RIGHT TO EDUCATION

COMMENTARY

CONVENTION AGAINST DISCRIMINATION IN EDUCATION

United Nations
Educational, Scientific and
Cultural Organization

COMMENTARY
ON THE CONVENTION AGAINST DISCRIMINATION IN EDUCATION

(ADOPTED ON 14 DECEMBER 1960 BY THE GENERAL CONFERENCE OF UNESCO)

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Preface

UNESCO has the constitutional mission of instituting collaboration among nations to "advance the ideal of equality of educational opportunity without regard to race, sex, or any distinctions, economic or social." The Convention Against Discrimination in Education, adopted by UNESCO on December 14 1960, reflects this mission. This Convention, which entered into force on May 22, 1962 and has thus far been ratified by 91 states, is UNESCO's first major international instrument which has binding force in international law; it prohibits all discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origins, economic condition, or birth.

The abiding significance of the Convention is indicated by the fact that it has often been mentioned in the other instruments concerning the right to education adopted by UNESCO. The importance of the Convention is also recognized in the work of the United Nations concerning the right to education. Thus, Article 13 on the right to education of the International Covenant on Economic, Social, and Cultural Rights (1976), drafted upon the proposal of UNESCO, is inspired by provisions of the Convention. In addition, the Convention is mentioned several times in the General Comment 13 on the Right to Education, elaborated by the Committee on Economic, Social, and Cultural Rights (CESCR) in collaboration with UNESCO. The Convention also appears in resolutions on the right to education adopted by the United Nations Commission on Human Rights.

The fundamental principles of non-discrimination and equality of opportunity in the domain of education, established in the Convention, are essential in the process of Education for All (EFA). The Convention of 1960 has thus naturally become the cornerstone of this high priority domain for UNESCO. In order to achieve equal opportunity for all in the domain of education, we have much work ahead of us to ensure that education becomes truly inclusive, in particular by effectively reaching the unreached--especially the poor, marginalized and vulnerable groups, children and young people denied equal access to education, rural populations, etc.

This commentary, written by Professor Yves Daudet and Professor Pierre-Michel Eisemann, eminent professors of the University of Paris I (Sorbonne), constitutes a detailed analysis of the text of the Convention. It highlights the scope—article by article—and the legal obligations of Member States, in referring to the process of preparatory work and debates between governmental experts on the basis of which the Convention was elaborated. This elucidation is imperative for normative action and for a better implementation of this Convention.

It is a great pleasure for me to present this publication, *Commentary on the Convention Against Discrimination in Education*, which will be, I am certain, of great interest and of major importance, both intellectually and professionally. I am convinced that this work will serve as an essential tool for governments—both public authorities and national commissions—in order to help them to take hold of the scope and the significance of the Convention in its entirety as well as to implement it, within the framework of the normative action which they are called upon to lead. This work will not only serve as a precious resource for the researcher, but it will also be a valuable tool for courts in charge of ensuring the upholding of the obligations of participating states, and, when needed, of applying sanctions in order to encourage respect for the rights stated in the Convention.

This work will contribute, I hope, to a better understanding of the nature and of the extent of the right to education as covered by the Convention. It is my wish that it receives all the attention that it deserves to make education generally available and to render it accessible to all.

Koïchiro Matsuura

Director General of UNESCO

Introduction *

Adopted on 14 December 1960[1] by the General Conference of UNESCO, the Convention against Discrimination in Education[2] was the outcome of long deliberations and numerous studies carried out in the preceding years. The task thus accomplished is an important one because "of all forms of discrimination, those that occur in education are the most pernicious – because they affect the very essence of the individual and society, namely the forming of the mind – and the most abhorrent – because the victims are first and foremost children".[3]

At the invitation of the Economic and Social Council of the United Nations,[4] the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur, Mr Charles Ammoun, in 1954 and entrusted him with the task of preparing and submitting to it a detailed report on that particularly delicate question. In Mr Ammoun's words, "The prevention of discrimination touches upon many legitimate national susceptibilities. It involves a whole psychological or political climate or even an entire philosophy. It concerns the lives, futures and right to a better education of millions of children".[5]

* This commentary was drafted with the assistance of Mr Geoffrey Juchs, doctoral candidate at the Université Paris I Panthéon-Sorbonne.

1. The Convention entered into force on 22 May 1962; text available on the Internet: www.UNESCO.org.

2. A Recommendation against Discrimination in Education was also adopted on that same date by the General Conference. Its content is practically the same as that of the Convention. One of the reasons for adopting a recommendation was to enable some States (such as Federal States) to join in the fight against discrimination whereas they might not be in a position to ratify a convention. The original title of the Convention was ultimately changed in the final version to express clearly the desire to combat discrimination. See in this connection the title of the draft contained in document UNESCO/ED/167, Add.1, Annex 2 and the remark contained in document UNESCO/ED/DISC/5 Rev., p. 3.

3. UNESCO/ED/DISC/SR.1, p. 3.

4. Resolution 443 (XIV) of the Economic and Social Council, of 26 June 1952, which states: "The Economic and Social Council, [... requests the Sub-Commission [on Prevention of Discrimination and the Protection of Minorities] to continue its work for the prevention of discrimination and the protection of minorities".

5. Charles D. Ammoun, *Study of Discrimination in Education*, cited by P. Juvigny, *The fight against discrimination: towards equality in education*, Paris, UNESCO, 1962, p. 9. See also the English version of the report by Mr Ammoun (the only version now available), E/CN.4/Sub.2/181/Rev.1, p. vii.

The report was submitted to the Sub-Commission in February 1957. In his conclusions, Mr Ammoun formulated some basic principles and recommended that they be incorporated into an international convention. The Sub-Commission endorsed a large part of the report's proposals and adopted a number of resolutions[6] in which it set out several options for the elaboration of an international instrument to prevent discrimination in education.[7] Having before it the proposals of the Sub-Commission at its thirteenth session in April 1957, the Commission on Human Rights decided to consult the States. At the Commission's fourteenth session, in March 1958, there was disagreement as to the form the instrument should take, although many members agreed that it would be for UNESCO to elaborate the necessary instrument or instruments.

In October 1958, the Director-General of UNESCO affirmed, in his report on the advisability of preparing one or more international instruments designed to eliminate and prevent discrimination in the field of education,[8] that it was up to the General Conference to decide whether the question of the prevention of discrimination in education should be "regulated at the international level in the sense of the Rules of Procedure concerning recommendations and international conventions [and] to determine to what extent the question could be regulated and whether the method adopted should be one or more international conventions or one or more recommendations to Member States".[9] In 1958, at the 10th session of the General Conference, a resolution on that item was accordingly adopted.[10] Under the resolution, "UNESCO shall take responsibility for drafting recommendations to Member States and an international convention on the various aspects of discrimination in education". The Director-General was authorized to prepare a preliminary report, and to draft recommendations and a draft convention to be circulated to Member States for comment. He was also authorized to convene a committee

6. E/CN.4/Sub.2/L111. Those resolutions are reproduced in the annex to document 47 EX/7.
7. The three options were as follows:
   (1) the Economic and Social Council would be entrusted with the preparation of the instrument;
   (2) UNESCOshould consider the possibility of drafting one or more international instruments;
   (3) a place might be found within the draft International Covenant on Economic, Social and Cultural Rights for the basic principles endorsed by the Sub-Commission.
8. Document 10 C/23.
9. Document 10 C/23, para. 23.
10. 10 C/Resolution 1.34.

of technical and legal experts with a view to submitting revised drafts of the recommendations and of a convention to the General Conference. Lastly, at the 11th session of the General Conference the Programme Commission set up a Working Party to examine the draft amendments submitted to the session by various delegations and to make recommendations in that regard to the Programme Commission.

After this brief overview of the different stages leading to the adoption of the Convention against Discrimination in Education,[11] we turn now to our analysis of the Convention itself.

11. It should be noted here that numerous programmes subsequently provided further input to the Convention. See in this connection the comment by J. Blat Gimeno that "the general principles contained in the Convention have continued to be enriched by UNESCO's programmes", "La influenca de la UNESCO en las politicas educativas nacionales" (UNESCO's influence on national educational policy), in *Federico Mayor, Amicorum Liber: solidarity, equality, liberty*, vol. II, Bruylant Brussels, 1995, p. 1185.

Preamble

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 14 November to 15 December 1960, at its eleventh session,

▶ ***Recalling*** **that the Universal Declaration of Human Rights asserts the principle of non-discrimination and proclaims that every person has the right to education,**

▶ ***Considering*** **that discrimination in education is a violation of rights enunciated in that Declaration,**

▶ ***Considering*** **that, under the terms of its Constitution, the United Nations Educational, Scientific and Cultural Organization has the purpose of instituting collaboration among the nations with a view to furthering for all universal respect for human rights and equality of educational opportunity,**

▶ ***Recognizing*** **that, consequently, the United Nations Educational, Scientific and Cultural Organization, while respecting the diversity of national educational systems, has the duty not only to proscribe any form of discrimination in education but also to promote equality of opportunity and treatment for all in education,**

▶ ***Having before*** **it proposals concerning the different aspects of discrimination in education, constituting item 17.1.4 of the agenda of the session,**

▶ ***Having decided*** **at its tenth session that this question should be made the subject of an international convention as well as of recommendations to Member States,**

Adopts **this Convention on the fourteenth day of December 1960.**

Before turning our attention to the specific provisions of the preamble to the Convention, we should like to make some comments about the date of its adoption and to raise the question of whether it might not have been possible to adopt such an instrument some years earlier. The answer is that, considering the different stages leading to the adoption of a convention of that kind, it would not have been possible to achieve such a result more rapidly. The Convention was certainly not the first international instrument to deal with the prevention of discrimination; others had already been adopted by the International Labour Conference to prevent discrimination in respect of employment and occupation.[12] Yet the 12 years that had elapsed since the adoption of the Universal Declaration of Human Rights[13] cannot be considered too long; it took that amount of time to gauge "the diversity of specific national situations"[14] to which the provisions adopted were to apply. Moreover, it was deemed preferable to wait[15] "before taking standard-setting action, for the Commission on Human Rights to have read" the report by Mr Ammoun.[16]

The preamble to the Convention against Discrimination in Education is an extension of the Universal Declaration of Human Rights,[17] which, as the preamble states, "asserts the principle of non-discrimination and proclaims that every person has the right to education". More specifically, the preamble refers to Articles 2 and 26 of the Declaration. Paragraph 4 refers to the Constitution of UNESCO which affirms in its preamble that "the States Parties to this Constitution, believ(e) in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge". That is not the only reference to education in the

12. H. Saba, "La Convention et la Recommendation concernant la lutte contre la discrimination dans le domaine de l'enseignment" (The Convention and the Recommendation against Discrimination in Education), AFDI, 1960, p. 647.

13. For the text of the Universal Declaration of Human Rights, see for example, "Human Rights: A Compilation of International Instruments", United Nations, New York, 1988, pp. 1-7.

14. UNESCO/ED/DISC/SR.1.

15. As pointed out by P. Juvigny, "the special study, authorized by the United Nations, was carried out in three stages: collection, analysis and verification of material; production of a report; recommendations for action", op. cit., p. 12.

16. E/CN.4/Sub.2/181/Rev.1.

17. A.S. Nartowski, "The UNESCO system of protection of the right to education (as an example of the most rational model of the protection of human rights by an international organization)", PYBIL, 1974, No. 6, p. 305: "Like other problem-oriented conventions, the UNESCO Convention is also inspired largely by both the letter and the spirit of the Universal Declaration of Human Rights; nevertheless, while models of the Declaration expressed only a minimum regulation of the right to education, the UNESCO Convention contains an optimum programme ...".

Constitution of UNESCO: Article 1.2(b) stipulates that the "Organization will [...] give fresh impulse to popular education and to the spread of culture: by collaborating with Members, at their request, in the development of educational activities; by instituting collaboration among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social; ...".

Although the Universal Declaration of Human Rights and the UNESCO Constitution are the only international instruments mentioned in the preamble to the Convention, other texts served as sources of inspiration, such as the resolution adopted by the General Conference of UNESCO in 1956 inviting the Member States to take all appropriate measures to eliminate racial discrimination.[18]

To go back to the wording of the preamble itself, it may be seen that there is no enumeration or single formula for the factors constituting discrimination. That may be explained by "the differences noted in the enumeration of the factors of discrimination listed in [UNESCO's] Constitution, depending on whether the reference was to respect for human rights or the achievement of equality of opportunity".[19] Since the Convention itself contained an enumeration, the Committee of Governmental Experts considered it superfluous to mention those factors in the preamble.[20]

The fifth preambular paragraph of the Convention reflects the outcome of the debate within the Working Party set up by the Programme Commission. The Working Party ultimately amended the paragraph by adding the following: "while respecting the diversity of the national educational systems". "The change made in the original text [was] the result of a proposal by the French delegation put forward during the discussion of the draft amendment submitted by the delegation of Mexico, which initially related to Article 4 of the Draft

18. For an overview of the sources of inspiration for the Convention, see M. Konishi, *Convention concernant la lutte contre la discrimination dans le domaine de l'enseignement (contribution de l'UNESCO à la protection des droits de l'homme)* (The Convention against Discrimination in Education (UNESCO's contribution to human rights protection)). Report presented to the centre for studies in international law and international relations at The Hague Academy of International Law. Peace Palace, The Hague, at the session: 15 VIII-22 IX, 1967, pp. 6-8.

