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Wojciech Burek

**Time to Wake Up: Reservations to the Istanbul Convention
and the Role of GREVIO**

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Berlin Potsdam Research Group
International Law – Rise or Decline?

Thielallee 69
14195 Berlin

info@kfg-intlaw.de
+49 (0)30 838-61521
www.kfg-intlaw.de

Time to Wake Up: Reservations to the Istanbul Convention and the Role of GREVIO

Wojciech Burek*

Abstract:

The question of whether the monitoring bodies have competence concerning reservations (alone or shared with state parties) is at the center of the discussion of reservations to human rights treaties that has occupied many international legal scholars over the last few decades. The Istanbul Convention's treaty monitoring body, the Group of experts on action against violence against women and domestic violence (GREVIO), is the only human rights treaty monitoring and adjudication body with a direct competence (one that stems directly from the treaty) concerning reservations. However, as practice to date shows, it does not make much use of this power. This is a big disappointment considering all the efforts of other bodies in the past and the doctrinal positions of various scholars. The main aims of the article are threefold: to present GREVIO's practice to date concerning reservations, to provide a brief historical overview of how other human rights treaty bodies have approached their role concerning reservations, and finally, to attempt to explain why GREVIO has abandoned a more proactive position on reservations.

*Assistant Professor at the Institute of European Studies, Jagiellonian University, Krakow, Poland. Currently (2021-2022) Humboldt Fellow at the MenschenRechtsZentrum of the University of Potsdam. E-mail to: w.burek@uj.edu.pl.

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1. Introduction

Back in 1995, Liesbeth Lijnzaad, concluding her book on reservation to UN human rights treaties, proposed draft model reservations clauses, which could stop or at least significantly reduce the abuse of the right to formulate reservations in future human rights treaties.¹ The volume and extent of this abuse in the context of UN human rights treaties were thoroughly documented in the first parts of the same book. On a relatively smaller scale, the problem with questionable reservations also applies to treaties adopted under regional human rights systems.² The first draft clause proposed by Liesbeth Lijnzaad contains a bold prohibition, and the second one lists provisions to which reservations are allowed. In her comments to the second option, the author suggested that reservations should not be allowed to the core provisions or those concerning the functioning of the monitoring body of a given treaty. This second clause was followed by several detailed options, including the sunset provision, under which reservations have limited validity, with five years given as an example. Analyzing the reservations clause of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (hereafter: the Istanbul Convention or the Convention),³ its drafters followed this recommendation, as well as a very rare previous practice, with the other Council of Europe treaties.⁴

Article 78 (1) of the Istanbul Convention states that *[no] reservation may be made in respect of any provision of this Convention, with the exceptions provided for in paragraphs 2 and 3*. The partly available *travaux préparatoires* of the Convention contain the explanation of the selection of provisions to which reservations are allowed. The provisions listed in Article 78 (2) and Article 78 (3) are those towards which unanimous agreement was not reached among delegations of states responsible for drafting the treaty.⁵ This was later confirmed in the Explanatory Report, which also added that *[t]hese reservations aim at enabling the largest possible ratification of the Convention, whilst permitting Parties to preserve some of their fundamental legal concepts*.⁶ This is in line with the commonly accepted observation that reservations are *a tool for increasing flexibility in treaty design and flexibility through reservations makes it possible for more states to ratify*.⁷ Reservations are allowed only to directly listed provisions that cannot be seen as reflecting the subject and purpose of the Convention or, in other words, not its core provisions. The list does not include

¹ See Liesbeth Lijnzaad, *Reservation to UN Human Rights Treaties: Ratify and Ruin?*, Martinus Nijhoff 1995, pp. 421-423.

² See, i.a., Andrés E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, *American University International Law Review*, Vol. 16 (2001), Issue 2, pp. 269-313; Jochen Abr Frowein, *Reservations to the European Convention on Human Rights*, in: Franz Matscher, Herbert Petzold (eds.), *Protecting human rights: the European dimension: studies in honour of Gérard J. Wiarda*, Heymanns 1988, pp. 193-200.

³ Council of Europe Treaty Series (E.T.S.) No. 210.

⁴ Both the 1967 European Convention on the Adoption of Children (E.T.S. No. 58) and the 1975 European Convention on the Legal Status of Children born out of Wedlock (E.T.S. No. 85) contain provisions limiting the temporal validity of reservations but without clarification concerning the legal effect of no action before their expiration date. Only the 1999 Criminal Law Convention on Corruption (E.T.S. No. 173) explicitly stated that failure to act before the expiration date *shall cause declarations or reservations to lapse* (Article 38 (2)) – see Jörg Polakiewicz, *Treaty Making in the Council of Europe*, Council of Europe Publishing 1999, p. 101.

⁵ Reports of meetings of the Ad Hoc Committee for preventing and combating violence against women and domestic violence (CAHVIO) - available at <https://www.coe.int/en/web/istanbul-convention/cahvio> (accessed: 1.02.2022). See in particular: Report of the 8th Meeting of CAHVIO - CAHVIO (2010) 27 rev., para. 7, p. 3.

⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, <https://rm.coe.int/1680a48903>, para. 381, p. 64 (accessed: 1.02.2022).

⁷ Kelebogile Zvobgo, Wayne Sandholtz, Suzie Mulesky, *Reserving rights: Explaining Human Rights Treaty Reservations*, *International Studies Quarterly*, Vol. 64 (2020), Issue 4, pp. 785-786.

provisions concerning the functioning of the Istanbul Convention's treaty monitoring body, which is the Group of experts on action against violence against women and domestic violence (hereafter: GREVIO). Article 79 contains the sunset clause. Every reservation formulated under Article 78 (2) and (3) is valid for five years, with a possibility for further renewals for the same period. The whole procedure of renewal is regulated in a detailed way in Article 79 (2), and no action by the party at any point may result in the expiration of the reservation(s).

