

Lessons Learned from Spain's Practice before the United Nations Human Rights Reporting Mechanisms: Treaty Bodies and Universal Periodic Review

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I. INTRODUCTION

Periodic reporting mechanisms are means of implementing international standards based on cooperation between States. Their origin dates back to dispute settlement mechanisms used in the nineteenth century.¹ Within the context of international organizations, periodic reporting mechanisms were first included in the Constitution of the International Labour Office (ILO) in 1919. Article 22 of the ILO Constitution was the first text to include a periodic reporting mechanism within an international organization:

“Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such a form and shall contain such particulars as the Governing Body may request.”²

Over time, periodic reporting mechanisms have become the most commonly used mechanisms to guarantee that international human rights treaties are effectively implemented. Although the ILO still uses its own relatively unchanged mechanism from 1919, other more recent reporting mechanisms operate only slightly differently. These more contemporary mechanisms provide for procedures by which a

¹ General regulations in this regard were adopted by the Hague Convention for the Pacific Settlement of International Disputes of 29 July 1899, published in 205 *Consolidated Treaty Series*, p. 233. See especially Title III (Articles 9–14), which established commissions of inquiry that analyzed information submitted by the interested States.

² The Constitution of the ILO is included in Part XIII (Articles 387–427) of the Treaty of Versailles, published in *The Treaties of Peace 1919–1923, Vol. I, containing the Treaty of Versailles, the Treaty of St. Germain-en-Laye and the Treaty of Trianon*, The Lawbook Exchange, Ltd., Clark, New, Jersey 2007, pp. 3–266.

State party to an international convention submits information to a committee set up within the structure of an international organization. The committee usually consists of independent experts elected and nominated by all States parties to the treaty that sets up the mechanism. This committee establishes a dialogue with the affected State and civil society about treaty compliance to more effectively implement the treaty.

These mechanisms are very useful in international human rights law in that they fulfil two essential normative functions concurrently. First, they fulfill a reactive function against human rights violations by offering legal evaluations of the conduct of States. Second, they prevent violations, because they establish a continuous dialogue with a State to avoid future mistreatment.

Under the auspices of the United Nations, there are presently ten universal treaties in force on the protection of human rights that involve States parties' obligations to submit periodic reports.³ Spain is a party to nine of these treaties. In general, Spain has increased involvement with the treaty mechanisms, as evidenced by Spain's large presence on the committees. To illustrate, each of the following committees has a representative from Spain: the Committee against Torture (CAT),⁴ its Subcommittee against Torture,⁵ the Committee for the Elimination of Discrimination of Women (CEDAW),⁶ and the Committee for the Rights of Persons with Disabilities (CRPD).⁷

Considering Spain's increased commitment, this study will analyze Spanish practice before the periodic reporting mechanisms in the United Nations.⁸ We

³ These are the nine mechanisms that appear in Table 1, to which adds the mechanism foreseen in the International Convention on the Protection of the Rights of All Migrant Workers, adopted at New York on 18 December 1990, entered into force on 1 July 2003, UN Doc. A/RES/45/158, *UNTS* No. 39481, to which Spain is not a party. This shows that essentially all major human rights conventions provide for a periodic reporting mechanism. The notable exception is the Convention on the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference on the Status of Refugees and Stateless Persons, *UNTS* No. 2545. Spain ratified this convention on 22 July 1978, *BOE* No. 252, 21 October 1978. This convention only provides for an obligation of submitting to the Office of the United Nations High Commissioner for Refugees information and statistical data on refugees (Article 35.2). Though this information might be useful for the High Commissioner to decide on any action to provide humanitarian assistance to refugees, no independent legal control over State's compliance of this convention is done.

⁴ Prof Dr Fernando Mariño Menéndez, whose term expires on 31 December 2013.

⁵ Mr Leopoldo Torres Boursault, whose term expires on 31 December 2010.

⁶ Mrs Soledad Murillo de la Vega, whose term expires on 31 December 2012.

⁷ Mrs Ana Peláez Narváez, whose term expires on 31 December 2010.

⁸ Although this study is limited to the Spanish practice before the United Nations bodies, it should be noted that Spain has also assumed obligations in other institutional settings, such as in the specialized agencies of the United Nations and the Council of Europe. Thereby, Spain has the obligation to submit reports to the International Labour Office on implementation of each of the conventions adopted under the auspices of this international organization and ratified by Spain. These encompass twenty-two treaties. Furthermore, this State has to submit a number of annual reports on commitments assumed within

will focus on the treaty-based reporting mechanisms, as well as on the Universal Periodic Review (UPR). Although the UPR does not have a conventional basis (the United Nations General Assembly introduced the UPR in the same resolution that established the Human Rights Council), in May 2010 the UPR scrutinized Spain's human rights practice. Therefore, it will be considered in the present study.

This study of Spanish practice before international mechanisms pursues two main objectives. First, we want to identify the best practices that Spain has produced so far and to point out those aspects of its practice that deserve future improvement. Second, we want to critically appraise Spain's current review procedure within the UPR, keeping in mind its thirty-year-long background in human rights reporting before the United Nations.

II. THE PROCEDURE: PERIODIC HUMAN RIGHTS REPORTING IN THE UNITED NATIONS

1. The obligation to submit periodic reports to the United Nations treaty bodies

A. *General remarks on the obligation to submit periodic reports*

As we have noted, Spain is a party to nine of ten universal human rights treaties with reporting mechanisms: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child with their two Additional Protocols; and the Convention on the Rights of Persons with Disabilities. Table 1, included as an annex to this study, presents Spain's reporting requirements.

Although Spain has ratified the Convention on the Rights of Persons with Disabilities,⁹ Spain has reported only once to the committee of this treaty. This is

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UNESCO. Within the Council of Europe, Spain has taken up obligations to submit periodic reports with regard to the Framework Convention for the Protection of National Minorities (1 February 1995), the European Charter for Regional or Minority Languages (5 November 1992) and the European Social Charter (18 October 1961). By contrast, Spain is not a party to the revised European Social Charter (3 May 1996), so it does not have to report on its implementation.

⁹ Adopted on 13 December 2006 by the General Assembly of the United Nations by Res. A/RES/61/106. It should be emphasized that in accordance with its Article 42, this Convention is open for signature and ratification of both States and regional integration organizations. This last reference to regional integration organizations refers essentially to the European Union which approved the accession to this convention by Council Decision of 26 November 2009, *Official Journal* L 23, 27 January 2010, pp. 35–61, presenting the appropriate declaration in accordance with Article 44.1 of the Convention (Annex III

because the treaty entered into force very recently. Spain has ratified the International Convention for the Protection of All Persons from Enforced Disappearance, but in October 2010 one ratification was still needed for its entry into force. Thus Spain does not yet have an obligation to prepare a report.¹⁰ Spain is not a party to the Convention on Protection of Rights of All Migrant Workers and their Families, whose periodic reporting mechanism has been operating for some years.¹¹

Although ratification of an international treaty is a sovereign decision of each individual State, once a treaty is in force, a State is obligated to comply with all its provisions, including those of procedural character. Therefore, having ratified the United Nations human rights treaties, Spain must comply with treaty obligations to regularly report to the monitoring bodies. The treaties include very similar reporting procedures. In addition, the mechanisms themselves have made an effort to unify their procedures by way of adopting “harmonized guidelines”.¹² Nevertheless, some differences remain. One example of such a difference is the deadline for submitting periodic reports. As a general rule, the State must submit an initial report within one year from the entry into force of the treaty for that State. However, the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child and its Optional Protocols; and the Convention on the Rights of Persons with Disabilities, have two-year terms. After the initial report, the State must submit periodic reports every four or five years, depending on the treaty (see Table 1).

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of the Council Decision mentioned above). The Convention is complemented by the Optional Protocol adopted the same day by the same General Assembly resolution. In accordance with its Article 10, the Optional Protocol is open for signature of States and regional integration organisations that are parties to the Convention. This Optional Protocol establishes an individual communication procedure. Spain signed both instruments on 30 March 2007, and ratified them on 3 December 2007. The Convention is published in *BOE* No. 96, 21 April 2008, pp. 20648–20659, and the Optional Protocol in *BOE* No. 97, 22 April 2008, pp. 20750–20752.

¹⁰ Adopted by the General Assembly of the United Nations by Res. 61/177 of 20 December 2006, and open for signature by States on 06 February 2007. Spain signed this Convention on 27 September 2007 and submitted its instrument of ratification on 24 September 2009. Twenty ratifications are required for its entry into force, and in early March 2010 there were eighteen ratifications. Since the Convention, as we highlight, has not yet entered into force in international law, it has not been published in *BOE* either. It should be noted that this convention establishes a somewhat particular procedure by creating only one obligation to provide a report on measures taken to implement the Convention within the first two years since the entry into force of the Convention for that State (Article 29.1 of the Convention). No mention is made of the frequency of reporting, although the Committee has the authority to receive reports on enforced disappearances from any source, including the States themselves (this is implied in Articles 33 and 34 of the Convention).

¹¹ Since the first session of the Committee on Migrant Workers in May 2004 until the 13th session (22 November–3 December 2010) periodic reports of twenty States have been analyzed.

¹² The meetings of the presidents of the United Nations treaty bodies have allowed the drafting of the “Harmonized Guidelines”, UN Doc. HRI/GEN/2/Rev.6, 3 June 2009.

Another example of particular rules contained in human rights treaties that vary can be found in the Convention on the Elimination of Racial Discrimination. Since 1988, the requirement to submit a report every two years to the Committee on the Elimination of Racial Discrimination (CERD)¹³ has been re-interpreted to mean that only an “update report” is required in the second year. Thus, the “full report” need only be submitted every four years. More recently, the committee recommended in its concluding observations to the States parties that they submit two periodic reports together. This leads *de facto* to the extension of the reporting period to four years. The Committee on the Rights of the Child (CRC) and the CEDAW have also introduced the combination of pending reports in their working methods, and the CAT has done the same *de facto*.¹⁴

In addition, it is relevant to note that harmonized guidelines from the committees have established limits on the length of periodic reports. According to these limits, the initial report should not exceed sixty pages, and the subsequent reports, forty pages.¹⁵

B. Delays in submitting periodic reports

Although the committees have granted much flexibility to the States for the submission of periodic reports, States cause delays because they submit the reports very late. States might not comply with deadlines knowing that they will not be sanctioned. To promote States’ compliance with treaty obligations, the Secretary General of the United Nations has made himself available to assist States in preparing periodic reports.¹⁶ In addition, the committees have incorporated certain features in their own procedures to exercise political pressure on governments so that they prepare and submit periodic reports in time. Such features include adverse consequences for the case of non-submission of periodic reports. In addition, the committees have created a follow-up procedure, which also aims at promoting compliance with the concluding observations.

There are three specific ways to raise the interests of a State to comply. The less subtle is an official and public examination of a State that has already been a party to the relevant treaty for a long time, but has not fulfilled its obligation to submit an initial report.¹⁷ In the case of Spain, there has been no need for such

¹³ Article 9.1.b of the Convention on the Elimination of All Forms of Racial Discrimination.

