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REPORT

WORKING MEETING ON THE INTERNATIONAL CRIMINAL COURT
[(AG/RES. 2577 (XL-O/10)]

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Liberator Simón Bolívar Meeting Room

(Document prepared the Department of International Law)

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INTERNATIONAL CRIMINAL COURT

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The seventh working meeting on the International Criminal Court was held March 10, 2011, pursuant to resolution AG/RES. 2577 (XL-O/10) "Promotion of the International Criminal Court", operative fourteen of which reads as follows:

14. To request the Permanent Council to hold a working meeting prior to the forty-second regular session of the General Assembly, with support from the Department of International Law, which should include a high-level dialogue session among the permanent representatives of all member states to discuss, among other matters, the results of the Review Conference. The International Criminal Court, international organizations and institutions, and civil society will be invited to cooperate and participate in this working meeting.

Presiding over the meeting was the Chair of the Committee on Juridical and Political Affairs (CAJP), Ambassador Hugo De Zela, Permanent Representative of Peru to the OAS. In his remarks, the Chair alluded to the last working meeting, held January 27, 2010, and spoke about the importance of the International Criminal Court as it represented "one of the most important developments in the history of international law," having become the "keystone of the international criminal justice system." He also pointed to the fact that cooperation continues to be a central theme running through the General Assembly resolutions. As he called the meeting to order, the Chair thanked the Permanent Representatives of the member states of the Organization for their presence, as well as their alternate representatives, experts, civil society, members of international organizations and, in particular, those persons who worked directly with the International Criminal Court and who had helped with the preparations for the event.

The Chair then recognized Dr. Luis Toro Utillano, Principal Legal Officer with the Department of International Law. Dr. Toro Utillano spoke about the history of the mandate and highlighted the work done by the Department as Technical Secretariat of the Inter-American Juridical Committee, particularly dissemination of the documents the CJI prepares and fundraising for the Committee's training activities. He also observed in this connection that the Department had been organizing informal meetings with a view to working more closely with the Rapporteur of the Inter-American Juridical Committee, the International Criminal Court, the International Committee of the Red Cross, the organization Parliamentarians for Global Action, and the Coalition for the International Criminal Court. Dr. Toro Utillano observed that grants to the voluntary fund to support the Committee's work had not been forthcoming. He also described the working paper that the Department of International Law had prepared on the results of the First Review Conference on the Rome Statute. He went on to observe that all these initiatives mentioned were undertaken pursuant to the mandates that the General Assembly had given to the Inter-American Juridical Committee concerning promotion of the adoption of national legislation on the subject; promotion of the training of administrative and judicial officials and academics; and preparation of model implementing legislation for the Rome Statute. Finally, on the matter of the cooperation agreement between the International Criminal Court and the OAS General Secretariat, Dr. Toro Utillano reported that the parties had reached a formal agreement legally embodied in an "exchange of letters", but that it had

not yet been signed because the President of the Court, Judge Song, was unable to travel at that time. The plan is to arrange a meeting at OAS headquarters in April of this year.

In the next segment, called the “*High-level Dialogue among the Permanent Representatives of the Member States*,” the speakers were Congressman Felipe Michelini, Uruguay’s National Representative to the Parliamentarians for Global Action, and Ambassador Christian Wenaweser, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

Dr. Michelini explained the role of Parliamentarians for Global Action in promoting a permanent, effective and just International Criminal Court and described how important the International Criminal Court has become in North Africa in light of recent events. He also reported that Tunisia and the Philippines may soon ratify the Statute.

As for the “*Results of the Review Conference and their impact on the OAS and on the countries of the region*,” Dr. Michelini explained that universal acceptance of the Rome Statute and the ICC’s jurisdiction, States parties’ adoption of the corresponding domestic legislation, their full cooperation with the International Criminal Court and ratification of the amendments to the Statute are urgent measures essential to guaranteeing the preponderance of the Statute and its system.

He also underscored the recommendations that Argentina, Brazil, Chile, Costa Rica, Mexico and Uruguay had unilaterally made in the Human Rights Council urging other countries to make ratification of the Statute one of their human rights commitments.

With regard to the principle of complementarity, Dr. Michelini said that a strategy of shared responsibilities was essential, with national laws that allow for effective exercise of the International Criminal Court’s jurisdiction.