19. Document 11 C/15, Annex III.

20. It should be noted that in the draft convention concerning discrimination in education prepared by the Director-General, the second preambular paragraph read as follows: "Considering that discrimination constitutes a violation of rights which are set forth in the Universal Declaration of Human Rights, and the universal respect of which the Organization, under its Constitution, is to further for everyone without distinction of race, sex, language or religion"; see document UNESCO/ED/167 – Add. 1, Annex II.

Convention."[21] The delegate of Mexico, having noted that some provisions of the Convention departed from its subject – discrimination – and touched upon education systems existing in individual countries, expressed a fear lest those provisions might cast doubt upon principles regarded as fundamental in certain countries, such as the principle of undenominationalism. He therefore suggested that the national policy which States would, under the terms of Article 4, undertake to develop should take into account the standards of the national education system. There was, in his view, no ground for supposing that the reference to those standards might be intended to "cover discriminatory measures, since, in the same paragraph, the States (...) undertook to proscribe and prevent discrimination".[22] He considered it essential to prevent any lack of clarity in the text from casting doubt on the incompatibility that existed in Mexico between the clergy and the teaching profession. Account was taken of that position and the draft convention was duly amended, although no changes were made to Article 4. Instead, it was unanimously agreed that the best way to respect the diversity of nation educational systems was to mention it in the preamble. The final wording is very close to Article 1(3) of the Constitution of UNESCO which reads: "With a view to preserving the [...] fruitful diversity of the cultures and educational systems of the States Members of the Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction".

The wording of the preamble thus highlights the twofold objective of the Convention, which deals with the elimination and prevention of discrimination and with equality of opportunity.

21. Document 11 C/PRG/36, p. 3.
22 . Document 11 C/PRG/36, p. 3.

Article 1

1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

2. For the purposes of this Convention, the term "eduation" refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

Article 1 of the Convention defines both the terms "discrimination" and "education" as a necessary preliminary before setting forth the substantive obligations. As was pointed out, "[these] definitions are of prime importance, for they determine the scope it is intended to give to the Convention and, consequently, the extent of States' undertakings".[23]

In his commentary on the Convention and the Recommendation against Discrimination in Education, H. Saba noted that there was an increasing trend towards broadening the notion of discrimination to include certain inequalities that arise from specific conditions and are unintentional.[24] In his report, C. Ammoun pointed out that: "Legal discrimination has been virtually eliminated [...]. This does not mean that discrimination has been eliminated ...".[25] "The survival of some forms of discrimination is attributable to a body of prejudices, interests and economic, social and historical obstacles which still exist."[26] There may be a number of different sources of discrimination engendering either "static" discrimination or "active" discrimination. The preliminary report of the Director-General[27] states: "The term 'discrimination' obviously denotes a social evil or injustice which should be prevented, remedied or removed". Nevertheless the definition found in Article 1 of the Convention corresponds more to what was earlier described as active discrimination. It encompasses "any distinction, exclusion, limitation or preference [...] based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth". That list is much the same as the list of criteria laid down in Article 2 of the Universal Declaration of Human Rights, but, unlike Article 2, the definition of discrimination does not include the expression "or other status". The Special Committee of Governmental Experts on the preparation of a draft international convention considered that "the general nature of that expression, and hence the difficulties of interpretation to which it would inevitably give rise, would hardly be compatible with the precise

23. Document ED/DISC/5 – Rev., p. 5.
24. H. Saba, *op. cit.*, p. 647.
25. E/CN.4/Sub.2/181/Rev.1, p. 150.
26. *Ibid.*, p. 151.
27. Document UNESCO/ED/167.

language required in a Convention".[28] Furthermore, the Committee replaced the idea of "property",[29] which was included in the draft proposed by the Director-General, by "economic condition", thus adopting the same terms as those used in the UNESCO Constitution.[30]

It should be noted that the Special Committee of Governmental Experts also debated whether to add "capacity or intellectual aptitude" to the list of factors constituting discrimination. In the end, the Committee, while recognizing that "capacity or intellectual aptitude" might serve as a pretext for discrimination, considered that "education inevitably implied selection based on capacity and intellectual worth".[31]

The remainder of Article 1 of the Convention sets out a non-exhaustive list of precise examples of discriminatory measures by way of illustration of the general definition provided earlier.

The second term defined in Article 1 is "education". Here the Convention considers it solely in terms of the different levels of education (primary, secondary, higher), the quality of education and the conditions under which it is dispensed. It does not provide for non-discrimination in regard to access to the teaching profession, which is not mentioned until Article 4(d).

In French, a distinction* must be drawn between "enseignement" and "éducation". The former refers to both the different levels and the different forms of education (for example, vocational or professional education) whereas the latter, a much broader concept, is intended to provide individuals, both children and adults, with useful skills for everyday life and to enable them to acquire such skills.[32] As noted in the *World education report 200*0,

28. Document ED/DISC/5 – Rev., p. 5 or 11 C/15, Annex III.

29. The word "limitation" was added by the Special Committee of Governmental Experts to the concepts of "distinction, exclusion or preference".

30. Article 1(2)(b).

31. Document 11 C/15, Annex III, p. 15

*[Translator's note: The linguistic distinction does not apply in English.]

32. According to Jacques Delors, "education, too is changing fast. More and more opportunities for learning out of school are occurring in all fields ...". He also stresses in his Report the fact that the "traditional distinction between initial education and continuing education (...) needs to be reconsidered (...). The time to learn is now the whole lifetime (...). As the twenty-first century approaches, education is so varied in its tasks and forms that it covers (...) childhood to old age" in *Learning: the treasure within. Report to UNESCO of the International Commission on Education for the Twenty-first Century*, Paris, UNESCO, pp. 99-100.

"There has been a change in the world's perception of the right to education over the past few decades. Whereas the Universal Declaration of Human Rights proclaims that '[e]veryone has the right to education', that elementary and fundamental education shall be 'free' and that '[e]lementary education shall be compulsory', the Declaration adopted by the World Conference on Education for All[33] proclaims: 'Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs'. The Universal Declaration of Human Rights does not mention 'learners' or 'learning needs', and the World Declaration on Education for All does not mention 'elementary', 'fundamental', 'free' or 'compulsory' education".[34] This change also stems from the fact that "[t]he twin notions of 'elementary and fundamental education' have been overtaken by the notion of 'basic education', while at the same time there has been a shift of emphasis from 'education' to 'learning': from what society should supply [...] to what members of society are said to demand ...".[35] Marking a shift away from the Universal Declaration of Human Rights,[36] the Convention against Discrimination in Education is confined to the traditional framework of education (*enseignement*) and does not touch upon the broader question of education as a whole.

33. World Declaration on Education for All, adopted by the World Conference on Education for All (Jomtien, Thailand, 9 March 1990). The text is available on the Internet site: www.UNESCO.org.

34. *World Education Report, The right to education – towards education for all throughout life*, Paris, UNESCO, 2000, p. 26.

35. Ibid., p. 26.

36. The Convention against Discrimination in Education is the first treaty to mention secondary education and to seek to make it generally available. The Universal Declaration only makes a distinction between elementary education and higher education.

Article 2

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

A preliminary remark is in order with regard to the structure of Article 2. The list of situations is preceded by the phrase: "When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention". That was not the wording adopted by the Committee of Governmental Experts, but was an amendment introduced by the Working Party on the draft convention and recommendation against discrimination in education, following a proposal to delete subparagraph (b) made by the delegation of Mexico, which argued that the wording as it stood might present a difficulty for countries where members of religious orders were debarred from the teaching profession. Indeed, "the convention might be interpreted as authorizing the opening of religious schools"[37] and as allowing discrimination between different religions. That difficulty demonstrates, as C. Ammoun reminds us, that "the struggle between the State and the churches is a long-standing one".[38] For other delegations, however, subparagraph (b) represented part of the definition of discrimination. Mexico agreed to withdraw its proposal to delete paragraph (b) in return for the inclusion of the words: "without prejudice to the constitutional principles of States in which the educational system is officially based on undenominational teaching". Ultimately, a third form of words was chosen for the final version of the Convention.

Paragraph (a) of Article 2 of the Convention was the subject of lengthy debate within the Special Committee of Governmental Experts, thus highlighting the importance of the choice of words and the meaning that could be attributed to them. In the draft convention concerning discrimination in education, the following wording was used: "The establishment or maintenance of separate education systems or institutions for pupils of the two sexes shall not be deemed to constitute discrimination if these systems or institutions offer *equivalent facilities of access*, have equipment of the same quality and provide an education of the same standard".[39] That wording implied that education must be provided at the same level, although no reference was made to curricula.

37. Document 11 C/PRG/36, p. 3.
38. C. Ammoun, cited by P. Juvigny, op. cit., p. 32.
39. Document ED/167 – Add.1, Annex II.

That being said, the wording chosen was not yet definitive because the final report of the Director-General made it clear that the Commission on the Status of Women would be examining the Organization's draft and suggesting precise amendments.[40] The Commission did in fact make suggestions: it proposed a version of Article 2, paragraph 1, which read as follows: "the establishment or maintenance of educational systems or institutions in which the sexes are separated shall not be deemed to constitute discrimination if these systems or institutions offer equivalent facilities of access, and have the same curricula, a teaching staff with the same qualifications and the same type of equipment".[41] At the conclusion of the meeting of the Special Committee of Governmental Experts, some changes were made to take into account the Commission's amendment.[42]

To regard as non-discriminatory "the establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions", as stipulated in subparagraph (b) of Article 2 of the Convention, was not initially a foregone conclusion. The ambiguity arises from Resolution C[43] adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in which it requested the Commission on Human Rights to ask the Economic and Social Council to adopt a draft resolution providing that "all legislative provisions or administrative measures should be abolished, and all practices opposed, which, for the purpose of discriminating against any group: ... (c) establish or maintain separate educational systems or institutions for persons or distinct groups of persons".[44] As pointed out by the Executive Board in its commentary to the United Nations Commission on Human Rights, "there is a danger, indeed, that this clause, at least in its present form, be interpreted as condemning educational institutions specially reserved for pupils of either sex, or denominational religious schools". However, at a later

40. Document ED/167 – Add. 1, p. 4.
41. Document UNESCO ED/167 – Add. 3.
42. Article 2, para. 1, annexed to the report of the Special Committee of Governmental Experts: "The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes shall not be deemed to constitute discrimination if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take similar courses of study".
43. Document 47 EX/Dec.7.1.1, Annex, pp. 2-6.
44. Ibid., p. 3.

stage, it was stipulated in the draft convention concerning discrimination in education[45] that, under certain conditions "the establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering a distinct education" did not constitute discrimination. As P. Juvigny quite rightly comments: "The recognition [subject to conditions] of separate schools established for religious reasons results from the principle enshrined in the Universal Declaration of Human Rights and reproduced in the Convention itself, by virtue of which 'parents are free to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities'".[46]

A draft amendment debated during the meeting of the Committee of Governmental Experts proposed, on the contrary, to broaden the meaning of the subparagraph by deleting the words "for religious or linguistic reasons".[47] Nevertheless, the Committee took the view that such a proposal would open the door to a whole series of exceptions.

A final important point relating to subparagraph (b) concerns the conditions under which the maintenance of separate educational systems or institutions could be regarded as non-discriminatory. More generally speaking, the question that was raised concerned the role of States and their monitoring and evaluation of the quality of the education provided in the institutions in question. According to subparagraph (b), the education provided must "conform [...] to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level". The deletion of the words "for education of the same level" had been proposed by the Netherlands delegation because such a provision would be meaningless in countries where there were no public institutions of similar level or type of teaching. To that argument it had been objected that "if a particular country had no free schools covering

45. UNESCO/ED/167 Add. 1, Annex II.
46. P. Juvigny, op. cit., p. 36.
47. Document 11 C/15, Annex III, p. 16.

all levels and types of education, this should not debar it from laying down or approving standards applicable to separate institutions".[48] While there were numerous arguments in support of both positions, the Working Party opted for the wording that gave control to the authorities and decided to refer to the idea of "education of the same level". That same wording was, moreover, used in Article 2(c) of the Convention.

That last subparagraph was added by the Special Committee of Governmental Experts and concerns only private educational institutions. It is therefore distinct from the two other paragraphs, which, although referring to separate educational systems and institutions, did not apply exclusively to private institutions. Once again, the Convention specifies a certain number of conditions to be met for the establishment or maintenance of private institutions to be considered non-discriminatory. They must not, for instance, be aimed at securing the exclusion of a group and the education provided must meet the same conditions as those stipulated under subparagraph (b).