¹⁴ Even more so, the CAT has included a provision into its rules of procedure, whereby it admits the tacit accumulation of reports in the following manner: “In appropriate cases the Committee may consider the information contained in a recent report as covering information that should have been included in overdue reports,” see CAT Rules of Procedure, UN Doc. CAT/C/3/Rev.4, 9 August 2002, rule 64, para. 2.

¹⁵ See “Harmonized Guidelines”, UN Doc. HRI/GEN/2/Rev.6, 3 June 2009, para. 19.

¹⁶ See *inter alia* the res. of the Human Rights Commission 1988/27, on the situation of the International Covenants on Human Rights, para. 12.

¹⁷ In particular, on the practice of CERD and CESR, see C. Villán Durán, *Curso de Derecho internacional de los derechos humanos*, Trotta, Madrid 2002, p. 391.

an extreme measure. A more subtle way is to include the State's non-submission in the committee's annual reports to the United Nations General Assembly. These reports are publicly available and put political pressure on the State to avoid negative publicity. Finally, another way is when a committee studies a State that has not submitted its subsequent periodic reports. This last measure is the most striking among the procedural powers of the committees because it prevents the State from slowing down or boycotting the operation of the committee by not submitting the report. Also, merely the "threat" of being subject to public exhibition encourages States to submit their reports so that the committee will at least have some material coming from that State's official sources. At the 2009 meeting, the representatives of the United Nations committees observed once again that most committees had introduced this technique and that it had proven very effective.¹⁸

2. Consideration of reports before the treaty bodies

A. Consideration of reports by the committee and the list of issues

The committees supervising treaty implementation are comprised of independent experts with verified knowledge of the scope and interpretation of the relevant treaty. (For their composition, see again Table 1.) Due to the direct involvement of the

¹⁸ See "Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights", UN Doc. A/64/280, 6 August 2009, p. 11. This practice was pioneered by CERD in 1991 under its "review procedure", of proceeding with examination of the state of implementation of the relevant treaty by the State party even though no report has been received (see CERD, UN Docs. A/58/18, annex IV, Section P; CESCR, E/C.12/2004/9; CEDAW, rule 65; HRC, rule 70; CAT, rule 65; CRC, CRC/C/33, paras. 29 to 32 and rule 67). The procedure is as follows: The committee notifies a non-reporting State party of its intention to examine implementation of the relevant treaty by the State party in the absence of a report during a public meeting on a specified date. The State party may respond by submitting a report, at which time the procedure is suspended and the normal process of consideration of the report begins. Where the State party concerned indicates that a report will be provided, pending receipt of that report, the review may be postponed to another session; (ii) The committee may formulate a list of issues and questions for the State party, which is invited to send a delegation to attend the session. If the State party is not represented, the committee may decide to proceed with the review, or it may notify the State party of a new date for consideration; (iii) The committee reviews the situation in the country on the basis of information available to it, including any dialogue with the State party delegation and information submitted by United Nations partners and NGOs. The committee will prepare provisional concluding observations, which will be referred to, but not published, in its annual report and which will be transmitted to the State party. These provisional concluding observations become final if the State party does not respond or indicate that it will submit a report in the near future. See for this explanation "Report on the Working Methods of the Human Rights Treaty Bodies relating to the State party reporting process", UN Doc. HRI/MC/2005/4, 25 May 2005, para. 78.

States in proposing or defending their candidatures and their appointments, there is a stark risk of political interference in the election of committee members.¹⁹

Once a committee receives a State report, it forwards it to a rapporteur or working group to conduct a preliminary analysis of the State report and to highlight those aspects that need additional clarification from the government of that State.²⁰ Then, the rapporteur or working group prepares specific questions, called a “list of issues,” to submit to the State. The State will be set a deadline to submit its answers.

B. Consideration of reports in the public session

The public session allows the State and the committee to present opposing views. Once a State has submitted its answers to the list of issues, the committee holds a public session. This session takes place with the presence of representatives of the State under review, who will have the opportunity to present and explain the periodic report and to answer to the list of issues. The members of the committee can make comments to the government representatives, as well as ask questions more broadly on matters relating to the application of the treaty.

During a public session, the fulfillment of the obligations enshrined in the respective treaty is under scrutiny. The discussion in public session can be made either article by article or by thematic units covered by this treaty.²¹ If a State does not send a representative to the public session, some committees will hold a public session anyway. These committees will analyze the State report unless there is a sufficient justification for the State’s absence.²² If there is sufficient justification, the session is postponed.

Members of the civil society, including NGOs, can attend committee sessions. Furthermore, the delegates of the United Nations specialized agencies and other international organizations can be invited by the committee’s chairman to speak during the dialogue between the committee and the State representative. Although NGO representatives can not intervene directly in public sessions with governments, they are allowed to make written and oral statements at the beginning of

¹⁹ The election of the members is regulated in the human rights conventions. *Inter alia*, see Articles 28 to 38 of the ICCPR.

²⁰ In the case of the Human Rights Committee, the working group on article 40 of the Covenant were replaced with Country Report Task Forces, which instead of meeting before the session meet during the plenary session; see Section A of the *Human Rights Committee – Working Methods*, available online at <http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm#a2a> (14 March 2010).

²¹ It should be noted that holding a public session attended by government representatives is very peculiar characteristic of the United Nations. In other reporting procedures, it does not exist, as they are usually written procedures. See the procedures before the Committee of Experts on the Application of Conventions and Recommendations of ILO or Committees within the Council of Europe.

²² In particular, CESCR, HRC and CAT have rules on this. CRC and CERD may *de facto* decide not to wait for the government delegation.

committee sessions.²³ This happens in the HRC and the Committee on Economic, Social and Cultural Rights (CESCR), and – in slightly different ways – in the case of other committees. A common factor of the committees’ practice is to put a State in a different procedural position compared to members of civil society. Given that States enjoy full personality under international law, it is understandable that they are privileged before the United Nations bodies when compared to private parties.

C. Concluding observations and follow-up

Since 1992, the committees have begun to adopt “concluding observations” on each State under review that summarize the relevant issues raised by the study of the periodic reports and highlight the strengths and weaknesses in the practice of these States. Over the course of time, a common structure for all concluding observations has developed. It consists of an introduction; positive aspects; factors and difficulties impeding the treaty implementation; major concerns; and suggestions and recommendations addressed to the State. Concluding observations are published on the United Nations website²⁴ and in the annual report prepared by the committees to the attention of the General Assembly (and in the case of the CESCR, to the attention of the Human Rights Council).²⁵

Most committees have developed their own formal procedures for the follow-up of their concluding observations. The committees consider their recommendations from the previous reporting cycle to determine whether a State’s practice has improved. In the case of the HRC, CAT and CERD, more sophisticated follow-up procedures have evolved. In particular, since 2001, the HRC has designated a Special Rapporteur for follow-up of concluding observations. The States are asked to submit reports with information on their treaty implementation within one year after the adoption of the concluding observations.²⁶ Furthermore, when the CAT notes that the State has not adopted the measures requested in its concluding observations, it nominates one or several of its members as rapporteurs who set up deadlines for the State to

²³ See Section VIII of the Human Rights Committee – Working Methods, available at <http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm#a8> (14.03.2010).

²⁴ In particular, in the *United Nations Human Rights Treaty Body Database*, accessible via internet at <http://www.unhchr.ch/tbs/doc.nsf> (06.01.2009). Moreover, there is a *listserve* that alerts, via e-mail, to the new documents (including the concluding observations) published by the committees. To get further information, see <http://www.unhchr.ch/tbmailin.nsf/email?Openform> (6 January 2009). In Spain, there has been published a generous collection of the most important documents of these procedures in C. Villán Durán & C. Faleh Pérez, *Prácticas de derecho internacional de los derechos humanos*, Ed. Dilex, Madrid 2006, especially on the reporting procedures, pp. 16–108.

²⁵ It used to be submitted to ECOSOC; see Article 57.1 of Rules of Procedure, UN Doc. E/C.12/1990/4/Rev.1, 1 September 1993.

²⁶ See on this Special Rapporteur, *Civil and Political Rights: the Human Rights Committee*, Human Rights Factsheet No. 15 (Rev.1), United Nations, Geneva 2005, 23–24.

provide them with information about the implementation of the recommendations.²⁷ In particular, the CEDAW decided at the 41st session in July 2008 to create a follow-up procedure that identifies the most urgent protection measures required in the concluding observations. The follow-up involves the obligation of the State to submit reports to the committee within one or two years after the adoption of concluding observations. Thus, the follow-up procedure of the CESCR consists of the request and analysis of additional reports after the adoption of the concluding observations.²⁸ By contrast, the CRC has no follow-up procedure due to its heavy workload; the CRC supervises not only the Convention on the Rights of the Child but also the two additional protocols to this convention.

3. The Universal Periodic Review: an innovative and universal approach to human rights reporting

A. Setting up the Universal Periodic Review

Whereas all existing reporting mechanisms are based on treaty obligations, there has never been a genuinely universal compliance mechanism with competence over all States in contemporary international law. At the same time, the lack of a universal mechanism has been an obstacle to forming norms that customarily regulate the protection of human rights. This has caused the UPR to be considered by some observers a “breath of fresh air,” “genuinely innovative, positive, and encouraging.”²⁹ Yet others have been more critical of the UPR, focusing on

²⁷ Rule 68 of the Rules of Procedure of CAT, published in UN Doc. HRI/GEN/3/Rev.2, 28 May 2005.

²⁸ See “Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights”, UN Doc. A/64/280, 6 August 2009, p. 12.