As for resolutions 1 and 5 of the Review Conference, Dr. Michelini said that he agreed with the model law of the OAS Rapporteur, Mauricio Herdocia. He recommended that the definition of the crime of aggression in the new Article 8 bis be included in the Model Law. In his view, the definition of the crime constitutes an excellent guide for enacting domestic legislation. He also invited the Rapporteur of the Inter-American Juridical Committee to include the general principles of criminal law protected under part III of the Rome Statute in the Model Text, and to explain the bases for exercising jurisdiction under international law.

He pointed out that the OAS members have a vital role in the juridical, political and diplomatic areas. *In the juridical area*, the States must include within their domestic laws, measures that guarantee full and effective cooperation with the Court. The guidelines forthcoming from the Inter-American Juridical Committee, the 66 Recommendations from the 6th Session of the Assembly of States Parties in 2007, and the recommendations the Court issued in 2009 can be helpful in this undertaking. The cooperation also includes ratification of the ICC Agreement on Privileges and Immunities; only 14 States in this hemisphere have ratified that agreement thus far. *In the political area*, the Assembly of States Parties must have an adequate, permanent mechanism to prevent any act that undermines cooperation. *In the diplomatic area*, the Latin American and Caribbean States must rally behind the International Criminal Court and undo the false Europe-Africa dichotomy that seems to drive the debate. Recourse to Article 16 must be reserved for exceptional circumstances.

Dr. Michelini observed that the International Criminal Court had succeeded in maintaining its independence from the Security Council, although he pointed out that the Court has limited jurisdiction with respect to nationals of non-contracting States when those individuals commit crimes within the territory of States parties. Thus, universal ratification of the amendment is especially vital if an effective, preventive system is to be assured. Given the results accomplished at Kampala, Dr. Michelini invited Nicaragua to become party to the Statute.

Dr. Michelini said that the Kampala amendment is also a tribute to the victims of the Second World War and to the United States' efforts to have individuals who inflict horrors like the Holocaust upon humanity answer for their decisions. He therefore invited the Government of the United States to withdraw its reservation to the OAS resolution on the International Criminal Court and to begin the process of ratifying the Rome Statute.

Dr. Michelini expressed his admiration for the efforts and extraordinary work of Ambassador Wenaweser, whose legacy to future generations will endure.

In closing, he urged the States that are party to the Rome Statute to nominate outstanding candidates and to avoid vote swapping in the upcoming elections for judges and the prosecutor. Dr. Michelini said that international justice is the pillar of domestic and international peace and requires the unqualified, steadfast support of every member of the OAS and of the Organization as a whole.

The next to take the podium was Ambassador Christian Wenaweser, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court, who made reference to resolution 1970, adopted by the United Nations Security Council on the situation in Libya. This, he observed, was a historic decision since it was the first time that all the members of the Security Council had decided to refer a situation to the prosecutor of the International Criminal Court.

Ambassador Wenaweser mentioned some of the activities that the Assembly has planned, including the organization of a seminar intended to promote the universality of the Rome Statute among the CARICOM countries. That seminar will be held in Trinidad and Tobago.

The Ambassador then returned to some of the issues that Dr. Michelini had raised in connection with the results achieved by the Review Conference held in Kampala. He made specific reference to the ratification of the documents adopted by consensus, particularly the decision on the crime of aggression. Ambassador Wenaweser applauded the interpretation concerning the use of force in international relations. In his view, clearing up the difficulties in the Statute will enable the Assembly of States Parties to focus its efforts and energy on other collective challenges.

Given these developments, Ambassador Christian Wenaweser urged the States to study the amendments in the coming years and to submit them to thorough national scrutiny. It also underscored the crucial role the OAS member States played in the success of the Kampala Conference.

In bringing his remarks to a close, Ambassador Wenaweser mentioned that his term will end in December 2011. He availed himself of the occasion to express his appreciation for the trust that the OAS member countries had placed in him and for the support they had given him.