48. Document 11 C/PRG/36, p. 5.

Article 3

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

(a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;

(b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;

(c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;

(d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;

(e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

Founded upon the two fundamental principles of non-discrimination and equality of opportunity, the Convention lays down several obligations the nature of which varies depending on whether they are related to one or the other of those principles. Article 3 accordingly sets forth precise obligations to counter discrimination while Article 4,[49] considered to be a "framework text", is aimed at the progressive achievement of equality of opportunity.[50]

As pointed out in the report of the Special Committee of Governmental Experts, the draft initially presented by the Director-General echoes the principles laid down by the United Nations Sub-Commission.[51] One finds, for example, practically the same wording in the first principle laid down by the Sub-Commission and in Article 3(b) of the draft convention concerning discrimination in education.[52] It should, however, be noted that the draft[53] proposed variants. That was the case in the aforementioned subparagraph in which the words "in fact" were suggested. Similarly, subparagraph (c) simply proposes to add respectively the words "in law"* and "in fact"** to the provision which reads: "The States Parties to this Convention undertake: ... (c) to provide [*] and enforce [**] conditions applicable equally to all governing admission to any public educational institution ...". The distinction between fact and law was already to be found in the questionnaire sent to States with a view to drawing up a draft convention.[54] One of the questions[55] (under Question IX) read as follows:

49. *Cf., infra.*

50. According to A.S. Nartowski, "[t]he material canvas of the Convention is the principle of equality of opportunity and of treatment in the matter of education. It is not a mechanical reversal of the principle of non-discrimination, because it consists in binding the Member States for a systematic development of the system of education for the purpose of guaranteeing for all persons enjoying the right to education not only a theoretical freedom of access to teaching establishments, but also the fullest possible fulfilment of their deepest educational aspirations", op. cit., pp. 293-294. P. Juvigny writes that "the realization of the ideal of equal opportunity is only envisaged as a gradual process; but this does not mean that a free hand is given to States. They should, it will be remembered, 'formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment'", op. cit., pp. 57.

51. See document 10 C/23, Annex, pp. 5-7.

52. "To assure [(in fact) or in law] universal compliance with the obligations prescribed by law".

53. UNESCO/ED/167/Add.1, Annex II.

54. UNESCO/ED/167/Add.1, Annex I (Analysis of replies and comments received from Member States of UNESCO and international non-governmental organizations to the questionnaire contained in the preliminary report on discrimination in education).

55. Question (1) serving as the point of departure for the other questions under Question IX reads as follows: "Do you consider that the proposed instruments should provide that Member States recognize in their laws and regulations and apply in their national practice the principle of equal access to education at all levels and of all types without discrimination, and, if so, do you consider that such a provision should be inserted in the proposed convention?"

"Do you consider that these types of measures should include the following, as laid down by the Sub-Commission of the United Nations on Prevention of Discrimination and Protection of Minorities?

(a) Compulsory education prescribed by law should be assured both *in law* and *in fact* to every person or distinct group of persons;

(b) The entrance requirements for admission to scholastic institutions should, *in law and in fact*, be the same for all persons or distinct groups of persons; ..."

According to the subsequent analysis of replies, the countries "agree that the instruments should provide that Member States recognize in their laws and regulations and apply in their national practice the principle of equal access to education at all levels and of all types".

On the basis of those various considerations, the same distinction was maintained in the draft convention. However, the Convention as adopted in 1960 does not maintain it because the Special Committee of Governmental Experts[56] considered that "[t]his problem is one of terminology rather than of law" before adding an essential element in order to combat discrimination concretely: "The essential purpose of the article really is to bind Member States to discharge 'in fact' the obligations set out in Article 3". That analysis by the Special Committee of Governmental Experts therefore aptly illustrates the desire to draw up an instrument the aim of which is to combat discrimination in education and accordingly calling for different measures to be taken by States. Such measures require both the development of legislation in the States and its implementation, those two elements being indissociable prerequisites for combating discrimination.

Another aspect of the legislation issue was debated at the meeting of the Committee of Experts. The question raised pertained to Article 3(b)[57]

56. UNESCO/ED/DISC/5 – Rev. The question had already been put to the States. See on that point Annex 1 (Analysis of replies and comments received from Member States of UNESCO and international non-governmental organizations to the questionnaire contained in the preliminary report on discrimination in education) to document ED/167 Add.1 and, in particular, Question XVIII relating to the application of the instruments in question to non-governmental and private education institutions. To the question "Do you consider it desirable that the provisions of the proposed instruments should extend to educational institutions which are not publicly supported or maintained?", 17 countries replied that "the provisions of the instruments should apply to non-governmental institutions".

57. "to assure [in fact] universal compliance with the duty to attend school prescribed by law".

of the draft convention concerning discrimination in education. Might it not be deduced from that clause that only States that had established educational obligations would be bound by them, while other States could evade them? Obviously such wording could not be maintained in the final version. Moreover, the Committee of Experts raised the question of the "admissibility of a clause which really boiled down to an injunction to States to apply *immediately* and *fully* their own internal legislation on the subject".[58] The Committee opted for another solution allowing for a progressive application of legislative provisions and dealt with the issue under Article 4 of the 1960 Convention.

Returning to the distinction between public and private education, the question was raised whether States should be bound to ensure compliance with the regulations against discrimination in education by public institutions only or by public and private institutions alike. It is clear that an obligation applicable only to public institutions would to some degree undermine the Convention since its purpose is to combat discrimination in education in a comprehensive manner. Consequently, States must ensure that both public and private institutions comply with the regulations.[59]

Lastly, it is important to mention certain points discussed by the Working Party at its meetings held from 26 November to 8 December 1960. First of all, Article 3(c) of the Convention, which concerns in particular scholarships or other forms of assistance to pupils, refers to the absence of "differences of treatment ... between nationals". The precise wording "between nationals", which does not appear in the draft convention concerning discrimination in education,[60] may be explained, *inter alia*, by financial and technical considerations.[61] That proposal by Italy was therefore endorsed by a vote of 13 to two (with three abstentions). That addition therefore demonstrates certain limits to what might be regarded as absolute equality of treatment. Nevertheless, while such a position may be explained by a desire to remain realistic, another proposal suggesting that allowance should be made "for the national policy of each individual State,

58. UNESCO/ED/DISC/5, Rev., p. 8.
59. Eod. loc.
60. UNESCO/ED/167, Add.1, Annex II.
61. Document 11 C/PRG/36, p. 5.

in interpreting the provisions of this paragraph" was not endorsed. There is therefore clearly a distinction to be made between the introduction of some degree of relativity into the principle of equality of treatment and more radical departures from that principle which, had they been accepted, might have allowed some States to use their national policy as a pretext for not complying with the Convention's provisions and hence to call its effectiveness into question. The difficulty lies in the distinction between what is a desirable adaptation and what must be regarded as a weakening of the draft text that might in the long run threaten its very existence.

Article 3(e)[62] of the draft convention against discrimination in education also gave rise to debate in the Working Party. The difficulty arose from the use of the words "same access". An amendment had been submitted by the delegation of Austria according to which absolute equality of treatment was possible for primary education, but became more difficult to achieve afterwards, particularly in the case of technical institutions which required heavy financial investment. The majority of the Working Party considered that the use of the words "same access" did not necessarily mean free of charge. According to that interpretation, a distinction had to be drawn between access (as a principle) and the practical modalities, which could be different. Although the Working Party's interpretation was consistent with the reasoning underlying the interpretation of the previous paragraphs,[63] the word "same" might still be ambiguous in a simple reading of the Convention.

62. "To give foreign nationals resident within their territory the same access to education as that given to their own nationals".

63. See in particular Article 3(c).

Article 4

The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

(a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;

(b) To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;

(c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;

(d) To provide training for the teaching profession without discrimination.

Article 4, described as a "framework text",[64] defines the goals and the different stages of national policy-making as a function of the level of education (primary, secondary and higher). National policy must ensure free and compulsory primary education. For the other levels, States have lesser obligations. Secondary education must be accessible to all; higher education must be so also, but on the basis of individual capacity.[65] Those different objectives simply take up those laid down in less precise terms[66] in Article 26(1) of the Universal Declaration of Human Rights.[67]

A question relating to the principle of equality of access at the different levels of education had already been submitted to States in the questionnaire sent to them.[68] The States had unanimously replied that the proposed convention should contain an article stipulating that the "Member States recognize in their laws and regulations and apply in their national practice the principle of equal access to education at all levels and of all types".[69]

A unanimous response in regard to the principle does not mean, however, that all the States agreed on the contents of the article. Draft article 4, as initially proposed, was in fact amended. In the draft convention against discrimination in education, the wording in subparagraph (a) – "assure compliance by all with the obligation to attend school prescribed by law" – was missing from the text. That stipulation was in the draft convention but under Article 3(b), which provided that "The States Parties to this Convention undertake ... (b) to assure [in fact] universal compliance with the duty to attend school prescribed by law". Putting the wording elsewhere in the Convention thus resolved the problems of

64. *Cf. supra.*

65. That hierarchy of obligations was to be used subsequently in other standard-setting instruments drawn up by UNESCO, and there is wording similar to Article 4(a) in Article 28(1) of the Convention on the Rights of the Child (1989) and in Article 11(3) of the African Charter on the Rights and Welfare of the Child (1990). However, those instruments go further than Article 4(a) of the Convention since they stipulate that secondary education must be free.

66. On the more specific provisions of the Convention in regard to the level of education, see *World education report*, op. cit., p. 66.

67. Article 26 "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit".

68. ED/167 Add.1, Annex I, pp. 10-11 (Question IX).

69. Ibid., p. 11.

interpretation that had been raised[70] and, in so doing, modified the scope of the undertaking by States.[71]

An amendment discussed by the Working Party also resulted in a change in the wording of subparagraph (c), to which the words "and the continuation of their education on the basis of individual capacity" were added. Once again, this was a way of qualifying the actual achievement of equality of opportunity, without calling into question the principle itself.

Having considered equality of opportunity from the viewpoint of access to education, we turn to the question of access to the teaching profession and, more generally, the quality of education. The draft convention concerning discrimination in education stipulated that the States Parties to the Convention were required to "ensure that the standards of education are equivalent in all public educational institutions of the same level and, to the fullest extent possible, that the conditions relating to the number and qualifications of teachers, teaching materials, buildings and equipment are also equivalent".[72] That wording was altered by the Special Committee to become "a general, flexible formula"[73] that referred only to the "quality of the education provided". Moreover, the Committee added a new paragraph specifying that the States Parties undertook to "provide training for the teaching profession without discrimination".

Taking Articles 3 and 4 of the Convention together, it may be seen that States have obligations that may be immediate (Article 3) or progressive (Article 4); in either case, however, they are open to different interpretations over time, as indicated by Articles 6 and 7 of the Convention. Article 6 refers to subsequent recommendations that the General Conference of UNESCO might adopt to define measures to be taken against the different forms of discrimination in education, while Article 7 stipulates that the States shall provide reports on the results achieved and the obstacles encountered in the application of the Convention.

70. *Cf. supra.*
71. Document ED/DISC/5, Rev., p. 9.
72. ED/167 Add. 1, Annex II.
73. Document ED/DISC/5 – Rev., p. 9.

The progressive application of Article 4 relating to equality of opportunity does not mean that the extent to which those objectives are achieved cannot be assessed. This is especially important because access to education is a vital part of human development, enabling individuals to make informed decisions and hence to use their faculties to improve their existence at the social, cultural, economic and other levels.[74] The importance of education has been repeatedly stressed on numerous occasions in many standard-setting instruments, notably the World Declaration on Education for All and the Framework for Action to Meet Basic Learning Needs.[75] The Framework for Action defines one of the objectives as universal access to, and completion of, primary education (or whatever higher level of education is considered as "basic") by the year 2000.[76] In 2002, the publication of an EFA global monitoring report enabled a precise analysis to be made of the situation concerning access to education, providing a further analytical tool in addition to the specific mechanism established under Article 7 of the Convention against Discrimination in Education. The findings show that the goal set more than 40 years ago in Article 4(a) has still not been achieved. "[M]ore than 100 million children in the world are still deprived of access to primary education, while a number of countries are clearly not on track to achieve its universal provision. Some have actually been moving away from it. Nearly all out-of-school children live in developing countries, and a majority of them are girls."[77] These findings clearly demonstrate that the goals and objectives set in the Convention against Discrimination in Education are as topical and relevant as ever.

74. See on that point the *Global Education Digest 2003 – Comparing education statistics across the world*, Montreal, UNESCO Institute for Statistics, 2003, p. 7: "Numerous studies have shown that educational participation can result in improvements in individual living conditions, such as better health or increased income. At a national level, higher levels of educational attainment among the population have economic and social benefits for both individuals and society as a whole".

75. Adopted in 1990.

76. See in this connection the *Final Report of the World Conference on Education for All: Meeting Basic Learning Needs*, New York, Inter-Agency Commission, WCEFA, 1990, p. 53.

77. *EFA Global Monitoring Report. Education for All: Is the world on track?, op. cit.*, p. 126. This situation remains a matter of concern in 2003; see in this connection the Global Education Digest 2003, op. cit., p. 8: "Global estimates by the UNESCO Institute for Statistics (UIS) indicate that some 104 million children of primary school age are not enrolled in school".

Article 5

1. The States Parties to this Convention agree that:

(a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;

(b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction;

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

(i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;

(ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and

(iii) That attendance at such schools is optional

2. The States Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this Article.

Article 5, paragraph 1(a), after a number of draft amendments,[78] by and large contains the definition of the aims of education found in Article 26, paragraph 2, of the Universal Declaration of Human Rights.[79] The other subparagraphs of the Article closely reflect the proposals made by the Sub-Commission on Prevention of Discrimination and Protection of Minorities[80] and relate to the choice of schools by parents, religious education and the right of members of national minorities to engage in educational activities and in the management of schools.