²⁹ See J. Carey, “The UN Human Rights Council: What Would Eleanor Roosevelt Say?”, 15 *ILSA J Int’l & Comp L* (2009) 459, at p. 460. Other authors have also underlined its “innovative” character; see A. Varón Mejía, “De la Comisión al Consejo de Derechos Humanos: fortalecimiento de los mecanismos de protección de derechos humanos o profundización de la politización”, 10(1) *Estud. Socio-Juríd.*, Bogotá (Colombia), (2008); 129–157, at p. 149; others even pointed out to the fact that in their opinion the UPR was the “most innovative” feature of the newly created Human Rights Council; see M. Viégas-Silva, “El nuevo Consejo de Derechos Humanos de la Organización de las Naciones Unidas: algunas consideraciones sobre su creación y su primer año de funcionamiento”, 12 *Rev. Colomb. Derecho Int.* (2008), available online at <http://www.scielo.org.co> (26 April 2010), at Section III-B. The UPR has even been characterized as the “over-arching piece” which serves the Council in its work for the protection and promotion of human rights; see C. Villán Durán, “Luces y sombras del nuevo Consejo de Derechos Humanos de las Naciones Unidas”, 4 *Eikasia. Revista de Filosofía* (2006), available online at <http://revistadefilosofia.com/DH06.pdf> (26 April 2010), at p. 5. Others called upon certain relevant aspects of the UPR, such as its “unchartered character” and that it will eventually need a considerable amount of resources; see F.D. Gaer, “Perspectives on the United Nations Human Rights Council: Scrutinizing Countries: The Challenge of Universal Review”, 13 *Hum. Rts. Br.* (2006), 9, at p. 10.

the fact that it was designed as a peer review exclusively among States, with the total absence of independent experts who could break up the group alliances that inevitably form on the intergovernmental level.³⁰

In any case, the idea of an international peer review among States in the field of human rights is not new. Between 1956 and 1981, a periodic reporting mechanism to the United Nations Commission on Human Rights already existed, although on a merely formal basis without practical effectiveness.³¹ In 2002 the African Union decided to set up the African Peer Review Mechanism, which can be considered the nearest comparable precedent to the Human Rights Council UPR. The mandate of this African mechanism is to ensure that the States' policies and practices of participation conform to the political, economic, and corporate governance values, codes, and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.³² Thus, the African Peer Review Mechanism is a mutually agreed instrument for self-monitoring by the participating States.³³

The UPR was created with a unique institutional and functional nature alongside the Human Rights Council. Indeed, the legal basis of the UPR is the General Assembly Resolution 60/251, which created the Human Rights Council. In this resolution it was decided that the Council shall:

“undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned

³⁰ See in this sense the critical voice of A. Mulugeta Abebe, “Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council”, 9 *Human Rights Law Review* 1 (2009), 1–35, at p. 3.

³¹ This procedure was set up in 1956 by the establishment of the Special Committee on Periodic Reports, within the Commission on Human Rights (ECOSOC Res. 624 B (XXII), 1 August 1956). Based on periodic reports submitted by the member States of the United Nations, the Committee had to focus on the application of the Universal Declaration of Human Rights and the right of self-determination of peoples. It was abolished in 1981, after GA Res. 35/209, 17 December 1980 and the Res. of the Commission on Human Rights 10 (XXXVII), 13 March 1981. On this mechanism, see C. Villán Durán, *Curso de Derecho internacional de los derechos humanos*, ed. Trotta, Madrid 2002, p. 383; and Ph. Alston, “Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council”, 7 *Melbourne Journal of International Law*, 1 (2006), 185, at <http://www.austlii.edu.au/au/journals/MelbJIL/2006/9.html> (23 April 2010), in particular pp. 207–213. Both authors conclude that this procedure barely made any significant contribution to the protection or promotion of human rights.

³² Adopted at the 6th Summit of the New Partnership for Africa's Development (NEPAD) Heads of State and Government Implementation Committee, 9 March 2003, at Abuja, Nigeria. Text available online at <http://www.uneca.org/aprm/documents/book2.pdf> (17 May 2010).

³³ See 38th Ordinary Session of the Assembly of Heads of State and Government of the OAU: African Peer Review Mechanism, 8 July 2002, Durban, South Africa, AU Doc. AHG/235 (XXXVIII), Annex II, para. 1. In this resolution there is also laid down the competences and procedure of this procedure.

and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies...”.³⁴

General Assembly Res. 60/251 is further developed in Human Rights Council Resolution 5/1,³⁵ which contains the “institution-building package” for the Council. The first issue this package addresses is the UPR. The UPR follows a number of human rights oriented principles and pursues the following objectives:

“(a) The improvement of the human rights situation on the ground; (b) The fulfillment of the State’s human rights obligations and commitments and assessment of positive developments and challenges faced by the State; (c) The enhancement of the State’s capacity and of technical assistance, in consultation with, and with the consent of, the State concerned; (d) The sharing of best practice among States and other stakeholders; (e) Support for cooperation in the promotion and protection of human rights; (f) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.”³⁶

B. Relevant norms and commitments for assessment

Our study has presented the UPR so far as a human rights assessment of each individual State’s practice. In this point it is essentially identical to the treaty-based mechanisms, which we have analyzed in the previous sections. The most striking difference between the UPR and the United Nations treaty bodies is the legal basis for the UPR. Whereas the treaty bodies apply the human rights treaty that created them, the legal framework used for undertaking the UPR assessment is a list of different international human rights instruments: (1) the United Nations Charter, an international treaty; (2) the Universal Declaration of Human Rights, which is a General Assembly resolution; (3) the human rights treaties that each State under review is a party to; and (4) the voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Council,³⁷ and which can be characterized as unilateral acts of States. Furthermore, the resolution that created the UPR mentions international humanitarian law commitments as a basis for review. But it should be noted that the presence of international humanitarian law is much weaker, in so far as the resolution requires that such commitments are closely interrelated with international human rights norms. The resolution reads:

³⁴ Article 5 (e) of GA Res. 60/251. This GA resolution was voted, and gained 170 votes in favor, 4 against (United States, Israel, Marshall Islands and Palau), and three abstentions (Belarus, Iran and Venezuela).

³⁵ Human Rights Council Res. 5/1, 18 June 2007.

³⁶ Para. 4 of Annex I to Res. 5/1.

³⁷ Para. 1 of Annex I to Res. 5/1.

“[i]n addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law.”³⁸

Thus it seems that not all international humanitarian law is considered during the UPR, but only that humanitarian law which is interrelated with international human rights law. This has led to a certain debate about the extent to which international humanitarian law should be considered for the purposes of the UPR.³⁹

C. Aiming at an “interactive dialogue”

The resolution establishing the review procedure highlights the idea of conducting an “interactive dialogue” between the Human Rights Council, specifically the UPR Working Group, and the State concerned. Indeed, this “interactive dialogue” might be considered the core element of the entire procedure. Rather than focusing on legal technicalities or strict compliance control, the review intends to set up a universal forum for dialogue among States on human rights. This is reflected in the elements of the procedure, which can be structured in four phases: (1) the collection of information on each State’s practice in the field of human rights; (2) an “interactive dialogue” with the UPR Working Group; (3) the adoption of the “outcome report” by the Human Rights Council, including recommendations to the reporting State; and (4) the follow-up procedure.

As can be seen from these four phases of the procedure, it is essential that the State under review cooperates with the UPR. Since General Assembly Res. 60/251 was adopted by a wide margin of majority votes, it seems that most States decided voluntarily to partake in the UPR. Nevertheless, a number of States voted against that resolution, thus leaving open the possibility that some States will oppose the procedure and not cooperate with the Human Rights Council. Since the legal framework setting up the UPR does not provide any rules for a case in which a State does not comply with the procedure, it will be up to the Council to decide the consequences to attach to such a situation.

In the first procedural phase, the State bears the obligation to submit “information” on its human rights practice, whereas the treaty-based mechanisms use the term “report.”⁴⁰ This different use of terms may be explained by the fact that the information the State presents may only have a maximum extension of twenty

³⁸ Para. 2 of Annex I to Res. 5/1.

³⁹ In the context of the present study we are not going to discuss further this interesting question. Reference ought to be made to other authors who have studied this specific issue, which actually is not directly applicable to the situation in Spain, and thus not the object of the present analysis. See, instead, A. Mulugeta Abebe, “Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council”, 9 *Human Rights Law Review* 1 (2009), 1–35, at pp. 5–6.

⁴⁰ See for the guidelines for the submission of this “information”, the Decision 6/102 of the Human Rights Council, adopted as follow-up to Human Rights Council resolution 5/1 at its 20th meeting, 27 September 2007, on “General Guidelines for the Preparation of Information under the Universal Periodic Review”.

pages. Thus, it may not be as exhaustive and as comprehensive as a proper report submitted to the treaty-based mechanisms.

This State information is complemented by the Office of the United Nations High Commissioner of Human Rights, which drafts a synopsis of the information on the State's practice available from the different mechanisms, including the periodic reporting mechanisms. Furthermore, the Office includes in the synopsis information received from "credible stakeholders" (essentially, civil society).⁴¹ By supporting its synopsis with the outcomes of other human rights mechanisms, the UPR might be described as a "meta-mechanism" that operates not only on the basis of the State information, but also takes into account other mechanisms.

Once the information from these multiple sources is compiled, the "interactive dialogue" begins. This dialogue is twofold. The first dialogue takes place between the Human Rights Council Working Group and the State under review. Once the Working Group has drafted a report on a State, the report becomes an object of a second dialogue. This second dialogue takes place before the plenary Council.

Thus, the Working Group is the body that leads the Council in assessing the human rights practice of all United Nations member States. It is composed of the representatives of all 47 members of the Council and the Council observers, which for this purpose are all other United Nations member States, plus Palestine and the Holy See.⁴² While paying tribute to a well-balanced regional distribution, the Council draws lots for a group of three rapporteurs, called the *troika*. These three rapporteurs facilitate each individual review, including the preparation of the report of the Working Group.⁴³

⁴¹ See para. 15 of Annex I to Res. 5/1: "(a) Information prepared by the State concerned, which can take the form of a national report, on the basis of general guidelines to be adopted by the Council at its sixth session (first session of the second cycle), and any other information considered relevant by the State concerned, which could be presented either orally or in writing, provided that the written presentation summarizing the information will not exceed 20 pages, to guarantee equal treatment to all States and not to overburden the mechanism. States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders; (b) Additionally a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents, which shall not exceed 10 pages; (c) Additional, credible and reliable information provided by other relevant stakeholders to the universal periodic review which should also be taken into consideration by the Council in the review. The Office of the High Commissioner for Human Rights will prepare a summary of such information which shall not exceed 10 pages."

⁴² These two entities are considered permanent observers of the United Nations. For a historical and legal analysis of the observer status of the Holy See, see C. Corral Salvador and J.M. Sánchez Patrón, 'La participación de la Santa Sede en las Naciones Unidas: Su Nuevo Estatuto de "Estado observador permanente"', 21 *Anuario de Derecho Internacional* (2005), 449–474, in particular in regard to its role in the Human Rights Commission, pp. 464–465, where the authors particularly highlight the Holy See's involvement in the human rights agenda of the United Nations.

⁴³ Para. 18 (d) of Annex I to Res. 5/1.

The first oral interaction takes place in sessions between the members of the Working Group and the representatives of the State under review. Sessions last for a maximum of three hours.⁴⁴

After the session, the Working Group, through its *troika*, drafts a report that is submitted to the plenary Council. The Council considers the report for a maximum of two hours, whereby the State under review has twenty minutes to present its views and comments. In this stage, the State may formulate new voluntary commitments. Members and observers of the Council have once more – this time directly through their Council representatives – the opportunity to exercise pressure on the State by commenting on and criticizing the Working Group’s report and recommendations. Even civil society organizations may still take part at this stage by submitting written “general observations”. At the end of this session the Human Rights Council formally adopts a text called “outcome”.