The working meeting then moved on to the segment called “Dialogue among the Representatives of the Member States and the participants”:

The delegation of Mexico confirmed its country’s commitment to the mission of combating impunity for international crimes and called upon those states that had not yet become party to the Rome Statute to do so in order to make the ICC’s jurisdiction universal. It also applauded the work accomplished in Kampala and urged commitments that build upon the improvements to the system established under the Rome Statute. The delegation also pledged to present another resolution on promotion of the International Criminal Court at the upcoming session of the OAS General Assembly.

Finally, it reported on the Draft Law on the International Criminal Court approved in December 2009 and the creation in 2010 of a working group within the Inter-secretariat Commission on International Humanitarian Law, charged with making national law conform to the standards of international law. The delegation of Mexico reaffirmed its commitment to continue to follow this matter.

The delegation of Uruguay thanked the speakers and congratulated them on their remarks. It also reaffirmed Uruguay’s commitment to full observance of the universality and legal integrity of the Rome Statute. The distinguished Representative of Uruguay also requested the experts’ opinion on the limits on the exercise of the Court’s jurisdiction in the case of the crime of aggression and the implications for the effectiveness of the Rome Statute.

The delegation of Peru shared the concern regarding the need for measures to ensure that crimes are punished. It also observed that Peru is committed to criminalizing, in its domestic laws, the crimes established by the Rome Statute. It also confirmed Peru’s commitment to put an end to impunity. Finally, it commented on the support that the resolutions adopted in the United Nations and in the OAS have received.

The delegation of Ecuador noted the progress the Review Conference made on such basic principles as the universality of the Statute, complementarity, and cooperation between the States and the Court. It also commented on the work being done to support the affected victims and communities. At the same time, the delegation pointed out that Article 124 of the Statute needs to be discussed; in Ecuador’s opinion, this article introduces a political element that will have to be eliminated in the review convened in 2015.

The delegation of Ecuador also reminded those present that Article 80 of the Ecuadoran Constitution provides that crimes of genocide, lese-humanite, war crimes and crimes of aggression are not subject to any statute of limitations. It also reported that Ecuador is currently adapting its laws to conform to the letter and the spirit of the Rome Statute. The Ecuadoran delegation also commented on the domestic initiatives underway to ratify the amendments introduced in the Rome Statute as soon as possible, including those that concern the crime of aggression, which were decided by consensus in Kampala. At the close of her remarks, the delegate of Ecuador pointed out that for Ecuador, the gradual universalization of the Rome Statute and the International Criminal Court is an inalienable objective.

The Permanent Representative of Panama to the OAS recalled the obligations undertaken with respect to the Statute ratified on March 21, 2002, the Agreement on Privileges and Immunities

of the Court, ratified on August 16, 2004, and Panama's efforts to promote the objectives established by the international community in the Action Plan of the Rome Statute. He also pointed to the political efforts underway in regional and international forums to persuade those states that have not yet acceded to the Statute to do so. As for the adoption of national legislation, Panama's Ambassador to the OAS reported that in May 2007, Panama adopted a new Penal Code which establishes measures that apply in the case of penalties for crimes against humanity, genocide and war crimes. He also observed that in 2010 Panama signed the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Finally, he pointed out that as of then, Panama was up to date on its payments to the Court.

The delegation of Costa Rica, for its part, confirmed its commitment to the International Criminal Court, the amendments regarding the crime of aggression and the creation of a procedural mechanism that establishes the conditions for activation of the Court's jurisdiction over the crime of aggression. It joined with other voices within the OAS in calling for certain countries of the region, particularly those that have expressed reservations regarding the Rome Statute, to reconsider their positions and in the end withdraw their reservations and proceed to ratify this international instrument, including its most recent amendments on the crime of aggression. Finally, the delegation expressed Costa Rica's commitment to universalization of the Rome Statute

The delegation of Colombia highlighted the importance of the principle of positive complementarity and the processes of transitional justice. It also observed that the ICC can have its greatest impact in strengthening domestic jurisdictions and in the fight against impunity. The Colombian delegation also urged the OAS member states to contribute to the Trust Fund for victims of the crimes that come under the Court's jurisdiction, inasmuch as the Statute calls upon victims and witnesses to take active part in the judicial proceedings and provides that principles are to be established relating to reparations to, or in respect of, victims, for any damages, losses or injuries they have sustained.