In regard to parents' freedom to choose a school, two questions arising from the fourth principle established by the Sub-Commission[81] were raised in the document drawn up by the Director-General on the content and scope of the proposed regulation. The first was "whether the denial of freedom of choice of school to parents in itself constitutes discrimination in the sense intended in the proposed instruments … since the latter deal with inequality of treatment of groups in the exercise of rights in education, not the assertion of rights as such".[82] The second question was whether the right to establish private schools should be enunciated in the proposed instrument. The answer to the second question is found in subparagraph (b) of paragraph 1 which specifies that: "It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children *institutions other than those maintained by the public authorities*."

78. Document ED/DISC/5 – Rev., p. 10.

79. Identical wording was used a few years later in Article 13 of the International Covenant on Economic, Social and Cultural Rights.

80. Document 10 C/23, Annex 1, pp. 1-2; and Final Report by the Director-General UNESCO/ED/167 – Add. 1, p. 5, para. 38.

81. "Respect should be paid to the freedom of parents and when applicable, legal guardians, to choose for their children scholastic institutions other than those established by the public authorities, provided that those institutions conform to such minimum educational standards as may be laid down or approved by the State."

82. Document ED/167, p. 14.

Furthermore, a reading of the Working Party's report shows that there were a number of difficulties concerning this paragraph. The draft article in fact referred only to the "religious and moral education" of children. Some delegations considered that this wording was too restrictive and "incomplete, as it made no reference to other types of education, including secular education".[83] A more serious criticism was that it lacked balance and objectivity since there was no "opposing counterpart" to the notion of religious education. Some delegations made proposals – which were all rejected – to delete the word "religious" or to insert other terms such as "or atheist", "a-religious" or "philosophical".

The stir created by the religious issue was not confined to this particular point but also extended to the question of whether the wording proposed in the draft drawn up by the Director-General might not, in fact, oblige States to provide religious instruction in State schools and hence interfere with "the existing educational system in certain countries". To dispel such fears, the Working Party decided to insert the expression "in a manner consistent with the procedures followed in the State for the application of its legislation". It must be stressed, however, that, although this clarification put paid to other options previously raised, some delegations did not consider it to be very helpful. They felt that parents' freedom to ensure that their children received religious and moral education in accordance with their own convictions did not necessarily imply that such education would be provided in State schools and it might therefore be provided, where appropriate, out of school.

The question of minorities, which arises in subparagraph (c), is also a very important feature of the Convention. The first difficulty encountered in drafting the Convention was mentioned in Mr Charles Ammoun's report[84] and concerned the very notion of minority. The Director-General's preliminary report stated that: "the protection of minorities is understood

83. Document 11 C/PRG/36.

84. Ammoun (Ch.), *op. cit.*, p. 6: "The term 'minority' is used to designate some of the groups dealt with in the study. In view of the difficulties experienced by the Sub-Commission when it attempted to draft a precise definition of 'minority', it was considered wiser not to employ the term except in the case of distinct groups recognized as 'minorities' by the countries in which they reside", and p. 90: "Attention has already been drawn to the difficulties which arise from the use of the term 'minorities'; it is because of these difficulties that the scope of this chapter has been somewhat enlarged to include material relating to all distinct groups of people (ethnic, national, linguistic, etc.)…".

as meaning protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population".[85] However, this definition addresses the question of minorities only from the angle of the treatment that must be accorded to them and offers the somewhat vague definition of a minority as a non-dominant group in the country. The draft convention against discrimination in education[86] took up the definition proposed in the Ammoun report and referred to "ethnic, religious or linguistic minorities". That draft was amended by the Special Committee of Governmental Experts, which preferred the expression "national minorities". That definition was adopted and is to be found in the text of the Convention against Discrimination in Education.

Another difficulty arose when it came to determining what did and what did not constitute discrimination against minorities. In fact, the preliminary report[87] showed that "failure to 'protect the minority' may be tantamount to denying 'equal educational treatment'. In support of this argument it was pointed out that allowing a minority to receive early childhood education in its mother tongue could be a factor in preventing any disadvantage whereas, paradoxically, at a certain level of education, members of the minority

85. Document ED/167, p. 15. The definition of the protection of minorities given in this document is taken from document E/CN.4/42, Section V.

86. Document ED/167 – Add. 1, Annex II.

87. Document ED/167, p. 15.

might be disadvantaged if they did not speak the dominant language. This example amply showed that the drafters of the Convention had little room for manoeuvre[88] in taking the difficulties that might be experienced by minorities into account.[89]

Difficulties related to the concept of minority continued to surface and the Special Committee of Governmental Experts engaged in lengthy debates on the subject. One of the points raised was whether a distinction should be drawn in the proposed instrument between "national minorities" who "have always been regarded as such, in particular by the State within whose territory they live, and those who arrive as immigrants".[90] Some delegations supported the distinction on the grounds that "it was neither desirable nor possible to accord immigrant minorities the right to open schools in which teaching would be given in their mother tongue".[91] The distinction was not, however, adopted and the Committee confined itself to the expression "national minorities" without further explanations.

This choice of terminology contrasts with the precise wording used by the same Committee of Experts in the same subparagraph. Regarding the right of national minorities to engage in educational activities, it is clearly stated that it might be understood differently "depending on the *educational policy* of each

88. In this regard, see Juvigny (P.), op. cit., pp. 18-19: "The authors of the Convention also had to try to achieve a balance between the principle of non-discrimination, which, being only one facet of the notion of equality, may suggest to some minds the idea of absolute identity and respect for the rights of "minorities". The complexity of the problem has been admirably explained in the Ammoun report: "In the first place, compulsory teaching in a single language and, a fortiori, prohibition of the teaching of the language and cultural heritage of a distinct group, have in some cases constituted a formidable instrument of oppression and discrimination, especially where the schools possessed by the group are closed, or transferred to the dominant group against the will of the members of the distinct group. In a larger sense, it is no exaggeration to say that the rebirth of a language has in many countries been a certain sign of an awakening of national consciousness; this was the case in the Arab countries and in many other countries which have since attained independence. In the second place, and, it might almost be said, conversely, it is also discriminatory to prevent children belonging to a distinct group from learning the majority language, knowledge of which is necessary for access to higher education. Discrimination would also exist if the level of education in the schools of the distinct group was not equivalent to that in the ordinary schools. Finally, discrimination would exist if children of the distinct group were denied access to the general schools."

89. For a critical interpretation of Article 5 of the Convention, see Modeen (T.), "La Convention de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement et les îles d'Aland", *Revue des droits de l'homme,* 1977, Vol. 10, pp. 251 et seq. See in particular the analysis on the status (public or private) of the minority's schools, pp. 255 et seq.

90. Document 11 C/15, Annex III, p. 8.

91. Ibid., p. 8.

State".[92] The insertion of the term "educational" reflects the Committee's fear of giving States too much freedom in the application of this provision of the Convention and of the risk that might consequently arise of national policy being overused as an argument to lessen or weaken the rights that the article grants to national minorities. This right is therefore subject to three conditions. The first condition is that "this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty". This may mean, in particular, that the rights granted to minorities must not be interpreted as allowing minorities to isolate themselves from the community as a whole. The second condition concerns the standard of education in those schools, which must not be "lower than the general standard laid down or approved by the competent authorities". Lastly, while the right to conduct educational activities and manage schools is granted, attendance at such schools is optional and depends on parents' wishes and choices for their children.

It may be seen, then, that the Convention leaves it open to parents to choose the type of education that their children will receive and at the same time puts a number of necessary restrictions in place to combat discrimination in education and achieve equality of opportunity.

92. See T. Modeen's criticism of the insertion of the expression "depending on the educational policy of each State". Referring to subparagraph (c) as a whole, he wrote: "a clear distinction emerges depending on whether one term or the other of the alternative is used. The fact that there are two different ways of applying this provision weakens considerably the strength of the Convention's protection of minorities. It leaves States the option of authorizing only schools in which basic minority language teaching will be provided. There are also three or four restrictive conditions that further weaken the protection of minorities … [(i); (ii); (iii)]", op. cit., p. 253. Taking the opposite view, P. Juvigny wrote: "These then are three aspects of the problem which can only be treated with a great deal of nicety, reflecting the infinite variety of laws and practices in the world", op. cit., p. 20.

Article 6

In the application of this Convention, the States Parties to it undertake to pay the greatest attention to any recommendations hereafter adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization defining the measures to be taken against the different forms of discrimination in education and for the purpose of ensuring equality of opportunity and treatment in education.

By way of preliminary comment, it must be noted that the Recommendation against Discrimination in Education differs from the recommendations contained in Article 6 of the Convention. It was adopted on the same day as the Convention, and on that date the Convention had obviously not yet entered into force. Furthermore, Article 6 specifically states that "in the application of this Convention, the *States Parties to it undertake* …". The fact is that the adoption of the Recommendation against Discrimination in Education was prompted specifically by the difficulties encountered by some States in becoming Parties to a convention-type instrument; for example, in view of the distribution of powers within some federal States, responsibility for educational decisions falls within the purview of federal bodies and not within that of the central authorities.

Under Article 6 of the Convention, States Parties "undertake to pay the greatest attention to *any recommendations* hereafter adopted by the General Conference". From a terminological point of view, the Convention uses the word *recommendation*. In fact, an analysis of the texts adopted by the General Conference at its various sessions shows that it adopts many resolutions but very few recommendations. On the question of combating discrimination in education, many resolutions have been adopted in connection with the periodic reports submitted by States to the General Conference at various sessions.[93] Some resolutions have recommended that

93. See, *infra*, the comment on Article 7.

"the Director-General study whether it would not be advisable, as provided by Article 6 of the Convention and Section VI of the Recommendation, for the General Conference at subsequent sessions to adopt new recommendations for the international regulation of carefully selected questions, so as to clarify the measures to be taken against discrimination in education and to ensure equality of opportunity and treatment, and submit relevant proposals to this effect to the Executive Board".[94] Others have endorsed recommendations made by the Executive Board.[95] Those recommendations were obviously designed to combat discrimination in education although they did not fall precisely within the scope of Article 6 of the Convention.

Perusal of the many documents adopted by the General Conference at successive sessions shows that some are clearly identified as recommendations and concern various fields of UNESCO's activities, in particular education. The General Conference has adopted eight recommendations on that subject,[96] including the Recommendation against Discrimination in Education. None (except the 1960 Recommendation),[97] however, concerns action against discrimination in education. Hence it may be said that Article 6 of the Convention has not been applied since 1960.

94. Document 17 C/Resolution 31.3.

95. Document 15 C/Resolution 29.1: The General Conference "notes with satisfaction the work accomplished by the Special Committee and endorses the four recommendations (contained in paragraphs 157 to 160 of its report, Document 15 C/11) which follow its analytical summary of the replies given by Member States to the questionnaires that had been sent to them".

96. The recommendations in question are: Recommendation concerning the Status of Teachers (1966); Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms (1974); Revised Recommendation concerning Technical and Vocational Education (1974); Recommendation on the Development of Adult Education (1976); Revised Recommendation concerning the International Standardization of Educational Statistics (1978); Recommendation on the Recognition of Studies and Qualifications in Higher Education (1993); and Recommendation on the Status of Higher Education Teaching Personnel (1997).

97. See, *supra*, the comment on Article 5.

Article 7

The States Parties to this Convention shall in their periodic reports submitted to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, including that taken for the formulation and the development of the national policy defined in Article 4 as well as the results achieved and the obstacles encountered in the application of that policy.

Article 7 of the Convention against Discrimination in Education was applied quite soon after it came into force in 1962, for, "in accordance with the Director-General's proposals to the twelfth session of the General Conference, the Approved Programme and Budget for 1963-1964 provides, in connexion with the application of the Convention and Recommendation against Discrimination in Education, that 'a draft plan for periodic reports by Member States to the General Conference on implementation of the Convention and Recommendation, including detailed indications concerning the preparation of first reports, will be prepared for submission to the General Conference at its thirteenth session'…".[98] Before actually drawing up a plan, the Secretariat consulted the Sub-Commission on Prevention of Discrimination and Protection of Minorities,[99] which considered that "the submission of periodic reports by States constitutes one of the essential elements in the practical application of the international instruments adopted … in the field of discrimination".[100] These first stages constituted the starting point of a mechanism that led to the consultation of the States Parties to the Convention on six occasions. The periodic reporting mechanism was already well known in international law

98. Document 13 C/12, p. 2.

99. The consultation related to the role played by the Sub-Commission in the drafting of the Convention against Discrimination in Education. See *supra*.

100. Taken from a resolution adopted by the Sub-Commission at its 15th session in 1963, quoted in document 13 C/12, p. 2.

before the entry into force of the Convention against Discrimination in Education. The International Labour Organization used it regularly, thus contributing to the application by Member States of the conventions and recommendations that it had adopted.

