individual investors to bring arbitral claims for decades, and the law governing such tribunals is now rather sophisticated. In principle, an equivalent revolution would be possible through provision for arbitration in international organizations' headquarters agreements or other constituent instruments. That no such provisions exist may simply be due to the fact that neither international organizations, nor states, have a significant political interest in permitting recourse of this kind.

The problem of how to render international organizations accountable for their actions to those they harm, rather than those who create them (member states), may at its heart be one of pure politics. International organizations are created to resolve, at an international level, problems that member states do not feel comfortable or competent resolving domestically. In outsourcing political issues to international organizations, the member states may have little interest in permitting external judicial scrutiny of their acts. Nobody likes the prospect of having lawyers pore over their actions, particularly where the actions in question are complex, discretionary and political in nature. Governments and international organizations are no different from everyone else in this regard. Hence persuading governments to create judicial safeguards upon the actions of international organizations when they create them may be particularly difficult. The solution to this problem of incentives may be to create constant and compelling legal conventions. In this way, international organizations, and the states that create them, will feel obliged through public and moral pressure to submit the actions of international organizations to far greater levels of legal analysis than have hitherto been the case. To achieve this goal in the face of a lack of state interests will not be straightforward. It will require constant publicity, lobbying, scholarship and

[36] *See*, e.g., the United Nations Headquarters Agreement signed with the United States, whose arbitral clause was even the subject-matter of an advisory opinion rendered by the International Court of Justice in 1988. The arbitral clause contained in such instrument reads as follows: "*Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators (…)*." (*Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations,* Article VIII, Section 21.)

critique. The purpose of this committee is to pursue these goals. For all those who share them, we invite you to join us.