The delegation of Venezuela underscored its commitment to the International Criminal Court and to the Rome Statute. It also said it supported the documents approved at the Review Conference in Kampala. At the same time, given the situation in Libya, it suggested that the International Criminal Court, as an autonomous, independent and objective body, should confirm and evaluate the circumstances affecting a given country before taking measures based on unproven assumptions. In closing, the delegation of Venezuela called for peace and observed that peaceful mediation was essential before embarking upon any measures that might lead to war. This would demonstrate a genuine commitment to international justice.

The delegation of Chile emphasized the independence of the International Criminal Court and the importance of the commitments undertaken by the states to comply with the Rome Statute. It supported the Mexican delegation's pledge to present a draft resolution at the upcoming session of the OAS General Assembly under which the General Assembly would continue the mandate to promote the International Criminal Court. It also said that it would endorse any initiatives adopted at the General Assembly in support of the Court.

The delegation of Bolivia reaffirmed its commitment to the Court and mentioned the initiatives undertaken to implement the Rome Statute. It observed that the bill introduced in the Bolivian Congress in 2008 for implementing legislation for the Statute, had to be adjusted to conform to the constitutional amendments introduced in 2009. It recalled that Bolivia had made an express

statement pledging to ratify the amendments concerning the crime of aggression as soon as possible, and called upon all those OAS member States that have not ratified the Statute to do so.

Finally, the delegation of Nicaragua expressed concern over events taking place in several parts of the world, events that it said are contrary to international humanitarian law and cannot be countenanced. It noted with concern the double standard applied by the UN Security Council in dealing with this problem and questioned the sanctions that will be imposed on those countries that provide logistical support and military aid used in massive and systematic human rights violations. As for Nicaragua's legislation, it mentioned that Title 12 of the Penal Code criminalizes offenses under international law and crimes against humanity. Nevertheless, in Nicaragua the conditions are not yet present for accession to the Rome Statute. At the close of its remarks, the delegation asked the Court to review the situations of Iraq and Afghanistan about which cases have not yet been opened.

In the next segment, titled *Reports by specialized entities*, the first speaker was Dr. Mauricio Herdocia, a member of the Inter-American Juridical Committee and Rapporteur for the topic of the International Criminal Court. Dr. Herdocia had presented the Inter-American Juridical Committee's documents on the subject and in his remarks mentioned how gratifying it was for the Committee to see the OAS' strength and energy harnessed in the cause of promoting the International Criminal Court. He also mentioned the meeting of the informal network of entities and organizations dedicated to the cause of promoting the International Criminal Court, where a commitment was undertaken to further joint initiatives and strengthen concerted action.

He explained that the Committee had been lobbying for the adoption of national implementing legislation in those states that do not have yet have such legislation and, to the extent that its limited budget allowed, had also been instrumental in training state officials. As for the mandate on preparation of a model implementing legislation for the Rome Statute, in particular regarding the definition of crimes within the jurisdiction of the International Criminal Court, the Rapporteur reported that the Committee had presented a guide to incorporating the ICC's core principles and aspects in domestic legislation, as in the case of Canada, Ecuador, Mexico, Uruguay, Bolivia, Peru, Panama, Colombia, Argentina, Costa Rica and Nicaragua. In March 2010, the Committee presented its first guide for draft model laws criminalizing the offenses contemplated in the Rome Statute. In August 2010, the Committee presented its model laws for war crimes, consisting of 32 articles, and for genocide and crimes of lese-humanite.

As for the Review Conference held in Kampala, Dr. Herdocia made reference to an important conclusion the Committee had reached which was that while the Rome Statute defines and criminalizes war crimes, for example, in broader terms than any other text, in some respects it does not adequately reflect the current state of international humanitarian law; therefore, other provisions of international humanitarian law need to be introduced in the Rome Statute. When criminalizing these offenses in their own domestic laws, states must look at and beyond the Rome Statute and draw upon other legal texts as well, such as the Geneva Conventions and their additional protocols, and international conventions on human rights, protection of cultural property, gradual expansion of the universe of weapons prohibited under international law, and so on.