D. The “outcome” and its follow-up

The “outcome” is a report that summarizes the proceedings of the review.⁴⁵ Its contents depend upon the situation in each State. It may contain an assessment of the human rights situation in the country, highlighting positive developments as well as challenges; share best practices; emphasize the need for enhancement of cooperation for the promotion and protection of human rights; provide technical assistance and capacity building; or formulate voluntary commitments and pledges made by the State under review.⁴⁶

Once the “outcome” report is adopted by the Council, the follow-up begins. It consists of supervising each State’s voluntary commitments in the field of human rights. These commitments are assessed in the following UPR, which each State must pass periodically every four years.⁴⁷

III. IN PRACTICE: SPANISH PERIODIC REPORTING

1. Drafting periodic reports for the treaty bodies

The committees have elaborated their own criteria for the submission of periodic reports. These criteria have been published as the “Guidelines on the Form and

⁴⁴ During this dialogue, the State under review has 30 minutes for the presentation of its information, followed by a questions and answers session with the Council members and observers. In this session, each member State of the Council has the right for three minutes for its questions and comments. The observer States have two minutes. Once all questions are formulated, the State under review has another thirty minutes for answering the questions and for making final comments. See A. Mulugeta Abebe, “Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council”, 9 *Human Rights Law Review* 1 (2009), 1–35, at pp. 12–13.

⁴⁵ Para. 26 of Annex I to Res. 5/1.

⁴⁶ Para. 27 of Annex I to Res. 5/1.

⁴⁷ Para. 14 of Annex I to Res. 5/1.

Content of Reports to be Submitted by States Parties to the International Human Rights Treaties.”⁴⁸ They are further complemented by specific recommendations of each committee.

The guidelines provide that the obligation to report consists of two main parts. For the first part, each State has to submit general information about its geographic, political and legal characteristics. States usually present one document to all treaty bodies. This document is called the “core document.” The second part completes the information of the core document, as it contains the individualized information for each human rights treaty.

A. *The core document*

Currently, the committees require each State to draft a core document providing general information to assess its treaty implementation. The information contained therein must be sufficiently general to be relevant for all or at least some of the treaties.⁴⁹ States have to submit the core document with the first reporting cycle, and they have to keep it updated over time. The committees’ harmonized rules of procedure also allow the committees themselves to request an update of the core document.⁵⁰ They give some orientation as to the extension of the core document, which should range between sixty and eighty pages.⁵¹ States may submit an update as an addendum to the existing core document or as a new or completely revised version.⁵²

In the case of Spain, the core document dates from 1995.⁵³ Given its age, the government added in early 2008 an update as an annex to the fifth report on the International Covenant on Civil and Political Rights.⁵⁴ Spain had to update again this general data in the fifth periodic report to the CAT, submitted a year later.⁵⁵ The option of having a standard document valid for all committees would make it easier to submit periodic reports. Yet this would require a regular update of the core document, at least every two or three years, to reflect the current status of the State in terms of unemployment and literacy, territorial structure, etc. In spite of updating the general information in each periodic report, the core document would substantially facilitate the work of the Spanish authorities responsible for preparing the reports. They could rely on the core document and would not have

⁴⁸ See the comprehensive document entitled “Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties”, UN Doc. HRI/GEN/2/Rev.6, 3 June 2009.

⁴⁹ See *ibid.*, para. 27.

⁵⁰ *Ibidem.*

⁵¹ See *ibid.*, para. 19.

⁵² See *ibid.*, para. 27.

⁵³ See “Core document forming an integral part of the reports of State parties: Spain”, UN Doc. HRI/CORE/1/Add.2/Rev.2, 6 March 1995. The other country specific Core Documents can be found at the Treaty Body Database at <http://tb.ohchr.org/default.aspx>.

⁵⁴ See the clarification in para. 3 of the fifth periodic report of Spain to the Human Rights Committee, UN Doc. CCPR/C/ESP/5, 5 February 2008.

⁵⁵ See UN Doc. CAT/C/ESP/5, 22 January 2009, where pp. 2–5 summarize what the core document should contain.

to double efforts in submitting the same general information about Spain to the different committees.

B. Information for each specific committee

The second part of the periodic reports contains the State practice in implementing the human rights provisions in the specific treaty for which the report is due. In particular, the text must describe and explain recent developments in the legal system and administrative practice affecting the enjoyment of rights established in the respective treaty. In addition, and with the exception of the initial reports, the periodic reports comment on the issues raised by the committee in its previous concluding observations or recommendations.⁵⁶

This document is prepared individually for each treaty by the competent authorities of a State. The committees do not require a State to use any specific procedure for drafting the report. However, the reports must explain the social reality relevant to the subject matter of the treaty in accordance with the spirit of the guidelines we referred to before. In Spain, the Office of Human Rights of the Ministry of Foreign Affairs and Cooperation is in charge of coordinating the preparation of periodic reports to the United Nations bodies and specialized agencies. However, in Spain there is no working protocol or rules of procedure that must be followed in preparing the reports. As a result, the quality of the drafting depends on the Ambassadors leading the Office of Human Rights, as well as the political climate prevailing in Spain during the drafting.⁵⁷

During the analysis of the periodic reports, committees may express their views on the process by which the reports were drafted. Committees sometimes propose ways that States may improve the drafting process in the future. For example, one committee indicated to Spain that with the fourth or fifth report, it should more specifically address the most relevant issues regarding the treaty's implementation.⁵⁸ At the same time, however, this does not mean that a State may report on just one or two issues. At a minimum, a State should report on all follow-up issues identified by the committee in the previous reporting cycle.⁵⁹

⁵⁶ See "Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties", UN Doc. HRI/GEN/2/Rev.6, 3 June 2009, para. 29.

⁵⁷ At this point we should note that the committees even comment in their concluding observations on the positive or negative effects of a political change in a particular country for human rights reporting and treaty compliance. In the case of Spain such comments were made while dealing with the changes that took place in this State after 2003 for the application of the principle of equality between men and women; see the report on the 31st Session of the CEDAW, New York, 6–23 July 2004, published by the *International Service of Human Rights*, p. 10.

⁵⁸ It was stated by CESCR in the examination of the forth report of Spain, see the 32th session of CESCR (Geneva, from 26 April to 14 May 2004), published by the *International Service of Human Rights*, p. 6.

⁵⁹ It is evident from the analysis sessions of the 16th and the 17th Spanish periodic reports; see the summary of the 64th CERD session, Geneva, from 23 February to 12 March 2004, published by the *International Service of Human Rights*, p. 6.

2. Departments of the Spanish administration that participate in the drafting of the reports

A. *Authorship of the reports*

Through the Office of Human Rights of the Ministry of Foreign Affairs the Spanish government coordinates the various government bodies involved in the preparation of periodic reports. This coordination allows also for national human rights institutions to take part indirectly in the reporting procedure.

There are several ways an institution may participate. It may provide information to the body that is preparing the report; review the State's report in order to check its accuracy and precision; directly prepare the report; or coordinate the process of gathering information from various State bodies on matters relevant to the report and pass the information to the government agency responsible for its drafting.⁶⁰

Some committees suggest that national human rights institutions should independently submit a report, in addition to the report submitted by the government.⁶¹ Although many institutions use this procedural door towards direct involvement of national human rights institutions, the Spanish Ombudsman has not taken advantage of this option. The participation of national human rights institutions contributes to the information about the human rights situation in a State. This prevents periodic reports from being mere formal descriptions of the legislation in force. To recognize on the international level the role of national human rights institutions such as the Ombudsman offices, the General Assembly adopted a resolution containing a set of principles ("Paris Principles") in 1993. In paragraph 3 (d), the Paris Principles state the following:

"To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence."⁶²

One way to judge the quality of a report is to assess the level of intra-governmental collaboration. To that end, reports should describe the authorship and the procedure followed for their preparation. In Spanish practice, this information is sometimes insufficient. It is important to know the source of the information provided by the government, most notably in sociological and demographic matters where the official data can easily be refuted by other sources.

⁶⁰ For these alternatives, see *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, United Nations, New York and Geneva, 1995, pp. 68–69, paras. 211–214.

⁶¹ See CRC General Observation No. 2 (2002) on "The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child", UN Doc. CRC/GC/2002/2, 15 November 2002, para. 21.

⁶² See General Assembly Resolution A/RES/48/134, 20 December 1993, para. 3 (d).

To cite one example, a very recent Spanish report clarified the following points about authorship:

“The report was produced by the Ministry of Foreign Affairs and Cooperation in Spain with the involvement of relevant ministries and departments. These bodies will circulate the report prepared under the Optional Protocol together with the recommendations to be made by the Committee on the Rights of the Child.”⁶³

Although the clarification states that the Ministry of Foreign Affairs produced the report, the report appears to be written by the Ministry of Defense. From the point of view of the committee, a State has no reason to omit the Ministry’s or any other body’s participation in the drafting of the report. In order to facilitate report assessment by the committee, it would be more appropriate to identify authorship more precisely. Even worse is the case in which a report does not mention the author at all. Such occurred, for example, in Spain’s initial report on the implementation of the Optional Protocol to the Convention on the Rights of the Child relating to the sale of children, child prostitution and child pornography;⁶⁴ the fifth report to the CAT;⁶⁵ and the initial report to the CRPD.⁶⁶ In these cases, no one knows which public authority prepared the report, making it difficult to evaluate the origin and quality of the information. In a State with such complex functional and regional institutional structures as Spain, the issue of authorship is essential for the proper evaluation of periodic reports.

As positive examples of recent Spanish practice, the fifth and sixth periodic reports on the implementation of the Convention on the Elimination of Discrimination against Women accurately attribute authorship. The fifth periodic report of Spain states in the introduction that the Women’s Institute prepared the report with support from the Office of Human Rights and “other ministerial departments.” The report also explains the procedures followed to ensure that the autonomous communities and civil society participate.⁶⁷ The sixth periodic report, submitted in March 2008, was even more thoroughly elaborated and presented.⁶⁸ This sixth report attributed authorship to the same institutions as the fifth report. In addition, the sixth report was presented publicly by the Spanish Minister of Equality, Bibiana

⁶³ See “Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Initial reports of States parties due in 2004: Spain”, UN Doc. CRC/C/OPAC/ESP/1, 16 October 2006, p. 3.

⁶⁴ See “Consideration of Reports Submitted by States Parties under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Initial reports of States parties due in 2004: Spain”, UN Doc. CRC/C/OPSC/ESP/1, 17 October 2006. This report begins directly with the legal analysis of the protocol, written in a very elaborate, but “anonymous” style.

⁶⁵ UN Doc. CAT/C/ESP/5, 22 January 2009.

⁶⁶ UN Doc. CRPD/C/ESP/1, 1 July 2010.

⁶⁷ See “Fifth periodic report of Spain” to the CEDAW, UN Doc. CEDAW/C/ESP/5, 15 April 2003, p. 7.

⁶⁸ See “Sixth periodic report of Spain”, UN Doc. CEDAW/C/ESP/6, 28 April 2008, in particular paras. 5–8.

Aído Almagro, who led the Spanish delegation during the public session before the committee in New York on 22 July 2009.

Because the Women's Institute and the Ministry of Equality are relatively independent governmental bodies with sufficient financial resources, they seem to be able to produce quality reports.