Unlike the reports submitted previously which only concerned measures taken by States to fulfil their obligation under the Convention to submit conventions and recommendations to their national authorities, the reports covered by Article 7 deal with the actual measures taken to apply the Convention and Recommendation by States.[101] The purpose of the Convention, namely to combat discrimination in education, required and continues to require that all measures be taken to apply it as soon as possible.

The periodic reports that States are asked to submit have the effect of informing UNESCO, and therefore all the States in the international community, of the measures they have taken domestically to fulfil their obligations under the conventions to which they are parties. Thus, to make it more effective, States Parties to the *Convention against Discrimination in Education*, must give information in their periodic reports to the UNESCO General Conference on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of the Convention .[102]

If there are no obligations under conventions because the principles and standards are laid down in simple recommendations, declarations or frameworks for action, the report is not meant to verify whether a statutory obligation is being properly fulfilled but to indicate measures that a State has decided to take, to implement voluntarily the principles adopted in recommendations. Such behaviour may set an example, and, conversely, a State failing to act may be placed in a politically difficult situation. The reporting procedure therefore to some extent represents a means of applying

101. The importance of reports on the implementation of the Convention has been stressed by H. Saba: "This is particularly important when, as in the case of the 1960 Convention and Recommendation, the instrument in question does not merely define rules for immediate application but also constitutes the starting point for progressive measures that States are invited to take in the future, with a view to achieving to the fullest extent the objectives and goals pursued and which the Organization is duty bound to guide." Saba (H.), "UNESCO and Human Rights", in Vasak (K.) (ed.), *The International Dimensions of Human Rights*. Paris, UNESCO, 1982, p. 411.

102. See Yves Daudet and Kishore Singh, *The Right to education: An Analysis of UNESCO's Standard-setting Instruments*,UNESCO, Paris, 2001, p.48

pressure. It is, moreover, legally enshrined in the form of a State obligation under Article VIII of UNESCO's Constitution, which provides that each Member State shall submit to the Organization a report on the action taken upon the recommendations and conventions adopted by the UNESCO General Conference. It is therefore apparent that the report produced derives from an obligation whose content will vary depending on the instrument (whether a convention or not) to which it relates. Insofar that the report will give a precise account of the laws, regulations and practices adopted and it is known that all this information will be closely examined by UNESCO, it is clear that States will tend to give the maximum possible effect to the recommendations concerned. Furthermore, dissemination of information is always useful through the comparison it allows between systems that might possibly be taken as models or that provide answers to questions that arise. Lastly, this procedure reveals any problems that States may encounter in implementing measures. From this point of view, moreover, there is no reason to distinguish between a report on implementation of a convention and one relating to a recommendation, since the information value is the same in either case .[103]

From a practical point of view, the establishment of periodic reporting – and hence consultation of States Parties to the Convention – made it necessary to set up new structures within UNESCO. At its 70th session, the Executive Board considered that "the reports of the governments should be presented at regular intervals in a standardized form"[104] . Moreover, at its 23rd session, the General Conference recommended to the Director-General that the draft questionnaires or forms sent to Member States with a view to the preparation of their reports should be submitted to the CR (Resolution 29.1). Accordingly, "the reports submitted by governments shall be analysed by the UNESCO Secretariat, examined by a 12-member special committee of the Executive Board and transmitted with the Board's comments to the Reports Committee of the General Conference".[105] At its 71st session, the Executive Board decided to establish a

103. Ibid. p. 48, 49.
104. Doc. 70 EX/Decision 5.2.1, para. 5
105. Document 70 EX/Decision 5.2.1. A description of the procedure for the analysis of periodic reports can be found in Saba (H.), "UNESCO and Human Rights", *op. cit.*, p. 412.

Special Committee,[106] which met for the first time in October 1965 to establish its working methods and to give "the Secretariat the necessary directives for the preparation of the analysis of reports from Member States".[107] The Special Committee was re-established several times; its jurisdiction was subsequently extended to include UNESCO's other standard-setting instruments and its membership was increased. At its 104th session, the Executive Board decided to rename the Committee "Committee on Conventions and Recommendations". At the 122nd session, the Committee became a permanent committee of the Board.[108]

Before dealing with the content of the questionnaire, emphasis must be placed on an important point made in the draft plan for periodic reporting by Member States on the application of the Convention and Recommendation against Discrimination in Education,[109] namely that the method of periodic reports "cannot automatically ensure that national law and practices are wholly in accordance with the principles and standards laid down in the Convention and Recommendation against Discrimination in Education". Nevertheless, periodic reporting and legal procedures generally help public authorities and professionals involved in education to root out discrimination and gradually achieve equality of opportunity. One of the difficulties that arose in the 1960s concerned the type of questionnaire that was to be drafted. The problem was due to the very broad scope covered by the Convention, as may be seen, for example, from the definition of discrimination, which applies both to intentions and to facts.[110] This meant that the questionnaire could be worded in various ways. The first option was simply to paraphrase Article 7 of the Convention and draft the questionnaire in very general terms. But such a solution was by no means satisfactory and would not have been forceful enough to combat discrimination

106. For an overview of the background to the Special Committee established to examine the reports of Member States on the implementation of the Convention and Recommendation against Discrimination in Education and the changing of its name to Committee on Conventions and Recommendations see *The Executive Board of UNESCO*, Paris, UNESCO, 2002, pp. 59-60, and for a review of its terms of reference and methods of work, see pp. 61-63.

107. Document 14 C/29 Add., p. 6.

108. Document 122 EX/Decision 3.6 and 123 EX/Decision 4.

109. Document 13 C/12, p. 4.

110. Article 1 of the Convention, which states that "the term 'discrimination' includes any distinction, exclusion, limitation or preference which … has the purpose or effect of nullifying or impairing equality of treatment in education".

in education. The second option would have been to draw up a questionnaire scrupulously following the order of the articles contained in the Convention. This was not ideal either, because some clauses in various articles overlapped to some extent. In the end, it was a third option, broadly following the order of the articles of the Convention but grouping a number of them together,[111] that prevailed when the first questionnaire was drawn up.

In subsequent consultations, the content of the questionnaires was changed to bring it into line with new developments in the issues covered by the Convention, taking into account the difficulties ascertained from replies provided earlier by the reporting States. A more detailed analysis shows, for example, that the first questionnaire comprised seven sections,[112] while the second contained only four parts[113] because the Committee on Conventions and Recommendations considered that it was "logical to limit questions to certain parts of the Convention and Recommendation, on the understanding that the aspects of those instruments not covered by the said questionnaires should be covered later in greater detail".[114] Subsequent questionnaires also differed from each other.[115]

A new development is to be noted, however, in the sixth consultation of States. It consisted not of a list of direct questions but of an invitation to States to report on the application of the Convention with regard, in particular, to the basic education of four particular population groups (women and girls, persons belonging to minorities, refugees and indigenous people).[116] To facilitate their task, guidelines were proposed to States.[117] Yet another innovation was the use of other sources in drawing up the final report.[118]

111. In regard to the structure of the questionnaire, see Document 13 C/12, pp. 7-8.

112. See document 14 C/29 – Add., pp. 9 et seq.

113. Document 17 C/15, p. 8. The various parts deal with discrimination, equality of educational opportunity and treatment, educational activities of national minorities, and aims of education respectively.

114. Report of the Committee on Conventions and Recommendations in Education, document 84 EX/6, p. 3.

115. See, in particular, the following documents: 20 C/40 (specifically p. 5); 23 C/72; 26 C/31, Annex 1; and 27 C/Resolution 1.9.

116. Document 27 C/Resolution 1.9.

117. Document CL/3408, Annex.

118. Those sources were the national reports submitted to the International Bureau of Education and UNESCO on the follow-up to the Jomtien Conference and information provided by non-governmental organizations.

In this respect, it may be noted that in October 2002, the Executive Board "requested the Secretariat to rationalize the guidelines communicated to Member States for periodic reports …"[119] . Thus, the system of questionnaire is replaced by that of the Guidelines. The Guidelines on the implementation of the Convention and Recommendation were elaborated in 2004 for the seventh consultation of Member States covering a six-year (2000-2005) period. In elaborating these Guidelines, relevant Guidelines of the United Nations system, especially those of the United Nations Committee on Economic, Social and Cultural Rights (CESCR), have been taken into consideration. This is intended to facilitate integrating the reporting obligations of the States Parties to the Convention and those of the States Parties to the International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14 on the right to education) and reducing the state burden in reporting [120]. Moreover, the General Comment No. 13 on the Right to Education, elaborated by CESCR in cooperation with UNESCO, elucidates such obligations[121] .

These consultations take place in several stages. The General Conference decides to ask Member States to submit reports (Art. VIII of UNESCO's Constitution, Art. 7 of the *Convention against Discrimination in Education*), whereupon questionnaires are prepared and sent out to Member States, which are given a deadline for replying. Replies are analysed and collated by the UNESCO Secretariat. These documents are then examined by the Committee on Conventions and Recommendations, which draws up its own report and transmits it to the Executive Board. The latter examines all the documents and transmits them to the General Conference, accompanied by its own comments. The General Conference sets out its observations, recommendations and decisions in a resolution and, if necessary, a general report (Art. 18 of the Rule concerning recommendations and conventions)[122].

119. Doc. 165 EX/Decision 6.2, para. 9(a)

120. Doc. 171EX/22, §3

121. *Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No.13 (Twenty-first session, 1999), The right to education (Art.13 of the Covenant), Economic and Social Council, United Nations E/C.12/1999/10, 8 December 1999.

122. See Yves Daudet and Kishore Singh, op. cit., p.49.

But the consultation of States did not suffice to ensure that States took action to combat discrimination and promoted equality of opportunity. It was also important that the number of States responding to UNESCO's requests and the quality of the information provided should be such as to permit an accurate appraisal of the situation. It must be noted that States' replies pursuant to Article 7 fell far short of meeting the two conditions.

Accordingly, in its first report,[123] the Special Committee stated that the observations formulated were only provisional in character owing to the small number of replies received. In addition, there were great variations in the practice followed by the Organization's Member States in drawing up their reports; some States gave detailed replies to all the questions asked, while others answered only certain questions; and a few States merely made a general statement to the effect that there was no discrimination in education in the country. As a result of that report, the General Conference adopted a resolution[124] inviting Member States that had not yet replied to do so and requesting States that had not replied completely to supply the precise and detailed information required. In 1968, the Special Committee noted that 61 States had sent reports and 28 had submitted additional information. The analysis of the first set of information submitted by States showed that the application of the provisions of Article 7 was a rather delicate matter. That impression was only confirmed subsequently. When it came to the second consultation, again some States replied, and many replies received were incomplete.[125] This also held true for the third,[126] fifth[127] and sixth[128] consultations, although it may be noted that a larger number of States participated in the fourth consultation, as recorded in the relevant report.[129]

123. Document 14 C/29 Add. For an analysis of the replies contained in this report see Mertens (P.), "L'application de la Convention et de la Recommandation concernant la lutte contre la discrimination dans le domaine de l'enseignement un bilan proviso ire", *Revue de droit international et comparé*, 1968, Vol. 1-1, pp. 91-108.

124. Document 14 C/Resolution 39.1.

125. See in particular document 17 C/15 and the resolution adopted by the General Conference, 17 C/Resolution 31.3.

126. Document 20 C/40 Add.

127. Document 26 C/31 (especially p. 1).

128. Document 156 EX/21.

129. Document 23 C/72, paras. 8 and 351: "Greater participation by Member States in this fourth consultation, the number and quality of replies from countries in regions that took virtually no part in previous consultations, are clear signs of the interest taken by Member States, particularly developing States, in the implementation of the 1960 Convention and Recommendation."

The various consultations were the basis on which the Special Committee drew its conclusions and made recommendations to improve the application of the Convention and Recommendation against Discrimination in Education. The piecemeal information provided by States after the first consultation suggests, for example, that the principle of gender equality, though generally accepted, was difficult to put into practice because it had to be backed up by concurrent progress in the all-round development of society.[130] Furthermore, the question of minorities continued to raise difficulties. In spite of the discussions held during the preparatory work on the Convention[131] and the intention then expressed to ensure that all indigenous peoples in a minority situation in a given territory benefited from Article 5(c), the replies showed that States did not all understand the notion of minority in exactly the same way. Additional information enabled the Special Committee of the Executive Board to draw up more detailed conclusions and recommendations on discrimination, equality of opportunity, goals of education, freedom of choice and, lastly, national minorities, in 1968. In its recommendations, the Special Committee also took pains to refer to factors which, though outside the purview of the Convention, might nonetheless influence State action. Accordingly, in 1978,[132] the Committee on Conventions and Recommendations recalled that the General Conference had adopted a Revised Recommendation concerning Technical and Vocational Education in 1974 and a Recommendation on the Development of Adult Education in 1976, inviting States to give the utmost attention to the application of the provisions of those two Recommendations. Furthermore, the Committee recalled that Recommendation No. 64 concerning Education for International Understanding, as an integral part of life, and the Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms adopted by the General Conference in 1974 had a direct bearing on the application of the provisions of the 1960 Convention.

130. The question of gender equality is also one of the United Nations millennium development goals for education (resolution A/56/326 dated 6 December 2001). This point was made in 2002 in the *EFA Global Monitoring Report*. The report states that "despite significant progress, they are still less educated and more likely to be illiterate than men in many countries", op. cit., p. 70.