Dr. Herdocia observed that in preparing a model text, basic problems had to be confronted, such as how to reconcile the Rome Statute with international humanitarian law, since the former makes either no provision or only partial provision for certain crimes that are well established in

international humanitarian law. Here, the guide of principles should include such issues as attacks on works or installations that contain dangerous forces, attacks on undefended sites and demilitarized zones, unwarranted delays in repatriation of prisoners of war or civilians, attacks on cultural objects or places of devotion; the Rome Statute falls well short of the much broader scope that all such crimes would require.

Dr. Herdocia observed that another issue that has figured prominently in the CJI's discussion of this topic has to do with the differing qualifiers contained in the Rome Statute and the Geneva Conventions. A good example is the Rome Statute's reference to long-term and severe damage to the natural environment which would be "clearly" excessive in relation to the concrete and direct overall military advantage anticipated, a qualifier which does not appear in the Geneva Conventions, thus forcing one to choose between the best available standard. He also pointed to the differences in some descriptions or classifications. The Rome Statute continues to follow the practice of situating the crimes in the context of international armed conflicts and armed conflicts that are not international in nature. At the same time, the Kampala Conference follows the Committee's approach, which is to collapse that distinction and eliminate that borderline that made the use of certain weapons permissible in some instances, impermissible in other instances, but not impermissible across-the-board.

The Rapporteur therefore proposed a text that would make such behavior criminal in any armed conflict –international or otherwise–, as in the case of the provisions on causing hunger, or using human shields, or the improper use of certain signs; in other words, using the better standard or the higher standard in the event of a discrepancy between the Rome Statute and the conventions on International Humanitarian Law and Customary International Humanitarian Law. He recalled that there are 161 provisions of customary international law on war crimes that far outrank convention-based law. The Rapporteur also expressed an interest in considering the progress made in other areas such as human rights and fundamental freedoms.

Dr. Herdocia confirmed that the OAS is clearly conscious of the challenge that it faces in moving toward a new synthesis of international humanitarian law that takes into account the Geneva Conventions and their Additional Protocols, the Rome Statute, the human rights conventions and the model law itself. He also urged that the advances made in domestic laws also be taken into consideration in order to enrich the Rome Statute.

Owing to prior commitments, Ambassador Hugo de Zela had to excuse himself, whereupon Ambassador Guillermo Cochez, Vice Chair of the Committee on Juridical and Political Affairs, began to preside over the meeting and temporarily interrupted the order the business to allow Dr. Michelini to answer a question put to him by the Ambassador of Uruguay concerning the limits on the exercise of the Court's jurisdiction with regard to the crime of aggression and the implications for the effectiveness of the Rome Statute.

Dr. Michelini explained that the definition of the crime of aggression was added to the Rome Statute by an amendment that contains precise definitions in both juridical and political terms (Article 8 bis). At the same time, he observed that any difficulties that may result with respect to articles 15 bis and 15 ter, which set out the conditions for the Court's exercise of jurisdiction over the crime of aggression, particularly when it is the Prosecutor's job to initiate an investigation into a crime of aggression, can be minimized if the principle of the independence of the Court is respected. In effect, both articles require observance of that principle: in paragraph nine of Article 15 bis, and paragraph

four of Article 15 ter. Ultimately, respect for international law requires that a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under the Rome Statute.

Another problem is the entry into force of both Articles 15 bis and 15 ter; paragraphs two and three of both articles have similar wording. Dr. Michelini noted that this problem is resolved by a majority vote of the 30 states that have accepted the amendment and a decision by two thirds of the States to activate the Court's jurisdiction. He also mentioned the mechanism for the Court's exercise of jurisdiction, a State party's referral of a situation to the Court and the Prosecutor's authorities (articles 13, 14 and 15 of the Statute). Finally, he mentioned the deferral of an investigation or prosecution when lives are at stake (Article 16).