B. Participation of and coordination with the autonomous communities

A specific issue, related to the coordination between the central government and the autonomous communities, regularly arises when the committees consider Spanish periodic reports. The Spanish government does not follow a regulated procedure or a formally established communication channel, which would systematically allow autonomous communities to be involved with periodic reporting. Nevertheless, many of the issues handled in these reports are part of the autonomous communities' exclusive or shared competence. As a result, the committees do not receive necessary information for assessing the regional authorities' work. This situation distorts the committees' understanding of the State as a whole. States are responsible under international law for human rights compliance of their organs and subdivisions. When the committees do not have full understanding of the States' human rights practice, they can not assess the States' compliance with human rights treaties. Recognizing the importance of proper coordination, CERD in its concluding observations called for the Spanish government to provide more information "on the relationship between the central Government and the Autonomous Communities and their respective spheres of competence with regard to racial discrimination issues."⁶⁹

C. Participation of civil society

At times civil society has expressed frustration that it does not participate in periodic reporting or in public sessions where the committees consider State reports.⁷⁰ The committees themselves have asked the Spanish government to allow civil society a greater role in preparing periodic reports, especially NGOs.⁷¹ Recently, the HRC stated that "[t]he Committee also requests that the process of compiling

⁶⁹ See the concluding observations of the Committee on the Elimination of Racial Discrimination on the periodic reports No. 10, 11 y 12 of Spain, UN Doc. A/49/18, paras. 479–511 (1994), para. 506.

⁷⁰ In connection with the consideration of the fifth periodic report of Spain to the HRC, it was stressed by civil society, as in the case of the "Statement to the Human Rights Committee", made on 13 October 2008 by David Fernández Puyana, Representative of the Spanish Society for International Human Rights Law (AEDIDH, *Asociación Española para el Derecho Internacional de los Derechos Humanos*) and UNESCO Etxea (EU) in Geneva, p. 1.

⁷¹ It was pointed out by CEDAW members during the consideration of the fifth periodic report of Spain. See the summary of the CEDAW 31th session, New York, 6–23 July 2004, published by the *International Service of Human Rights*, p. 11.

the sixth periodic report involve civil society and non-governmental organizations in the State party.”⁷²

Although the Human Rights Office of the Spanish Ministry of Foreign Affairs keeps in contact with civil society interested in human rights, such contact is predominantly informal and does not usually happen in the context of periodic reporting. Moreover, the Office of Human Rights has no clear guidelines to assess the credentials of organizations or individual personalities and their respective fields of expertise. The recently approved National Human Rights Plan could have been an opportunity to include some general guidelines for drawing up such participation, but the plan did not refer to this issue.⁷³

NGOs in Spain may become more influential in their dealings with the public administration. Currently, strictly Spanish NGOs appear rarely before the United Nations bodies. In the last cycle of periodic reports to the HRC, only three Spanish NGOs were solidly represented: Spanish Society for International Human Rights Law, Association for Human Rights, and the Coordinating Organization for the Prevention of Torture. A few smaller Spanish NGOs addressed only highly specific issues directly affecting their members. In addition to these wholly Spanish NGOs, a few foreign NGOs monitor the human rights situation in Spain, as they do also in other States.⁷⁴

It is encouraging to note that in procedures before CEDAW and CAT in 2009, civil society was more involved. In the consideration of the report on discrimination against women, four NGOs submitted their comments.⁷⁵ In the case of the report to the CAT, nine organizations submitted information,⁷⁶ including the Ombudsman of Spain as the national human rights institution.⁷⁷ As we have said already, when

⁷² See HRC concluding observations on the fifth periodic report of Spain, UN Doc. CCPR/C/ESP/CO/5, 5 January 2009, para. 24.

⁷³ See *National Human Rights Plan*, published on 15 December 2008.

⁷⁴ For further information on ONGs that submitted reports to HRS, see <http://www2.ohchr.org/english/bodies/hrc/hrcs94.htm> (10 January 2009). In particular, the work of Amnesty International should be noted, whose office in Madrid, besides many other things, supervises Spanish practice before international mechanisms in a strict and methodical way.

⁷⁵ These NGO's were the Spanish Committee of Persons with Disabilities (CERMI), Global initiative to end all corporal punishment of children, *Plataforma Impacto de Género Ya* and *Fundación Secretariado Gitano*.

⁷⁶ These NGO's were Amnesty International, the Spanish Society for the International Human Rights Law, Basque Observatory of Human Rights, International Federation of Action by Christians for the Abolition of Torture, Women's Link Worldwide, International Commission of Jurists, Coordinator for the Prevention of Torture, and the Association for Human Rights. The ninth was the Spanish Ombudsman.

⁷⁷ See the document, available only in Spanish, “Observaciones del Defensor del Pueblo sobre el Quinto Informe Periódico de España (CAT/C/ESP/5), ante el Comité contra la Tortura de la Organización de Naciones Unidas”, published on the Committee's web site at <http://www2.ohchr.org/english/bodies/cat/cats43.htm> (20 February 2010). It should be noted that the report does not specify who “invited” the Ombudsman to submit his observations, whether it was the Spanish government or the committee, or anybody else.

the Ombudsman submits comments directly to the committee, collaboration with human rights bodies is enhanced in accordance with the Paris Principles.⁷⁸

3. Timely submission of reports

Generally, the government submits periodic reports in a timely manner, although occasionally it delays in the submission of the reports or in responses to the list of issues of the committee. In any case, such delays are becoming rarer. Thus, in the last cycle of reports to the CRC, the government submitted only one document late: the responses to the list of issues.⁷⁹

However, the Spanish government was significantly late in submitting its fifth periodic report to the HRC and also delayed the discussion of the report. More than twelve years passed between the study of the fourth and the fifth periodic reports. This stands in stark contrast with the prescribed period of four years between the submission of reports.⁸⁰ The explanation for this delay may lie in the Spanish government's concern, justified or not, that the HRC would scrutinize it in politically sensitive areas. The HRC is the most publicly visible treaty body, and the government is concerned because of the potential reaction by the public, NGOs and the media.

4. The Spanish government's participation in the public consideration of its reports

In general, the Permanent Missions of Spain to the United Nations, based in New York and Geneva, represent the Spanish government before the United Nations bodies. In practice, however, the Spanish delegation to any human rights body is reinforced with specially trained domestic personnel. In principle, any delegation, including the Spanish, should be composed of people with a solid knowledge of domestic affairs during the public sessions on the State reports. For example, the Director of the Women's Institute was part of the Spanish delegation at the consideration of the fifth report of Spain for CEDAW. Even the Minister of Equality appeared before the Committee to defend the sixth report, explaining the current government policy of equality. As for the consideration of the third report of Spain to the CESCR, the committee praised the participation in the Spanish delegation

⁷⁸ See para. 3 (e) of the Paris Principles: "To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights".

⁷⁹ See Concluding observations on Spain, UN Doc. CRC/C/15/Add.185, 13 June 2002, para. 2.

⁸⁰ The fifth report (CCPR/C/ESP/5) was to be submitted on 28 April 1999, and it was delayed until 9 February 2007. See "Report of the Human Rights Committee, vol. I", UN Doc. A/63/40 (Vol. I), p. 208. The problem was also stressed by the civil society. See the "Statement to the Human Rights Committee", made on 13 October 2008 by David Fernández Puyana, *loc. cit.* note 35, p. 1.

of “women, representing the ministries concerned.”⁸¹ And in the case of the fourth report, more broadly, it praised the participation of “experts in the various areas covered by the Covenant.”⁸² The committees are usually grateful to the State for assigning high level officials to its delegations.⁸³

However, the Spanish practice still has room to adjust to the current decentralized nature of the State. Thus, it might be possible to assign autonomous communities’ representatives to the delegations, in case this assignment were convenient to pay tribute to the distribution of competences between the government and the autonomous communities. It may also be convenient to assign Spanish Ombudsman’s staff or independent experts working in Spain in the fields covered by the agreement under consideration.

5. The Spanish government’s follow-up on concluding observations and recommendations

The concluding observations, along with recommendations for improving States’ human rights practices, are not legally binding. However, given the fact that they emanate from a treaty obligation assumed by the State party, States parties are obligated to cooperate in good faith with the treaty bodies. Hence the recommendations should be considered with the same good faith. The good faith obligation also underlays the follow up procedure’s legal relevance. Given the committees’ statements, we can say in general terms that Spain demonstrates a serious commitment to implement the committees’ recommendations and conclusions.⁸⁴ The following text in the third report submitted to the CAT illustrates Spain’s understanding of its treaty obligations:

“(3) The periodic drafting of a specific report on the implementation of the Convention is not an added administrative burden but a welcome occasion for the State to take stock of the domestic situation regarding the prohibition of torture, a matter of the greatest importance for the protection and safeguarding of fundamental rights.

⁸¹ See CESCR concluding observations, UN Doc. E/C.12/1/Add.2 (1996), para. 2.

⁸² See CESCR concluding observations, UN Doc. E/C.12/1/Add.99, 7 June 2004, para. 3.

⁸³ As indeed did the Committee on the Elimination of Racial Discrimination in its concluding observations on Spain after having analyzed the third and the fourth reports of Spain, UN Doc. A/54/38, 25 June 1999, paras. 249.

⁸⁴ This is evident from the comments of members of the Committee on the Rights of the Child during the consideration of the second periodic report of Spain; see the summary of the 30th session of the Committee on the Rights of the Child held in Geneva from 20 May to 7 June 2002, published by the International Service of Human Rights, available at http://www.ishr.ch/hrm/tmb/treaty/crc/reports/crc_23-41/CRC_30.htm (3 January 2009). The same is also observed in CAT, see CAT Concluding Observations on the third periodic report of Spain, UN Doc. A/53/44, 27 November 1997, paras. 119–136, especially paras. 120–123; and CESCR, see CESCR Conclusions and recommendations on the third periodic report of Spain, UN Doc. E/C.12/1/Add.99, 7 June 2004, paras. 2 and 3.

(4) The Committee's consideration of reports takes the form of a dialogue, and the benefit to be derived by the State in terms of perfecting the safeguards of prevention and protection is undeniable. For that reason, in keeping with the spirit of the Convention, the Spanish Government reiterates its satisfaction with the functioning of the system and advocates its maintenance. It is an honour and most useful to continue to work with the Committee."⁸⁵

Apart from this positive rhetoric, Spain has amended on several occasions its domestic legislation due to, among other possible reasons, the committees' recommendations.⁸⁶

However, Spain does not have a specific working procedure or protocol for the domestic implementation of concluding observations. According to the United Nations, the national human rights institutions could be in charge of such a follow-up.⁸⁷

The broadly discretionary character of the periodic reporting mechanisms explains why they are so flexible. Against this background, it is understandable that the Spanish government clings to its policies, despite the committees' repeated criticism. When these issues have great political implications, Spain does not necessarily follow the committee's recommendations. For example, we can mention the antiterrorist policy criticized by the CAT;⁸⁸ the establishment of a dual instance in the criminal court system, which was sought for many years in vain, drawing severe criticism from the HRC;⁸⁹ or the right of Spanish speakers in the Basque

⁸⁵ See Third report of Spain to CAT, UN Doc. CAT/C/34/Add.7, 23 June 1997, paras. 3 y 4.