131. See *supra*.

132. Document 20 C/40, para. 312.

Periodic reporting is primarily a means of taking stock of the application of the Convention by States at a given moment, but it is also a means of making a more general assessment of the situation in comparison with previous consultations. In its fourth report, when drafting its recommendation, the Committee analysed trends in access to school education at the various levels concerned.[133] The Committee's conclusions may also be used to determine whether States' efforts have led to the attainment of some of the goals set by the Convention. The 1991 report found, for instance, that "primary/basic education is well covered",[134] and subsequently certain very specific points relating to the Convention were analysed in greater depth.[135]

As noted, Article 7 of the Convention is of paramount importance in ensuring the application of the Convention and in monitoring States' progress in combating discrimination in education and in promoting equality of opportunity. It is more demanding than the monitoring mechanisms established earlier, and is justified by the importance of the objectives set by the Convention.

133. Document 23 C/72, para. 352.
134. Document 26 C/31.
135. See document 156 EX/21 et *supra*.

Article 8

Any dispute which may arise between any two or more States Parties to this Convention concerning the interpretation or application of this Convention, which is not settled by negotiation shall at the request of the parties to the dispute be referred, failing other means of settling the dispute, to the International Court of Justice for decision.

Article 8 of the Convention against Discrimination in Education, like other articles, was discussed at length during the preparatory work. Two specific points are, however, worthy of mention. The first is that the article was discussed in plenary at the General Conference and put to a separate vote. The second is that the General Conference adopted a resolution at its 11th session requesting the General Conference "to prepare a draft protocol instituting a conciliation and good offices committee competent to seek a settlement of any disputes which may arise between States Parties concerning the application or interpretation of the convention", deciding "to convene an ad hoc committee, consisting of governmental experts from Member States" and instructing it to consider the draft protocol drawn up by the Director-General and to report to it thereon at its 12th session.[136] As a result of the resolution, Article 8 was indirectly the starting point for the drafting of the Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking the settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education.[137] Before describing the Commission, its development and its operation in detail, we propose to go back over the debates on Article 8 during the preparatory work and at the plenary meeting of the General Conference.

As pointed out in the preliminary report, "in drawing up conventions, while the determination of measures for their application on the national level is normally a matter left to States, it is usual to insert in the international

136. Document 11 C/Resolution adopted on the report by the Programme Commission, at the thirtieth plenary meeting (14 December 1960); see Internet site: www.UNESCO.org.
137. Text adopted at the twenty-ninth plenary meeting on 10 December 1962; see documents of the 12th session of the General Conference.

instrument provisions determining the means of settling any disputes which might arise as a result of non-execution by one State of the obligations it has accepted".[138] As a rule, the purpose of such provisions in international conventions is to settle disputes in which non-compliance by one State is detrimental to one or more Contracting States. Where the Convention against Discrimination in Education was concerned, the difficulty lay in the fact that States, through that instrument, "undertake to apply to all persons residing on their territory" the provisions of the Convention. Because of that provision, and having regard to other international instruments such as the draft covenants on human rights and the Convention concerning Discrimination in respect of Employment and Occupation,[139] there was some question about the wording to be used in the Convention against Discrimination in Education. The final report by the Director-General proposed the following wording: "Any dispute which may arise between any two or more States Parties to this Convention concerning the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any one of the parties to the dispute be referred to the International Court of Justice for decision, unless they agree to another mode of settlement."[140]

A draft amendment was submitted to the Special Committee of Governmental Experts. The amendment concerned disputes not settled through negotiation and proposed that such cases might be referred to the International Court of Justice at the request of one of the parties. The specific purpose of the amendment, however, was to require the prior consent of the parties to the dispute. The amendment was rejected as potentially causing serious difficulties and even preventing supervision of States' application of the Convention.[141]

138. Document ED/167, p. 17.

139. Document ED/167, p. 18.

140. Document ED/167 Add. 1, p. 3.

141. Document ED/DISC/5 Rev., p. 12: "It was pointed out that this draft article already appeared in a number of conventions concluded under the auspices of the United Nations and that the amendment, prompted by the arbitration system, might enable any State Party, by refusing to submit to the jurisdiction of the Court, to obstruct, in the final analysis, supervision of the application of the Convention."

The content of the article was subsequently discussed by the Working Party established by the Programme Commission. In December 1960, a few days before the Convention was adopted, the very principle of such an article had still not been accepted by all delegations. The problem, as already noted in the preliminary report,[142] stemmed from the fact that the article permitted "one State to intervene in disputes between another State and persons or groups within its territory".[143] Such an argument was not acceptable, however, because it was in the interest of States ratifying a convention intended to define the rights of individuals and to ensure their protection to ensure compliance with its provisions, and that called for supervision. Another amendment, proposing the consent of States Parties before the dispute was brought before the International Court of Justice, was also submitted and then rejected. However, further to yet another amendment, the words "unless the parties to the dispute agree to another mode of settlement" were replaced by "if no other way of settling the dispute can be found". To justify the amendment, its author argued that the effect of such a modification would be that "in most cases States would not refer to the highest international authority, but would make use either of bilateral procedures or of non-jurisdictional procedures".[144] Nevertheless, that amendment alone could not suffice; there was clearly a need to establish mechanisms to avoid referral to the International Court of Justice. It was therefore proposed that the General Conference adopt a resolution requesting the Organization to draw up a draft protocol setting up a commission of conciliation and good offices and to submit that draft to an ad hoc committee of governmental experts.

The clarifications provided at the meeting of the Working Party were not enough, however, to settle definitively all the questions raised by the article. Several delegations subsequently took the floor at the thirtieth plenary meeting of the 11th session of the General Conference. This was particularly[145] the case of the delegate of Venezuela,[146] who insistently called for the wording of

142. See *supra*.

143. Document 11 C/PRG/36, p. 9.

144. Document 11 C/PRG/36, pp. 9-10.

145. The other States that took the floor to speak on Article 8 were Peru, Lebanon, France, Nicaragua and USSR.

146. The proposed amendment was supported by various States that took the floor, except France which wanted to retain the text adopted by the Working Party.

Article 8 to be amended. When he took the floor for the second time,[147] he stressed that it was impossible for his country to ratify the convention as it stood and that about 40 other States which otherwise approved the substance of the draft convention were in the same position. Venezuela's argument concerned the jurisdiction of the International Court of Justice and more specifically the optional clause providing for compulsory jurisdiction. Although Venezuela was a Party to the Statute of the International Court of Justice and had accepted its jurisdiction, it had not made the declaration accepting the Court's compulsory jurisdiction, under which a State is required to appear before the Court on a unilateral request. This was exactly what was being imposed by Article 8 as it stood after the Working Party's debates. It was therefore very clear that its wording ran counter to those States' position and would oblige them to accept under a particular convention, namely the Convention against Discrimination in Education, something that they had always generally rejected. In view of this situation, which constituted a serious obstacle for many States, a vote was taken on the article. Following the vote, Article 8 was amended and the phrase "at the request of one of the parties" was replaced by the words "at the request of the parties", this latter wording implying a joint submission and consequently excluding the possibility of a unilateral submission to the Court.

Even though it was set up under a separate Protocol from the 1960 Convention, the institution of a Conciliation and Good Offices Commission calls for some comment here.

Work on the drafting of the Protocol instituting the Commission began immediately after the adoption of the Convention against Discrimination in Education.[148] The Director-General drew up a report to which the draft protocol was appended. The Director-General recalled the spirit in which the idea of instituting the Commission had been put forward. The Commission was intended to afford States a means of settling their disputes amicably "so that the actual reference of a dispute to the International Court of Justice would become, as it were, a 'subsidiary' recourse".[149] In instituting such a Commission, a number

147. Thirtieth plenary meeting, paras. 58.1-58.4.
148. See *supra*, footnote 128.
149. Document UNESCO/ED/188.

of precedents were given as examples. For instance, the report by the Director-General referred to the commission established under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the draft Covenant on Civil and Political Rights and the Fact-Finding and Conciliation Commission on Freedom of Association set up in 1950 by the Governing Body of the International Labour Office.[150]

With regard to the Commission's terms of reference, the resolution adopted in 1960 specified that it would address disputes that might arise between States Parties. That excluded the possibility, suggested by Mr René Cassin, referring to the precedents of the European Commission of Human Rights and the Commission on Freedom of Association, of "non-governmental organizations, groups speaking on behalf of their members, even individuals" being given the right to lodge complaints.[151] The scope *rationae materiae* of the Commission was also clearly defined and confined to seeking a settlement of disputes "concerning the application or interpretation of the Convention".[152] Its strictly defined terms of reference contrast, too, with the broader terms of the Fact-Finding and Conciliation Commission which "may receive 'any allegations of infringements of trade union rights which the Governing Body, or the Conference acting on the report of the Credentials Committee, considers it appropriate to refer the Commission for investigation'".[153]

Unlike the International Court of Justice, which may consider matters only with the joint consent of the States Parties concerned, the Conciliation and Good Offices Commission may be petitioned unilaterally by a State.[154] In accordance with Article 12 of the Protocol, however, referral to the

150. For an analysis of experience and drafts relating to human rights disputes, see Bastid (S.), "Une nouvelle commission de conciliation?" in *Mélanges offerts à Henri Rolin*, Paris, Pedone, 1964, pp. 3-4.

151. Bastid (S.), *op. cit.*, p. 7.

152. See the resolution adopted at the 11th session of the General Conference and Article 1 of the Protocol: "There shall be established … a Conciliation and Good Offices Commission … to be responsible for seeking the amicable settlement of disputes between States Parties to the Convention against Discrimination in Education … concerning the application or interpretation of the Convention."

153. Document ED/188, p. 3.

154. Mention must be made here of the distinction drawn in Article 13 of the Protocol concerning States that are Parties to the Convention but not to the Protocol. The latter may not unilaterally have recourse to the Commission. Furthermore, States not Parties to the Protocol may not petition the Commission during the six years after its entry into force. This article must no doubt be considered an encouragement to become a party to the Protocol.

Commission is conditional on diplomatic negotiation. It is only if negotiation fails that a State may have recourse to the Commission. Once that step has been taken and after the necessary information has been obtained, the question is whether the Conciliation and Good Offices Commission should rule on whether or not provisions of the Convention have been violated. This matter was discussed at the preparatory meetings and the solution was the outcome of a compromise found by the ad hoc Committee of Governmental Experts, under which it was agreed that the "Commission should draw up a report on the facts and indicate the solutions which it had recommended[155] with a view to conciliation".[156] Nevertheless, if States decided, after failing to settle the dispute with the Commission's assistance, to have recourse to the International Court of Justice, they might include a reference to the Commission's report. In these circumstances, it may be considered that States will be more interested in bringing their case to court than in proposing or accepting compromise solutions that are quite likely to be to their disadvantage later on.[157] The fact remains that, to this day, the issue has remained a matter of speculation since no dispute has ever been submitted to the Conciliation and Good Offices Commission.

The Commission consists of 11 members "who shall be persons of high moral standing and acknowledged impartiality and shall be elected by the General Conference of the United Nations Educational, Scientific and Cultural Organization".[158] While nominations are submitted by the States Parties and the Commission may not include more than one national of each State, it is, however, specifically stated that the members of the Commission shall serve in their personal capacity. When making its choice "the General Conference shall endeavour to include persons of recognized competence in the field of education and persons having judicial experience, or legal experience

155. In regard to the recommendation made by the Commission, despite the absence of dispute, another difficulty mentioned by N. Valticos must be mentioned: "An important question is whether these recommendations will relate only to bases for discussion, as the notion of good offices would imply, or whether the Commission may propose the terms of a possible settlement, which would correspond to the notion of conciliation" ("Les systèmes de contrôle on judiciaire des instruments relatifs aux droits de l'homme", in *Mélanges offerts à Polys Modinos. Problèmes des droits de l'homme et de l'unification européenne*. Paris, Pedone, 1968, p. 350).

156. Document 12 C/16, Annex II, p. 13. This quotation seems to answer the question raised in the preceding footnote. However, this view is merely that expressed by the ad hoc Committee set up to examine the draft protocol drawn up by the Director-General.

157. Bastid (S.), *op. cit.*, pp. 11-12.

158. Article 2 of the Protocol.

particularly of an international character".[159] It shall "also give consideration to equitable geographical distribution of membership and to the representation of the different forms of civilization as well as of the main legal systems".[160] These factors all suggest that the negotiators intended to confer quasi-judicial functions on the Commission.