Ambassador Cochez then recognized Dr. Miriam Spittler, the Advisor on International Legal Cooperation, Office of the Prosecutor of the International Criminal Court, who gave a presentation on "*The International Legal Cooperation of the Office of the Prosecutor of the International Criminal Court.*" The Advisor on International Legal Cooperation of the Prosecutor's Office described the current standing of the principal investigations and analyses the Office of the Prosecutor of the International Criminal Court is pursuing in the Democratic Republic of the Congo, the Central African Republic, Darfur, Uganda, the Republic of Kenya and Libya. She used the occasion to also present a brief summary of the nine cases that are in the preliminary phase with the Office of the Prosecutor of the ICC, and which concern Afghanistan, Colombia, Georgia, Palestine, the Ivory Coast, Guinea, Nigeria, Honduras and the Republic of Korea. She observed that no decision has as yet been made as to whether an investigation will be undertaken in these cases. In the case of the Central African Republic, she described the measures taken to protect witnesses who were testifying about the attempted *coup d'état* and crimes like homicide, looting and, above all, rape. She explained that aggressive, violent rape and other sexual crimes committed on a massive scale become a weapon of war. In conclusion, Dr. Spittler requested support for all the members and for the International Criminal Court to facilitate the arrest of persons with cases pending before the Court.

Ambassador Cochez then recognized Dr. Patrick Zahnd, Legal Advisor of the ICRC for Latin America and the Caribbean, who gave a presentation on "*The steps to implement the Rome Statute and other international rules on the subject.*" The ICRC Advisor underscored the work of the First Review Conference and the role of the national commissions for International Humanitarian Law. Dr. Zahnd also urged the countries to make review of their penal codes, codes of criminal procedure and codes of military justice a priority with a view to including all war crimes and other grave violations of the treaties on international humanitarian law, including the war crimes in Article 8 of the Rome Statute. He highlighted the important role of the national commissions for International Humanitarian Law in this undertaking and the support that the ICRC provides to them. Both the Kampala Review Conference and the Third Universal Meeting of the National Commissions for International Humanitarian Law –held in Geneva in October 2010 as a follow-up to the Kampala Conference- have set in motion a positive dynamic and created an important opportunity for mobilization. Dr. Zahnd concluded by pointing out that the role of the national commissions for International Humanitarian Law will become increasingly important in encouraging the promotion and application of the Rome Statute.

Finally, the Vice President of the CAJP recognized Dr. Karen Mosoti, Head of the Liaison Office of the Court to the United Nations, who spoke about the topic of the cooperation of the States parties with the International Criminal Court and national implementing legislation for the ICC. She

urged the OAS member states to consider the adoption of resolutions supporting the work of the Court through activities in various areas. On the subject of national implementing legislation, she expressed the readiness of the International Criminal Court to actively support the states that have requested its assistance, by identifying the obstacles and difficulties and communicating ways to deal with those problems. Finally, Dr. Mosoti emphasized the concrete support of the States in the form of specific amendments introduced in their national laws or contributions to specific funds.

Ambassador Cochez then yielded the floor to the delegations of the OAS member states.

The delegation of Mexico thanked the speakers and reaffirmed its commitment to continue to support the work of the Inter-American Juridical Committee on issues related to the International Criminal Court, including promotion of national legislation for cooperation with the Court and preparation of a model law to make possible fulfillment of the obligations emanating from the Rome Statute. At the same time, it expressed its appreciation for the work that the International Committee of the Red Cross is doing in this endeavor and reported that in Mexico, the integral approach suggested by the ICRC is being followed when laying the groundwork for this reform effort. It also pointed out that Mexico's reference in this endeavor is the national legislation of other countries of the region, which have already gone through the process, as in the case of Uruguay, Chile, Argentina and Canada.

For its part, the delegation of Nicaragua thanked the panelists for their presentations. It suggested that efforts be made to gradually develop international humanitarian law, with the emphasis on opting for the higher international standard in the event of a conflict of laws that may be different in nature. Finally, it thanked the International Committee of the Red Cross for its work.

In closing, Ambassador Guillermo Cochez thanked the speakers for their presence and their learned presentations. He then adjourned the meeting.

ANNEXES

1. Agenda of the Working Meeting:
 - <http://scm.oas.org/IDMS/Redirectpage.aspx?class=CP/CAJP&classNum=2923&lang=s>
 - <http://scm.oas.org/IDMS/Redirectpage.aspx?class=CP/CAJP&classNum=2923&lang=e>
 - <http://scm.oas.org/IDMS/Redirectpage.aspx?class=CP/CAJP&classNum=2923&lang=p>
 - <http://scm.oas.org/IDMS/Redirectpage.aspx?class=CP/CAJP&classNum=2923&lang=f>
2. [Panelists' presentations](#)
3. [Panelists' biographies](#)