⁸⁶ It can be mentioned, in this context, the change in the definition of torture in the Spanish Penal Code of 1995 (Article 173 of the LO 10/1995 of 23 November, *BOE* No. 281, 24 November 1995, rectification in *BOE* No. 54, 3 February 1996) to conform to the wording of Article 1 of the Convention against Torture. For further information, see "Concluding Observations of the Committee against Torture, UN Doc. A/53/44, 27 November 1997, paras. 119–136, especially para. 124.

⁸⁷ See *Economic, social and cultural rights. Handbook for national human rights institutions*, the United Nations, New York/Geneva, 2004, p. 69.

⁸⁸ See "Concluding Observations of the Committee against Torture on Spain", UN Doc. CAT/C/ESP/CO/5, 19 November 2009, para. 12.

⁸⁹ According to Article 14.5 of the International Covenant on Civil and Political Rights, each criminal conviction requires at least one review instance. In the case of crimes tried before the High Court (*Audiencia Nacional*) and before the criminal courts (*Salas de lo Penal*) of the provincial courts (*Audiencias Provinciales*), this is not the case since it can only be reviewed on appeal if they meet the limited eligibility criteria. This important incompatibility of the Spanish legislation with the Covenant was highlighted in the concluding observations on the fourth report of Spain (see UN Doc. CCPR/C/79/Add.61, 3 April 1996, para. 19), and in the concluding observations on the fifth report of Spain (see UN Doc. CCPR/C/ESP/CO/5, 1 May 2009, para. 17). It should be noted, however, that in Spain there have been done a number of changes to the legal system to provide for the right to criminal review. This was shown by the fact that Spain ratified Protocol No. 7 to the European Convention of Human Rights on 16 September 2009, with entry into force on 1 December 2009, *BOE* No. 249, 15 October 2009. This Protocol, *inter alia*, provides for this criminal review.

Country and Catalonia to education in their mother tongue, as pointed out by the CERD.⁹⁰

Publicity and dissemination of the conventions' texts and the committees' concluding observations are other key issues in the follow-up to the concluding observations. In this context, Spain has been repeatedly criticized for not disseminating information. The committees have asked the Spanish government to provide more international and domestic human rights education for its own public officials and civil society.⁹¹

Since legal consequences of failing to comply with the concluding observations are limited, the procedure before the human rights bodies is designed to be as flexible as possible so that the State may have plenty of time to react. In this context, it is important that the government is politically willing to comply with the recommendations. This way the implementation becomes essentially a gradual and sometimes long process, whereby trends develop to attain better compliance with human rights standards.

6. Lessons learned from the treaty bodies: the first Universal Periodic Review session dedicated to Spain

During the setting up of the Human Rights Council, the Spanish government declared that the most innovative feature of the new Council's attributions was the UPR. Following the opinion of the principal human rights NGOs, the government asserted that the characteristics of the Human Rights Council are not up to desirable standards. Nevertheless, the government recognized that the Human Rights Council marked a step forward in the reform of the United Nations and signaled an improvement of the universal mechanisms for the promotion and protection of human rights.⁹²

Since its inauguration in 2006, the Human Rights Council has become a primary political and diplomatic focus for Spain. This focus has been evidenced by Spain's active role in all Council sessions, ordinary and extraordinary, albeit only as an observer country. Among other specific measures, Spain increased its financial contributions to the Office of the High Commissioner of Human Rights. By 2008, Spain had become the second largest financial contributor of any United Nations

⁹⁰ The lack of free exercise of this right is criticized by CERD at least since 1996, see "Concluding Observations of the Committee on the Elimination of Racial Discrimination on the 13th periodic report of Spain", UN Doc. CERD/C/304/Add.8, 28 March 1996, para. 20.

⁹¹ This was mentioned, for example, in "Concluding observations and comments of the Committee on Economic, Social and Cultural Rights: Spain", UN Doc. E/C.12/1/Add.99, 7 June 2004, para. 42; as well as in "Concluding Observations of the Committee on the Elimination of the Discrimination against Women on the fifth report of Spain", UN Doc. A/59/38 (Supp.), 18 March 2004, paras. 323–355, especially para. 355.

⁹² This was declared in the reply on 16 May 2006 to a parliamentary question regarding the creation of a Human Rights Council to replace the UN Human Rights Commission, *BOCG-Congreso*, D, VIII Leg., n. 412, p. 661; reprinted in an English translation in 12 *SYIL* (2006), p. 136.

member State.⁹³ Spain submitted its candidacy for Council membership for the period 2010–2013. The elections were held in May 2010, and Spain was elected to the Council.⁹⁴ Spain's membership objective has been to further push for the protection and promotion of human rights worldwide. Nevertheless, although when questioned during the UPR about the specific steps Spain planned to take to lessen the Council's politicization, the Spanish delegation did not answer on the record.⁹⁵

As we have discussed in the chapter on the UPR procedure, the UPR was considered to be the expression of a universal, transparent and participatory human rights compliance mechanism that would bring to the forefront relevant human rights violations in a particular State. Yet only by analyzing the contemporary practice of the UPR can we demonstrate whether this assertion has become true.

Spain submitted its report on 18 February 2010.⁹⁶ The Working Group considered this report during its eighth session from 3 to 14 May 2010, specifically at the fifth meeting on 5 May 2010. The Secretary of State for Constitutional and Parliamentary Affairs, José de Francisco, headed the Spanish delegation. At its 9th meeting, held on 7 May 2010, the Working Group adopted its draft report on Spain,⁹⁷ which became the definitive report on 16 June 2010.⁹⁸ The *troika* that drafted this report was composed of Chile, India and South Africa.⁹⁹ On 13 September 2010, Spain's written answers to the recommendations were published.¹⁰⁰ The "outcome report" on Spain forms an integral part of the Report of the Human Rights Council on its fifteenth session, published on 1 October 2010.¹⁰¹

⁹³ According to the Spanish Foreign Ministry's web site, see <http://www.maec.es/es/MenuUpal/Asuntos/DerechosHumanos/Paginas/Derechos%20Humanos.aspx> (26 April 2010).

⁹⁴ Spain had submitted its candidature for the Human Rights Council in its "Letter dated 10 March 2010 from the Permanent Representative of Spain to the United Nations addressed to the President of the General Assembly", UN Doc. A/64/704, 15 March 2010. It was elected member of the Council during its 64th session on 13 May 2010 with 177 votes in favor. Within the Western European and Other groups of States, there was also elected Switzerland to the Human Rights Council, with 175 votes. See for this information the Human Rights Council's web site at <http://www.un.org/ga/64/elections/hrc/index.shtml> (16 May 2010).

⁹⁵ See para. 29 of the "Report of the Working Group on the Universal Periodic Review," UN doc. A/HRC/16/6, 16 June 2010.

⁹⁶ See UN Doc. A/HRC/WG.6/8/ESP/I, 18 February 2010.

⁹⁷ See "Draft report of the Working Group on the Universal Periodic Review. Spain," UN Doc. HRC/WG.6/8/L.5, 7 May 2010, para. 1.

⁹⁸ See the document "Report of the Working Group on the Universal Periodic Review. Spain," UN doc. A/HRC/16/6, 16 June 2010.

⁹⁹ See the document "UPR-Troikas – Eighth Session of the Working Group (3–14 May 2010)," available at http://www2.ohchr.org/SPdocs/UPR/Selection_troikas_6th_7th_8thUPR_sessions.doc (26 April 2010).

¹⁰⁰ See the document "Informe del Grupo de Trabajo sobre el Examen Periódico Universal. España. Adición: Opiniones sobre las conclusiones y/o recomendaciones, compromisos voluntarios y respuestas presentadas por el Estado examinado," UN Doc. A/HRC/15/6/Add. 1, 13 September 2010.

¹⁰¹ See the document "Report of the Human Rights Council on its fifteenth session," UN Doc. A/HRC/15/L.10, 1 October 2010.

There was little publicity about the Spanish State's report submission to the Human Rights Council. Civil society barely had the opportunity to offer any input. This lack of publicity was also apparent when the Human Rights Council Working Group publicly considered Spain's situation.¹⁰² More than other international human rights mechanisms, the UPR is designed to be public and to serve the publicity interests of the State concerned. Thus, it would be in Spain's interest to present itself as a State with a very high stake in human rights not only before the representatives of the United Nations member States, but also before its own population.

During Spain's oral submission before the Working Group in May 2010, the delegation took the opportunity to present the Spanish State and its human rights record positively, focusing on the same topics it underscores before other human rights bodies. The delegation did not address complicated issues, such as the application of the Law on Historical Memory.¹⁰³ However, the Law of Historical Memory came up later; it needed to be addressed during the plenary session before the Human Rights Council.¹⁰⁴

The substantive discussion with the Working Group was animated and, at times, even polemic.¹⁰⁵ During the interactive dialogue with Spain, 55 delegations made

¹⁰² There was no public broadcasting coverage in Spanish media, neither of the drafting nor the submission of the report, or the public session with the Working Group. Only one article was published in *El País* ("Cinco países piden a España en la ONU que investigue el franquismo. El Gobierno se examina por primera vez de derechos humanos en Naciones Unidas," published on 6 May 2010, see <http://www.elpais.es>). *El Mundo* published only news on the election of Spain to the Human Rights Council. Surprisingly, no reference was made to Spain's review within the UPR. See the two articles "Angola, Libia y Uganda toman asiento en el Consejo de Derechos Humanos" and "España, Guatemala y Ecuador, elegidos miembros del Consejo Derechos Humanos," both published on 13 May 2010, see <http://www.elmundo.es>. The newspapers *ABC* and *La Razón* did not include any reference to the Spanish scrutiny under the UPR. Neither did the newspaper *La Vanguardia* published in Barcelona. More surprisingly even was to observe that also academia did not seem interested in the UPR. No academic study or commentary on the Spanish practice or the Spanish role in the UPR has been published so far.

¹⁰³ Nevertheless, this law was largely explained in its report submitted in February 2010. See para. 62 of the national report, UN Doc. A/HRC/WG.6/8/ESP/1, 18 February 2010.

¹⁰⁴ See the outcome report at "Report of the Human Rights Council on its fifteenth session", UN Doc. A/HRC/15/L.10, 1 October 2010, para. 210 (comments by the government of Spain). Human Rights Watch also used its opportunity to submit general comments to denounce that in Spain no process had started for the disappearances and other crimes committed during the Franco regime, except, but that "so far the only person prosecuted in relation with those crimes is Judge Baltazar Garzón"; see *ibid.*, para. 225.