As indicated earlier, the Conciliation and Good Offices Commission has never met to consider any dispute. Although there was the situation hoped for by Mr R. Maheu, who said in his opening statement at the Commission's first meeting "It is to be hoped, ladies and gentlemen, that after this first statutory meeting, you may never have to meet again, because there will be no disputes to settle",[161] it nonetheless raises doubts as to the point of keeping it in existence, especially as many judicial or quasi-judicial bodies have been established or developed in the field of human rights in the last few decades. This prompted the Director-General to take up the issue of the high costs entailed in servicing a commission[162] that had never functioned,[163] referring to the documents drawn up for each session of the General Conference and the steps required to elect the bureau of the Commission.[164] The Director-General's report contained two draft resolutions submitted to the General Conference. The first proposed the radical solution of either terminating or suspending the Protocol, while the second proposed to discontinue submission to the General Conference of the reports provided for under Article 19 of the Protocol and to hold no further elections, the members of the Commission being deemed to be automatically re-elected indefinitely. Those proposals were opposed by the Legal Committee which held that the General Conference could not substitute its competence in such matters for that of States Parties to the Protocol and stressed "that the pure and simple termination of a procedure whose purpose was to protect a human right would constitute a regrettable precedent, and that furthermore the absence of any disputes to settle did not justify the

159. Article 4 of the Protocol.

160. Ibid.

161. Document DG/71/1 quoted in document 29 C/52, p. 3.

162. Document 29 C/52.

163. It should no doubt be pointed out that when the Protocol was being drawn up (admittedly for reasons other than finance) the representatives of some States clashed over the question of whether the Commission should be an ad hoc commission established for each dispute or a permanent commission. See, on this point, Bastid (S.), *op. cit.*, p. 5.

164. The list of the various documents is provided in document 29 C/52, pp. 4-5.

termination of the Commission, especially since its existence had an undoubted deterrent effect".[165] At its 30th session the General Conference followed the recommendation of the Legal Committee and adopted a resolution inviting the Director-General "to call a meeting of the Contracting States to the Protocol … in order to seek appropriate means of revitalizing and developing this procedure" and "not to include the report of the Conciliation and Good Offices Commission in the documents of the General Conference until such time as it contains information relating to substantive activities on the part of the Commission".[166] After an initial attempt to hold such a meeting, which proved fruitless because the level of participation was insufficient, the General Conference at its 31st session invited the Director-General to reconvene the States Parties to the Protocol during the 32nd session of the General Conference to review the Commission's procedures in order to make them effective.[167] At the meeting on 7 and 8 October 2003, the States Parties to the Protocol discussed the matter on the basis of a document drawn up by the Secretariat,[168] which contained three options: an amendment to the Protocol, an interpretation of some of its provisions, or its suspension or termination. Affirming their will to keep the Conciliation and Good Offices Commission alive, the States Parties decided to give an interpretation of specific articles so that the Commission's operational rules would be consistent with the situation arising from its lack of activity.[169]

The fact remains that the mechanism for the settlement of disputes instituted under the 1962 Protocol has not been used by its 30 or so States Parties, but this can by no means be regarded as proof of full compliance with the provisions of the Convention against Discrimination in Education.

165. Document 29 C/75.
166. 29 C/Resolution 85.
167. 31 C/Resolution 14.
168. Discussion paper without a symbol.
169. Report of the meeting, document CCBO/2003/REP Rev.

Article 9

Reservations to this Convention shall not be permitted.

The question of permitting reservations to a multilateral treaty is always a relatively delicate one. It entails a choice between two separate objectives: one founded on the desire to ensure that the instrument adopted is supported as widely as possible – by permitting the expression of reservations[170] – and the other aimed at ensuring the integrity of the convention and the uniformity of the obligations undertaken by the States Parties. Unlike the UNESCO Constitution, which contains no reference to reservations, the Convention against Discrimination in Education explicitly prohibits reservations.[171] The matter had nevertheless been discussed at the preparatory meetings. According to the report by the Committee of Governmental Experts,[172] a draft amendment to delete the article had been submitted. In fact, the absence of a provision on reservations would have given rise to a measure of uncertainty since there were no absolute rules on the subject, the International Court of Justice having merely stated in an advisory opinion of 28 May 1951: "In the absence of any express provisions on the subject, to determine the possibility of making reservations as well as their effects, one must consider their character, their purpose, their provisions, their mode of preparation and adoption."[173]

Later on, during the Working Party's debates, the question of reservations was raised once more and two conflicting views were expressed. One delegation stressed that "if no reservations were permitted some States might refrain from ratifying the Convention".[174] That view was not accepted and it was considered

170. Article 2, paragraph 1(d), of the Vienna Convention on the Law of Treaties states that: "'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".
171. The Convention against Discrimination in Education is the only convention in the field of education adopted by UNESCO that rules out reservations. The other conventions and agreements make no reference to reservations. See the UNESCO website: <www.UNESCO.org/education/information/standards/english/UNESCO.htm>.
172. Document UNESCO/ED/DISC/5 Rev., p. 12.
173. *Advisory opinion relating to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1950-1951), 28 May 1951, ICJ Reports 1951.
174. Document 11 C/PRG/36, p. 10.

that "there was no justification for permitting reservations in the Convention which would have the effect of restricting its scope and reducing its authority".[175] The uniformity of obligations therefore prevailed over flexibility.[176] Lastly, it must be noted that, at the request of the delegation of the Soviet Union, a separate vote was taken on Article 9 at the thirtieth plenary meeting of the General Conference at its 11th session. Unlike Article 8 which had been amended, Article 9 was adopted by 48 votes to nine, with eight abstentions.[177]

175. *Ibid*., p. 10; see also Daudet (Y.) and Singh (K.), *The Right to education: an analysis of UNESCO's standard-setting instruments*, Paris, UNESCO, 2001, p. 15: "It was also desirable to keep a firm line on these principles and ensure that they were not watered down. Reservations to the Convention are therefore excluded in Article 9 …".

176. By way of comparison, it is interesting to note that as at 30 April 1963 UNESCO had 113 Member States, but only 14 States had ratified the Convention against Discrimination in Education. By 30 June 2002, 90 of the Organization's 188 Member States had ratified the Convention.

177. See document on thirtieth plenary meeting, p. 510, para. 75.2.

Article 10

This Convention shall not have the effect of diminishing the rights which individuals or groups may enjoy by virtue of agreements concluded between two or more States, where such rights are not contrary to the letter or spirit of this Convention.

Article 10, as it now stands in the Convention, was proposed quite late in the process. In fact, the draft convention concerning discrimination in education appended to the Director-General's report contained only 18 articles.[178] The proposal to insert an article on the effects of the Convention on bilateral treaties and agreements was not made until the Special Committee of Governmental Experts' meeting of 13 to 29 June 1960. The Committee rejected, however, the proposal to insert an article worded as follows: "Bilateral treaties or agreements regulating any matter dealt with in this Convention shall not be affected by this Convention if those treaties or agreements are not against the spirit of this Convention."[179] The Committee was of the view that a special article on bilateral agreements was not necessary because such agreements continued to be binding on States and were not affected by the Convention against Discrimination in Education. Nevertheless, an alternative was considered to ensure that the Convention would not be interpreted as diminishing rights and guarantees granted by other bilateral treaties. It was therefore suggested that a safeguarding clause, similar to the one provided for in the draft international covenants on human rights, be inserted into the Convention.[180] The Working Party established by the Programme Commission re-examined, however, the question of inserting a new article into the Convention. In the amendments to the draft Convention that it proposed, it used a different wording from the one initially suggested. This entailed an expansion of the text to read as follows: "This Convention shall not have the effect of diminishing

178. Document ED/167 Add., Annex 2.
179. Document ED/DISC/5 Rev., p. 12.
180. Article 5, para. 2: "No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

the rights which individuals or groups may enjoy by virtue of agreements concluded between *two or more States* …". The draft article therefore covered both bilateral agreements and multilateral conventions. It also clarified matters further inasmuch as it provided that such treaties must not be not contrary to the *letter* or *spirit* of the Convention. In the original proposal, the article was more abstract as far as conditions were concerned in that it merely stated that treaties or agreements should not be against the spirit of the Convention.

The newly inserted article may be said to have set the seal on equality of opportunity and action to combat discrimination in education, since the obligations set forth in the Convention constitute what may be considered a minimum standard that might be enhanced by the provisions of other bilateral or multilateral instruments.

Article 11

This Convention is drawn up in English, French, Russian and Spanish, the four texts being equally authoritative.

This article (like Article 12 relating to the expression of consent to be bound, Article 14 relating to the entry into force of the Convention, Article 16 concerning denunciation of the Convention, Article 17 on communication of ratifications, acceptations, accessions and denunciations to States Members and not members of the Organization, and Article 19 concerning registration with the Secretariat of the United Nations) was adopted without debate during the preparatory meetings. This is not surprising because they are final clauses of a technical nature and have no political implications.

The 1969 Vienna Convention on the Law of Treaties states that: "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language" and its terms "are presumed to have the same meaning in each authentic text". Should there be a difference of meaning that cannot be removed by the usual rules of interpretation, "the meaning which

best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".[181]

The four languages listed as authentic reflect the fact that the Organization's official languages at the time were English, Spanish, French and Russian. By comparison, the Convention on Technical and Vocational Education, adopted in 1989, was draw up in six languages (English, Arabic, Chinese, Spanish, French and Russian), as the status of official language of the Organization had by then been granted to other languages.

Article 12

1. This Convention shall be subject to ratification or acceptance by States Members of the United Nations Educational, Scientific and Cultural Organization in accordance with their respective constitutional procedures.

2. The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

This provision reflects the custom in practice when the Convention was drafted. Accordingly, the Convention leaves it to States to determine under which procedure of domestic law they will express their consent to be bound by the Convention (the choice then was generally limited to ratification and acceptance). It also assigns the function of depositary (see Article 17) to the most senior officer of the organization under whose auspices the Convention has been adopted.

181. Article 33.

Article 13

1. This Convention shall be open to accession by all States not Members of the United Nations Educational, Scientific and Cultural Organization which are invited to do so by the Executive Board of the Organization.

2. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

This article illustrates the desire of this Convention's negotiators to ensure that it would be an instrument of universal scope, for it is open not only to UNESCO Member States but also to States that are not members. The approach taken by the drafters of the article must be seen in conjunction with comments on Article 9,[182] namely that the drafters of the Convention opted for uniform obligations under the Convention even if that meant accession by a smaller number of States Parties. The provision as it stands actually suggests that it was not really a matter of choosing between two different options but rather of combining them: the Convention should not be open to any unilateral modification in respect of any of the obligations established therein, but at the same time it was intended to bind as many States as possible. The goal of universality has to do with the very aim and purpose of the Convention and with what its implementation may mean for the future of millions of children.[183]

Accession, a procedure open to States that had not taken part in the negotiation – namely States not members of UNESCO in 1960 – is not, however, completely free but forms part of a process controlled by the Organization. To be specific, States not members must be invited to accede to the Convention by the Executive Board.

182. See *supra*.
183. See Juvigny (P.), *op. cit.*, p. 9.

This procedure may be understood only in the historic context of East-West opposition and the issue of divided States (Germany, Korea and Viet Nam). While the socialist bloc was in favour of multilateral conventions open to "all States" to permit accession by entities whose status as States was contested by the other camp, the Western bloc was in favour of controlling accession to those conventions precisely to prevent such accession. On this particular point, an amendment was submitted by the delegation of Czechoslovakia to enable all States to accede without restriction to the Convention. The amendment was rejected[184] because some Members pointed out that "as the other Conventions adopted by UNESCO provide for invitations to be extended by the Executive Board, this procedure should be maintained". It may be said, however, that apart from this trace of a past era, the negotiators' intention was indeed to make this Convention as universal as possible, in view of UNESCO's commitment to combating discrimination and promoting equality of opportunity in education.

Article 14

This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession.

Article 14, as mentioned above,[185] is one of the Convention's final clauses and concerns its entry into force. Attention should be drawn to one particular feature, however. The article provides that the "Convention shall enter into force three months after the date of the deposit of the third instrument of ratification". The number of instruments required may seem very small in comparison with the number of instruments of ratification required for the entry into force of

184. Document 11 C/PRG/36, p. 11.
185. See *supra*.

other conventions relating to discrimination [186] or, more generally, human rights.[187] An analysis of UNESCO's standard-setting instruments on education suggests, however, that this remark must be qualified somewhat. Under the other instruments, the number of instruments of ratification that must be deposited varies from two to ten. For instance, the entry into force of the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character (1948) requires the deposit of ten instruments, while several regional conventions concluded under the auspices of UNESCO require only two[188] (this low figure may be explained, however, by the small geographical coverage of those conventions). It may be noted, however, that the Convention on Technical and Vocational Education (1989) requires the deposit of the same number of instruments of ratification or accession as the Convention against Discrimination in Education. Although this number is undeniably small, it is nonetheless consistent with the approach adopted in UNESCO's other standard-setting documents and permitted the rapid entry into force of the Convention and effective action to combat discrimination in education.

Pursuant to the provisions of this article, the Convention came into force on 22 May 1962. In October 2003, there were 90 States Parties to the Convention (and 32 States Parties to the Protocol).

186. See, for example, Article 27 of the Convention on the Elimination of all Forms of Discrimination against Women, which provides that the Convention shall enter into force after the deposit of the twentieth instrument of ratification or accession.

187. The European Convention on Human Rights requires the deposit of ten instruments of ratification in order to come into force (Article 66, para. 2) while the 1989 Convention on the Rights of the Child requires twenty (Article 49, para. 1).

188. See the Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Latin America and the Caribbean (1974), the Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States (1981), and the Regional Convention on the Recognition of Studies, Diplomas, and Degrees in Higher Education in Asia and the Pacific (1989).