¹⁰⁵ According to accounts of the Spanish newspaper *El País*, the representative of Iran accused Spain of practicing "apartheid", referring to the situation of the Muslim girls which can not go to school wearing a scarf. See the article "Cinco países piden a España en la ONU que investigue el franquismo. El Gobierno se examina por primera vez de derechos humanos en Naciones Unidas," *El País*, 6 May 2010, available online at <http://www.elpais.es> (17 May 2010). Interestingly, this accusation was omitted in the report of the Working Group submitted at the end of the review.

statements.¹⁰⁶ Additional statements that could not be delivered during that dialogue due to strict time limits were posted on the Council's web site.¹⁰⁷ Most States also formulated recommendations, classified by the Spanish delegates in four categories: (a) those which have been examined by Spain and enjoy its support;¹⁰⁸ (b) those which enjoy the support of Spain and which it considers already implemented or in the process of implementation;¹⁰⁹ (c) those which Spain will examine and provide a response in due course so that they can be included into the outcome report adopted by the Human Rights Council at its fifteenth session in September 2010;¹¹⁰ and (d) those which do not enjoy the support of Spain.¹¹¹

With regard to the substantive issues that were discussed during the review, a large number of States raised the same topics over and again. Frequently raised topics included gender and racial discrimination; xenophobia and racism; trafficking of women and children; domestic violence against women; as well as the measures adopted to counter terrorism. Some States addressed different topics. When States asked these more precise questions about the Spanish human rights record, they demonstrated a thorough knowledge of the particular human rights situation in Spain. While most of these topics were dealt with in depth in the working session in May 2010, some of these topics also came up for discussion during the plenary session in September that same year.

Among these more noteworthy issues was the application of the Law of Historical Memory.¹¹² Notably, Cuba raised a question about this Law and encouraged Spain to try to identify those responsible for crimes committed during the dictatorship.¹¹³ However, if the Cuban regime is so concerned about justice, it would be interesting to see Cuba's reaction to the same claim by the people affected by the expropriations, political detentions, and other human rights violations committed

¹⁰⁶ Para. 17 of the "Report of the Working Group...*loc. cit.*"

¹⁰⁷ See <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/ESSession8.aspx> (16 May 2010).

¹⁰⁸ See for these recommendations, para. 84 of the "Report of the Working Group...*loc. cit.*" There were 56 such recommendations.

¹⁰⁹ See for these recommendations, para. 85 of the "Report of the Working Group...*loc. cit.*" There were 29 such recommendations.

¹¹⁰ See for these recommendations, para. 86 of the "Report of the Working Group...*loc. cit.*" There were 34 such recommendations. The answers to these questions and recommendations are published in the document "Informe del Grupo de Trabajo sobre el Examen Periódico Universal. España. Adición: Opiniones sobre las conclusiones y/o recomendaciones, compromisos voluntarios y respuestas presentadas por el Estado examinado," UN Doc. A/HRC/15/6/Add.1, 12 September 2010, section A.

¹¹¹ See for these recommendations, para. 87 of the "Report of the Working Group...*loc. cit.*" There were 18 such recommendations.

¹¹² Law No. 52/2007, 26 December 2007, by which rights are recognized and amplified, and measures are adopted in favor of those who suffered prosecution and violence during the Civil War and the Dictatorship, *BOE* No. 310, 27 December 2007, pp. 53410–53416.

¹¹³ See para. 24 of the "Report of the Working Group...*loc. cit.*"

over the last fifty years by the Castrist dictatorship. Other States also encouraged Spain to give effect to that law.¹¹⁴

The second noteworthy issue was the United States Central Intelligence Agency's (CIA) flights over Spanish territory. A number of States commented on Spain's reaction to the use of its air space by the CIA to carry terrorist suspects who had been illegally detained in third States.¹¹⁵ Spain's response was elusive, explaining that the government had requested guarantees from the United States government that no flights were operated by its special agents. Nevertheless, the Spanish government openly recognized that two flights operated by the CIA flew over Spanish territory, although none of them carried detainees.¹¹⁶

Another relevant issue was the protection of minorities. States focused primarily on violations against Spain's Roma minority, although other minority rights violations deserve to be addressed in the Human Rights Council.¹¹⁷ In response to the Roma questions, and in contrast to the less forthcoming reaction to the question on the CIA flights, the Spanish delegates acknowledged room for improvement. Specifically, they informed the Working Group that on 9 April 2010 the government had adopted an action plan for 2010–2012 to enhance Roma social integration.¹¹⁸

Another noteworthy topic was the human right to water, which States discussed jointly with the right to food.¹¹⁹ These rights form part of the category of “emerging

¹¹⁴ See the intervention by Peru, at para. 43 of the “Report of the Working Group... *loc. cit.*” According to the news account published in the newspaper *El País*, also Argentina, Mexico and Colombia insisted upon Spain to proceed to investigate the violations of the Civil War and the Franco regime, in conformity with Law No. 52/2007; see “Cinco países piden a España en la ONU que investigue el franquismo. El Gobierno se examina por primera vez de derechos humanos en Naciones Unidas,” *El País*, 6 May 2010, available at <http://www.elpais.es> (16 May 2010).

¹¹⁵ See the statement by Cuba, para. 24; and by Iran, para. 34 of the “Report of the Working Group... *loc. cit.*” Nevertheless, the response by the Spanish government was somehow evasive, because it only stated that the respect for human rights should be at the center of the fight against terrorism, and that the Spanish Minister of Foreign Affairs had provided the Chamber of Deputies and the European Parliament with extensive information about the subject (para. 54 *ibid.*). It would have certainly helped to provide a more exhaustive answer by Spain, during that session, about its position on this regard, yet eventually the presence of the United States in the Council prevented the Spanish delegates from further developing on this issue.

¹¹⁶ See “Informe del Grupo de Trabajo sobre el Examen Periódico Universal. España. Adición: Opiniones sobre las conclusiones y/o recomendaciones, compromisos voluntarios y respuestas presentadas por el Estado examinado,” UN Doc. A/HRC/15/6/Add. 1, 13 September 2010, para. 45, note 29. These facts are being investigated by the Spanish General Prosecutor's Office (*Fiscalía General del Estado*).

¹¹⁷ In this case, the principal legal basis would be the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly resolution 47/135, 18 December 1992.

¹¹⁸ See para. 53 of the “Report of the Working Group... *loc. cit.*”

¹¹⁹ See the National Report of Spain, para. 72 (food) and 84 (water), UN Doc. A/HRC/WG.6/8/ESP/1, 18 February 2010.

rights.” Palestine,¹²⁰ Burkina Faso¹²¹ and Jordan¹²² recommended to Spain to continue promoting the right to water. Jordan, however, did not refer expressly to the right to water or food, but instead used the term “emerging rights.” Jordan praised Spain for its contribution to the development of international law. This interaction among States within the Human Rights Council, among other elements of proof, suggests the existence of a new rule of international law. This interaction is particularly relevant to the development of such emerging rights as the rights to water or to food, which are not yet codified in any general international human rights convention.

Another field where the “interactive dialogue” within the Human Rights Council might contribute to the progressive development of international law concerns the legal rights and obligations of foreigners. In a strong debate, some States asked Spain to comment on this issue. The Spanish delegates answered that the recent legal changes, chiefly the Organic Law 4/2000, had resulted in the “near” assimilation of foreigners’ legal rights and obligations to those of Spanish citizens, except for political rights.¹²³ A significant number of States responded by recommending to Spain to ratify the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹²⁴ Yet for the time being, following the practice of all EU member States, Spain is not considering signing this particular convention.

EU member States have not signed the convention because their position was not taken into account when the convention was drafted.¹²⁵ Furthermore, they consider it an “unbalanced instrument.”¹²⁶ Spain, however, considered Nigeria’s recommendation that “all laws and regulations discriminating against immigrants”

¹²⁰ See para. 38 of the “Report of the Working Group...*loc. cit.*”

¹²¹ See para. 75 of the “Report of the Working Group...*loc. cit.*”

¹²² See para. 78 of the “Report of the Working Group...*loc. cit.*”

¹²³ See para. 82 of the “Report of the Working Group...*loc. cit.*”

¹²⁴ This recommendation was made by Indonesia, Burkina Faso, Azerbaijan, Bolivia, Guatemala, Paraguay, Nicaragua, Palestine, Pakistan, Argentina, Peru, Nigeria and Algeria. Spain included all these recommendations among those which will be reported on to the fifteenth session of the Human Rights Council in September 2010. See para. 86 of the “Report of the Working Group...*loc. cit.*” In its answers to these recommendations produced in September, Spain explicitly rejected them; see “Informe del Grupo de Trabajo sobre el Examen Periódico Universal. España. Adición: Opiniones sobre las conclusiones y/o recomendaciones, compromisos voluntarios y respuestas presentadas por el Estado examinado,” UN Doc. A/HRC/15/6/Add.1, 12 September 2010, para. A-1.

¹²⁵ See. “Informe del Grupo de Trabajo sobre el Examen Periódico Universal. España. Adición: Opiniones sobre las conclusiones y/o recomendaciones, compromisos voluntarios y respuestas presentadas por el Estado examinado,” UN Doc. A/HRC/15/6/Add. 1, 13 September 2010, para. 1.

¹²⁶ Cfr. the views expressed by Spain on the recommendations and/or conclusions well as on its voluntary commitments and on the outcome of the UPR procedure, contained in the outcome report entitled “Report of the Human Rights Council on its fifteenth session”, UN Doc. A/HRC/15/L.10, 1 October 2010, para. 208.

ought to be abolished.¹²⁷ Spain responded in writing to Nigeria that discrimination does not exist in Spain, and, therefore, there is no discrimination against immigrants.¹²⁸ In any case, the majority of States' statements showed a trend towards the assimilation of the legal status of foreigners with citizens. It would be a significant development in international law if the Human Rights Council, through the UPR, endorsed such an interpretation of the status of foreigners. And certainly it would be a clear demonstration of the ground-breaking legal developments this Council is able to lead.

Finally, in this brief study we would like to point out Spain's acceptance of the recommendation, submitted by Malaysia, Uruguay, the United States and Egypt, to record and publish official statistics about incidents and reports on racially motivated crimes, and to improve the collection of hate-crime data by law-enforcement officials.¹²⁹ It is encouraging that Spain accepted this recommendation, since Spain for a long time had stated that it was not able to provide these statistics.¹³⁰ This acceptance shows how effective the UPR can be to make publicly available situations of non-compliance by States and to move them to adjust their practice to the rules of international law.

IV. CONCLUSIONS AND OUTLOOK

The Spanish periodic reporting to the United Nations human rights bodies is, in light of this analysis, substantially satisfactory, although it deserves a constant and critical reflection on its effectiveness. In a relatively short period of time – from

¹²⁷ See recommendation No. 32 at para. 86 of the "Report of the Working Group... *loc. cit.*"

¹²⁸ See the document "Informe del Grupo de Trabajo sobre el Examen Periódico Universal. España. Adición: Opiniones sobre las conclusiones y/o recomendaciones, compromisos voluntarios y respuestas presentadas por el Estado examinado," UN Doc. A/HRC/15/6/Add.1, 12 September 2010, para. A-29.

¹²⁹ See recommendations No. 18 to 21 at para. 84 of the "Report of the Working Group... *loc. cit.*"

¹³⁰ CERD has pointed to this problem in its last concluding observations on Spain adopted in 2000. Specifically on this issue, it noted "that violence against certain foreigners often results in judicial proceedings alleging assault, unlawful detention and property damage, and that the racial aspect of such acts is not taken into consideration. With reference to article 4 of the Convention, the Committee recommends that the State party register, for inclusion in the next periodic report, statistics of allegations of racially-motivated and related offences, their investigation and the punishment of those responsible." See "Concluding observations on Spain", UN Doc. CERD/C/304/Add.95, 19 April 2000, para. 6. Most recently, this issue was also touched upon by CAT in its concluding observations on Spain, calling upon this State to furnish more information about crimes committed during detention (among them are may racially motivated crimes), see "Concluding Observations on Spain," UN Doc. CAT/C/ESP/CO/5, 19 November 2009, para. 23. Also CEDAW has required Spain to provide more information about the "situation" of women belonging to vulnerable groups, where also such data as racially motivated crimes might be included; see "Concluding observations on Spain", UN Doc. CEDAW/C/ESP/CO/6, 7 August 2009, para. 32.

the 1990s to the present – Spain has managed to consolidate a “constructive dialogue” with international bodies that is so essential for the proper and effective functioning of reporting mechanisms.

Reporting mechanisms require States to have an administrative structure adapted to the requirements for quality periodic reporting. The shortcomings and obstacles currently plaguing the Spanish Ministry of Foreign Affairs in this area will become more noticeable when the new mechanisms on persons with disabilities and enforced disappearances become fully operational.

The practice we have analyzed in this study allows us to conclude that Spain should consider adhering to the general working guidelines before the treaty bodies by keeping updated only one core document. It need not update its general information each time a new periodic report must be submitted to a committee. In addition, Spain might want to establish in its domestic legal system a procedure or a working protocol for the drafting of these reports. Among other reasons, such a procedure would enable Spanish authorities to consult and collaborate with the central government, national human rights institutions, and autonomous communities, thereby producing higher quality work. When specialized public agencies were in charge of drafting a report, such as the Women’s Institute with respect to the report to the CEDAW, they produced particularly high quality work. It would also be useful to consider how to improve cooperation with civil society, both at the report’s preparatory phase and at the public discussion stage with the committee. During the public consideration of reports, the assignment of autonomous communities’ representatives to the Spanish delegation should be especially considered.

The mechanisms themselves are considering various options to assist States in fulfilling their reporting obligations. Some ideas currently being discussed and tested include setting more flexible deadlines for submitting periodic reports (in short, to accept what is already being done *de facto*). Mechanisms also are discussing whether to review a State’s compliance without the periodic reports and merely to accept, instead of the State reports, government responses to the list of issues.¹³¹ The official study of the situation in the States parties to each treaty without periodic reports is a viable option. Yet it is not consistent with the original idea of these procedures, which was based on mutual cooperation between States and between States and international organizations.

This study also focused on the practice and effectiveness of the recently inaugurated UPR, under which Spain was scrutinized for the first time in 2010. The UPR is performed by the Human Rights Council of the United Nations every four years on the basis of information submitted by each State and other relevant stakeholders. The information is analyzed by a Working Group and then in plenary session by the Council.

¹³¹ See the summary of the “Inter-Committee Meeting and Meeting of the Chairpersons of the Human Rights Treaty Bodies, the 6th and the 19th Meetings, 18–22 June 2007”, published by *Treaty Body Monitor*, June 2007, p. 3, available at http://www.ishr.ch/hrm/tmb/icm_mc_june_2007.pdf (3 January 2009).

In light of the increasing complexity and technical perfection of periodic reporting before treaty bodies, the UPR might have seemed *prima facie* a step backwards in the evolution of international human rights mechanisms. However, our analysis of the first reporting cycle of Spain reveals some interesting findings that demonstrate the value of this mechanism.

First, the UPR may provide a platform to accelerate the expression of consensus among States, which is necessary to create new rules on human rights. This especially affects what has been called “emerging rights,” such as the rights to water or to food. If subsequent practice confirms States’ willingness to recognize these rights, the UPR would have taken giant steps towards the progressive development of International Human Rights Law.

A second observation that stresses the importance of the UPR is related to the change in States’ attitude in matters regulated by International Human Rights Law, with which a State might not have been in full compliance. Public coverage of Human Rights Council sessions supported by the mass media may cause a State to change its conduct. Spain, for example, reacted to the UPR by expressing its willingness to compile and publish information or statistics about racially motivated crimes.

These are positive effects of the UPR that make it a promising meta-mechanism for the progressive development and implementation of International Human Rights Law.

ANNEX – Table 1: Obligations of Spain to submit periodic reports to United Nations treaty bodies (September 2010)

Convention	Elimination of Racial Discrimination	International Covenant on Economic, Social and Cultural Rights	International Covenant on Civil and Political Rights	Elimination of all Forms of Discrimination against Women	Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Rights of the Child	Optional Protocol to the CRC on the involvement of children in armed conflict	Optional Protocol to the CRC on the sale of children, child prostitution and child pornography	Rights of Persons with Disabilities
Adoption of the treaty	07.03.1966	16.12.1966	16.12.1966	18.12.1979	10.12.1984	20.11.1989	25.05.1989	25.05.2000	13.12.2006
Entry into force – general / – for Spain	04.01.1969 04.01.1969	03.01.1976 27.07.1977	23.03.1976 27.07.1977	03.09.1981 04.02.1984	26.06.1987 20.11.1987	02.09.1990 05.01.1991	12.02.2002 08.04.2002	18.01.2002 31.01.2002	03.05.2008 03.05.2008
Spanish official publication in <i>Boletín Oficial del Estado</i> (BOE)	BOE No. 118, 17.05.1989 and 05.11.1982	BOE No. 103, 30.04.1977	BOE No. 103, 30.04.1977	BOE No. 69, 21.03.1984	BOE No. 268, 09.11.1987	BOE No. 313, 31.12.1990	BOE No. 92, 17.04.2002	BOE No. 27, 31.01.2002	BOE No. 96, 21.04.2008
Supervisory organ	Committee on the Elimination of Racial Discrimination (CERD)	Committee on Economic, Social and Cultural Rights (CESCR)	Human Rights Committee (HRC)	Committee on the Elimination of Discrimination against Women (CEDAW)	Committee against Torture (CAT)	Committee on the Rights of the Child (CRC)	Committee on the Rights of the Child	Committee on the Rights of the Child	Committee on the Rights of Persons with Disabilities (CRPD)
Composition	18 Experts	18 Experts	18 Experts	23 Experts	10 Experts	10 Experts	–/–	–/–	12 Experts, which become 18 after the 60th ratification

Table 1 (cont.)

Convention	Elimination of Racial Discrimination	International Covenant on Economic, Social and Cultural Rights	International Covenant on Civil and Political Rights	Elimination of all Forms of Discrimination against Women	Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Rights of the Child	Optional Protocol to the CRC on the involvement of children in armed conflict	Optional Protocol to the CRC on the sale of children, child prostitution and child pornography	Rights of Persons with Disabilities
Mandate	4 years	4 years	4 years	4 years	4 years	4 years	–/–	–/–	4 years
Periodicity of the reports: initial report and periodic reports	1 year 2 years	2 years 5 years	1 year 4 years	1 year 4 years	1 year 4 years	2 years 5 years	2 years; then the information is submitted as an annex to the periodic report to the CRC. For States which are not a party to the Convention: 5 years.	2 years; then the information is submitted as an annex to the periodic report to the CRC. For States which are not a party to the Convention: 5 years.	2 years 4 years

ABSTRACT

Since Spain's democratization this State has ratified many human rights treaties. Currently, Spain is bound by nine universal human rights treaties. They provide for substantive human rights obligations as well as for periodic reporting mechanisms. These reporting mechanisms are assigned to the United Nations Human Rights Council. In addition, in early 2010 the Human Rights Council has scrutinized for the first time the human rights situation in Spain in the context of the Universal Periodic Review.

Spain's practice before all these mechanisms raises questions such as the timeliness of Spain's submission of reports, the authorship and contents of reports, the participation of national human rights institutions as well as civil society in the drafting stage and the public discussion of reports, as well as the practical implications of these procedures in Spain's human rights practice. The present study will consider all these issues, and it will identify good practices and make suggestions for improvement of the Spanish practice.

Keywords

United Nations Human Rights Council, Universal Periodic Review, human rights, reporting mechanisms, implementation of international law.

RESUMEN

Durante los últimos treinta años, España ha ratificado numerosos tratados de derechos humanos. Actualmente, España está obligada por nueve tratados universales de derechos humanos que establecen obligaciones sustantivas, así como mecanismos de aplicación, entre los que se cuentan los de información. Estos mecanismos de información se asignan al Consejo de Derechos Humanos de las Naciones Unidas. Además, a principios de 2010, el Consejo de Derechos Humanos ha examinado por primera vez la situación de los derechos humanos en España en el contexto del Examen Periódico Universal.

La práctica de España ante todos estos mecanismos plantea cuestiones tales como la observancia de los plazos para la presentación de los informes, la autoría y contenido de los informes, la participación de las instituciones nacionales de derechos humanos y de la sociedad civil en las fases de redacción y debate público de los informes, así como los efectos de estos procedimientos en la práctica de derechos humanos en España. Todas estas cuestiones se tratarán en el presente estudio, poniendo de manifiesto las buenas prácticas que se han podido identificar así como sugerencias para mejorar la práctica española.

Palabras clave

Consejo de Derechos Humanos de las Naciones Unidas, Examen Periódico Universal, derechos humanos, mecanismos de información, aplicación del Derecho internacional.

RÉSUMÉ

Depuis sa démocratisation, l'Espagne a ratifié de nombreux traités relatifs aux droits de l'homme. Actuellement, l'Espagne est tenue par neuf traités universels relatifs aux droits de l'homme qui établissent des obligations dans le domaine des droits de l'homme, ainsi que des mécanismes d'application, tels que les mécanismes des rapports réguliers. Ces derniers mécanismes sont assignés au Conseil des Droits de l'Homme de l'Organisation des Nations Unies. En outre, au début de 2010, le Conseil des Droits de l'Homme a examiné pour première fois la situation des droits de l'homme en Espagne dans le cadre de l'Examen Périodique Universel.

La pratique de l'Espagne avant tous ces mécanismes soulève des différentes questions, comme la ponctualité de la soumission des rapports, la rédaction et le contenu des rapports, la participation des institutions nationales des droits de l'homme et la société civile dans la phase de rédaction et débat public sur les rapports, ainsi que les effets de ces procédures dans la pratique des droits de l'homme en Espagne. Toutes ces questions seront abordées dans cette étude, mettant en évidence les bonnes pratiques et les propositions pour l'amélioration de la pratique espagnole.

Mots clés

Conseil des Droits de l'Homme de l'Organisation des Nations Unies, Examen Périodique Universel, droits de l'homme, mécanismes d'information, application du Droit international public.