Article 15

The States Parties to this Convention recognize that the Convention is applicable not only to their metropolitan territory but also to all non-self-governing, trust, colonial and other territories for the international relations of which they are responsible; they undertake to consult, if necessary, the governments or other competent authorities of these territories on or before ratification, acceptance or accession with a view to securing the application of the Convention to those territories, and to notify the Director-General of the United Nations Educational, Scientific and Cultural Organization of the territories to which it is accordingly applied, the notification to take effect three months after the date of its receipt.

One question in the questionnaire sent to Member States before the Director-General drafted his report containing the draft convention concerning discrimination in education concerned trust and non-self-governing territories. It was worded as follows: "Do you consider it desirable that the proposed convention should contain a clause whereby contracting states may extend the application of the convention to all or any of the territories for whose international relations they are responsible?"[189] The majority of the Organization's Member States replied in the affirmative except for one State, which considered that the draft convention should not contain such a provision. The non-governmental organizations were unanimously in favour of such a provision. Two different proposals for the wording of the article were contained in the draft produced at the end of the consultation.

The first proposal simply stated that a State might apply the Convention "to all or any of the territories for whose international relations it is responsible" after it had declared such extension bynotification addressed to the Director-General.[190] This type of wording corresponds to the classic "colonial clause"

189. Document ED/167 Add. 1, Annex 1, p. 24.

190. Article 14 of the draft convention concerning discrimination in education: "Any State may, at the time of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, that this Convention shall extend to all or any of the territories for whose international relations they are responsible. The said notification shall take effect three months after the date of its receipt."

under which "any State may declare at any time that the Convention shall extend to all or any of the territories for whose international relations it is responsible".[191]

The second proposal was more detailed.[192] It stated the principle of the application of the Convention to all territories, while stressing that the State Party should secure the consent of the non-metropolitan territory concerned if that State's laws or constitutional practices so required. The second wording drew heavily on the provisions of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956)[193] and on the Convention on the Nationality of Married Women (1957).[194]

A third proposal had also been made during the preparatory work and it provided for the Convention to be applied "not only to metropolitan territories … but also to all non-self-governing, trust, colonial and other territories …".[195] In the end, the text of the Convention was based on the second form of words proposed in the draft convention concerning discrimination in education while taking the third proposal into consideration.[196]

As a result of the decolonization process, this article is far less important today than in the 1960s, even though there are territories to which it may still apply. The distinction between metropolitan territory and other territories is

191. Document ED/DISC/5 Rev., p. 12.

192. Article 14 of the draft (second proposal):

"1. This Convention shall apply to all the non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which a State Party to the Convention is responsible; the State concerned shall, subject to the provisions of paragraph 2 of this Article, at the time of ratification, acceptance or accession, declare the non-metropolitan territory or territories to which this Convention will apply *ipso facto* in consequence of such ratification, acceptance or accession.

2. In any case in which the previous consent of a non-metropolitan territory is required by the constitutional laws or practices of the State Party to this Convention or of the non-metropolitan territory, the State concerned shall endeavour to secure the needed consent of the non-metropolitan territory within the period of six months from the date of its ratification, acceptance or accession, and when such consent has been obtained, the State concerned shall notify the Director-General of the United Nations Educational, Scientific and Cultural Organization. This Convention shall apply to the territory or territories named in such notification three months from the date of its receipt by the Director-General."

193. Article 12.

194. Article 7.

195. Document ED/DISC/5 Rev., p. 12.

196. The inclusion of such an article as Article 15 is explained by the desire to "keep a firm line" and ensure that the principles contained in the Convention were not watered down. On this point, see Daudet (Y.) and Singh (K.), *op. cit.*, p. 15.

still made in many conventions,[197] but it seems very difficult today to justify any differential treatment in the field of human rights that might rest on such a basis although, conversely, the wide variety of situations may lead to the inclusion of such a clause in some instruments such as conventions with economic implications.

A comparison with the Convention on Technical and Vocational Education, adopted by the General Conference of UNESCO on 10 November 1989,[198] shows that the latter does not contain any clause relating to non-metropolitan territories. It is clear from this that there is no longer any reason to make such a distinction in this field today.

Article 16

1. Each State Party to this Convention may denounce the Convention on its own behalf or on behalf of any territory for whose international relations it is responsible.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation.

This article contains a denunciation clause under which States Parties may be released from their obligations. This option is recognized in most international treaties, including those on human rights. Denunciation is a unilateral act by the State making the denunciation, but it does not take immediate effect since 12 months' notice is required. That is a fairly common period in treaty practice[199]

197. See, for example, Article 63 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

198. See the Internet site: www.UNESCO.org.

199. See Article 56, para. 2, of the 1969 Vienna Convention on the Law of Treaties.

even though different examples can be found (six months under the United Nations Convention on the Law of the Sea and five years under the European Social Charter, for example). By comparison, the amount of notice to be given under the Convention on Technical and Vocational Education[200] is exactly the same as under this Convention. It may also be noted that the wording used in Articles 11 and 12 of the Convention on Technical and Vocational Education differs only very slightly from that used earlier in Articles 16 and 17 of the Convention against Discrimination in Education.

Article 17

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States Members of the Organization, the States not members of the Organization which are referred to in Article 13, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance and accession provided for in Articles 12 and 13, and of the notifications and denunciations provided for in Articles 15 and 16 respectively.

In accordance with established and very widespread practice, the chief administrative officer of the organization within which a multicultural convention has been adopted is assigned the role of depositary of the instrument. The Vienna Convention on the Law of Treaties provides that: "The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance."[201] The depositary keeps custody of the original text of the treaty and registers it with the Secretariat of the United Nations (see Article 19 below), receives the instruments in which States establish their intention to be bound by the treaty and also notifications of denunciations, and is responsible for informing other States of such events in the life of the instrument concerned.

200. Article 11.
201. Article 76.

Article 18

1. This Convention may be revised by the General Conference of the United Nations Educational, Scientific and Cultural Organization. Any such revision shall, however, bind only the States which shall become Parties to the revising convention.

2. If the General Conference should adopt a new convention revising this Convention in whole or in part, then, unless the new convention otherwise provides, this Convention shall cease to be open to ratification, acceptance or accession as from the date on which the new revising convention enters into force.

The General Conference of UNESCO may revise the Convention. Under the rules laid down in its Rules of Procedure, it may adopt, by a majority vote of its Member States, "a new convention revising this Convention in whole or in part". This somewhat ambiguous wording is to be understood as providing an alternative between, on the one hand, the substitution of a wholly new convention for the one adopted in 1960 and, on the other, a revision of the 1960 Convention in part by means of an additional protocol distinct from the original instrument. Neither of these two options is straightforward for, as Ch. Rousseau has pointed out, "the procedure, orthodox though it is, has its disadvantages in that it may well lead to the coexistence of two or more sets of standards if all States Parties to the original Convention do not become parties to the subsequent convention(s)" and, furthermore, "trying to amend treaties with due regard for the intention of each and every Contracting Party is like trying to square the circle".[202]

This problem was not lost on the delegates attending the meetings of the Special Committee of Governmental Experts. The question of whether the new convention "would take the place of the old one in relations between States" was raised,[203] but that option was rejected because it was quite rightly pointed

202. Rousseau (Ch.), *Droit international public, tome 1: Introduction et Sources*, Paris, Sirey, 1970, pp. 232-233.
203. Document ED/DISC/5 Rev., p. 12.

out that: "the automatic substitution of the new instrument for the old, if not ratified by the State, would be contrary to the principles of international law and to the provisions of the Organization's Constitution".[204] The fact is that while the General Conference may adopt the text of an international convention or a protocol amending an existing convention, it may not in any way impose observance thereof on States even if they are Members of the Organization. The principles of consensus and of the relative effect of treaties mean that the State is bound only by instruments to which it has expressly consented to become a party.

A revision of the Convention, whether in whole or in part, may result in there being a number of different legal systems for combating discrimination in education. The fact is that States refusing to become parties to the new instrument would continue to be bound by the original version of the Convention while, conversely, States ratifying the new treaty or acceding to it would be bound only by the Convention as amended or by the Convention that replaces it, as the case may be. It is easy to imagine the problems that would arise from such a situation. It should be pointed out, however, that the provisions of Article 18 have never been invoked with a view to changing the content of the Convention, the 1962 Protocol instituting the Conciliation and Good Offices Commission[205] having merely established a complementary mechanism without affecting the integrity of the Convention.

Article 19

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 102, paragraph 1, of the Charter of the United Nations provides that: "Every treaty and every international agreement entered into by any Member

204. Document ED/DISC/5 Rev., p. 12.
205. See *supra*.

of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it," and paragraph 2 adds that: "No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

This provision is intended to ensure that international conventions are publicized. It goes without saying that all conventions concluded under the auspices of or within organizations belonging to the United Nations family contain a provision on compliance with this registration requirement.

The Convention was registered with the Secretariat of the United Nations on 29 May 1962 under No. 6193 (together with the 1962 Protocol). It was published in Volume 429 of the United Nations Treaty Series (the Protocol is in Volume 651).

Done in Paris, this fifteenth day of December 1960, in two authentic copies bearing the signatures of the President of the eleventh session of the General Conference and of the Director-General of the United Nations Educational, Scientific and Cultural Organization, which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in Articles 12 and 13 as well as to the United Nations.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization during its eleventh session, which was held in Paris and declared closed the fifteenth day of December 1960.

IN FAITH WHEREOF we have appended our signatures this fifteenth day of December 1960.

The President of the General Conference **The Director-General**

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Conclusion

The Convention against Discrimination in Education adopted in 1960 is one of the pillars of UNESCO's standard-setting activity in education. It is of particular interest because of the scope and importance of the field concerned and the existence of a monitoring mechanism. The mechanism has of course been beset by a number of operational problems, but they may be explained by the technical obstacles encountered by many States in gathering the information that they have been asked to provide.

Putting UNESCO's standard-setting activity since 1960 into perspective, two significant points come to light: firstly, the limitations of the Convention and, secondly, its enduring validity.

As the French* title of the Convention clearly indicates, it concerns education in the narrower, formal sense (*enseignement*) only. Now while formal education issues have of course continued to be of concern to UNESCO,[206] the outlook has broadened to encompass lifelong education for all.[207] Education, or schooling, in the strict sense, is therefore no more than one aspect among others of the overall education that each person should receive and acquire.

* [See translator's note, p. ...].

206. Various conventions and recommendations were adopted after 1960 concerning particular aspects of education (technical and vocational education, recognition of diplomas and degrees in higher education, etc.).

207. See, for example, Delors (J.), *Learning: The Treasure Within, Report to UNESCO of the International Commission on Education for the Twenty-first Century*, mentioned earlier.

The Convention nonetheless remains fully relevant and topical. Schooling is a vital stage and the fundamental building-block in a person's education. Furthermore, as the goals and objectives of the Convention have unfortunately not yet been fully attained,[208] the obligations enshrined therein must be constantly brought to mind to ensure that each person effectively has access to quality education in all countries, without any distinction whatsoever among individuals. Only on that condition will the objective that "all the children of the world should have the right to equal opportunity" be achieved,[209] and only through the universal provision of education free of discrimination will it be possible to make "full use of all the talent and intelligence available as an essential contribution to continued moral and cultural progress and economic and social advancement".[210]

208. See the *World Education Report (2002)* and the *Global Education Digest 2003*, mentioned earlier.

209. Piaget (J.), "The Right to Education in a Modern World" in *Freedom and Culture*, quoted by Daudet (Y.) and Singh (K.), *The Right to Education: An Analysis of UNESCO's Standard-setting Instruments, op. cit.*, p. 9.

210. Recommendation concerning the Status of Teachers (1966); see Internet site: www.UNESCO.org.

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CL/3631 Annex II, pp. 23-25 : State of ratifications, acceptances, approvals, signatures without reservation as to ratification, accession and notification of succession, as at 30 June 2002. Convention against Discrimination in Education.

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UNESCO/ED/167 : Preliminary report prepared in accordance with the provisions of Article 10.1 of the Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution.

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The right to education is an integral part of UNESCO's Constitutional mission. UNESCO has the mandate of instituting collaboration among nations to "…advance the ideal of equality of educational opportunity without regard to race, sex, or any distinctions, economic or social….". The *Convention Against Discrimination in Education* (1960) which is UNESCO's first major international instrument in the field of education, embodies this mission.

The purpose of the Convention is not only the elimination of discrimination in education, but also the adoption of measures aimed at promoting equality of educational opportunities and treatment in this field. Decisions taken by UNESCO's Executive Board recognize the Convention as a key pillar in the Education for All (EFA) process.

The Convention is most pertinent in today's world in order to ensure full respect, in law and in fact, for the fundamental principles of non-discrimination and of equality of educational opportunities. Normative action based upon the Convention is indeed very valuable for universalizing access to education without discrimination or exclusion.

The present publication on the *Commentary on the Convention Against Discrimination in Education*, written by Professor Yves Daudet and Professor Pierre-Michel Eisemann, of the University of Paris I (Sorbonne), presents a detailed analysis, article by article, of the scope and the significance of the text of the Convention. It provides a better understanding of the nature and of the extent of the right to education as enshrined in the Convention and legal obligations of Member States.

The Commentary constitutes a precious source not only for public authorities responsible for education development and for achieving Education for All, but also for law courts and tribunals as well as for researchers, professional bodies and intellectual community at large.