At this point, one can argue that the drafters of the Istanbul Convention learned a lesson from the past and chose the second best (next to full prohibition) option regarding the reservation system. Furthermore, the whole system seems to be additionally safeguarded by the direct competence of GREVIO, which derives from Article 79 (3): *[i]f a Party makes a reservation (...) it shall provide, before its renewal or upon request, an explanation to GREVIO, on the grounds justifying its continuance.* The question of whether the monitoring bodies have competence concerning reservations (alone or shared with state parties) is at the center of the discussion of reservations to human rights treaties that has occupied many international legal scholars over the last few decades. In the case of the Istanbul Convention, we are dealing with a unique situation, as GREVIO is the only human rights treaty monitoring and adjudication body with a direct competence concerning reservations.

In the light of the above, two immediate questions arise: "Do the above-signaled safeguards and limitations on reservations positively affect the practice of states?" and "Is GREVIO making use of its authority towards reservations?" The first two sections of this article provide answers to these two questions. Noting GREVIO's surprising inactivity regarding reservations, the next two sections will be devoted respectively to presenting practices in this area of other human rights treaty monitoring bodies and the UN International Law Commission position on the subject, and to attempt to explain why GREVIO has abandoned a more proactive position on reservations.

2. States' practices on reservations

Detailed analysis of the provisions towards which reservations may be formulated (as listed in Article 78), as well as the practices of states regarding reservations, can be found in my other publications.⁸ From the perspective of the objectives of this article, repeating this in length is not necessary. Therefore, by way of introduction, I will only present a few issues concerning Article 78 and Article 79, and their practical applications which are relevant for further analysis.

To date, of the 45 entities that have at least signed the Istanbul Convention, 24 States have formulated a reservation (or reservations).⁹ None of the reservations formulated so far have been objected to by other parties to the Convention. In principle, it appears that the vast majority of them seems to be admissible. However, it cannot be ruled out that some of the submitted reservations may give rise to doubts. This will especially be the case when there is a direct reference to national law in the reservations.¹⁰ Only after closer examination of this reference to national law can a full

⁸ Wojciech Burek, *Reservations and declarations under the Istanbul Convention*, in: Johanna Niemi, Lourdes Peroni and Valdislava Stoyanova (eds.), *International Law and Violence Against Women: Europe and the Istanbul Convention*, Routledge 2020, pp. 277-295; Wojciech Burek, *Article 78-79*, in: Sara De Vido, Micaela Frulli (eds.), *Commentary to the Istanbul Convention*, Edward Elgar 2022, forthcoming.

⁹ The current state of ratification, and the text of all reservations and declarations are available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=210> (accessed: 1.02.2022).

¹⁰ This is the case, for example with Germany's reservation to Article 44 (1) (e): *In accordance with Article 78, paragraph 2, of the Convention, the Federal Republic of Germany reserves the right to establish jurisdiction for offences committed abroad by persons who have their habitual residence in the territory of the Federal Republic*

assessment be made. Moreover, an analysis of the national law and practical consequences of a given reservation (based, i.a., on a dialogue with the State) may also help assess whether the continued maintenance of the reservation is necessary and whether there may not be alternative solutions. One possible example of this kind of concern is a Polish reservation formulated to Article 30 (2) (discussed below), which was later modified (also not without controversy) and renewed at the beginning of 2021. Poland was not the only one to renew its reservations. The current practice of states which formulated reservations and for which the Convention entered into force more than five years ago, shows that seven out of ten of them decided to uphold all of their reservations.¹¹ Three states decided to withdraw some of their reservations and uphold others,¹² and finally, Poland modified its reservations not only to Article 30 (2), but also to Article 44 (1) (e).

Coming back to the concerns regarding the Polish reservation formulated to Article 30 (2) (supplementary state compensation for the victims of violence), its initial version stated that this provision of the Convention

shall be applied solely in regard to victims who are citizens of the Republic of Poland or the European Union and in accordance with a procedure provided for by national law. Modified and renewed in 2021, this version stipulates that Article 30 (2) shall be applied solely in regard of victims whose habitual residence is the Republic of Poland or other Member States of the European Union and in accordance with a procedure provided for by national law.

The discriminatory effect of both versions of this reservation raises various concerns when interpreted not in isolation from the other provisions of the Convention and other international law standards. They might be considered incompatible with one of the core provisions, namely Article 4 (3) of the Istanbul Convention, which enshrines the prohibition on discrimination and includes a non-exhaustive list of grounds, including migration status, based on which discrimination is not allowed. Furthermore, Poland is a party to many human rights treaties which prohibit discrimination and require equal treatment. Even if one can argue that under a literal interpretation of Article 19 (c) of the Vienna Convention on the Law of Treaties, if the reservation relates to a provision to which reservations are expressly permitted, then the test of compatibility of reservation with the object and purpose of the treaty does not apply, and consequently the State is entirely free to formulate the reservation and determine its scope, the situation is different with a modified version of the reservations. There are strong arguments that a modification/amendment which further restricts the application of the Convention to the reserving state is prohibited. First of all, the procedure for renewal of reservations, as adopted in the Istanbul Convention, does not provide for notification of a State Party's decision to this effect to the other States Parties, and in consequence, this reservation

of Germany (Article 44, paragraph 1.e) only pursuant to the conditions stipulated in Section 7 (2) no. 2 of the German Criminal Code. German criminal law does not contain any provision that implements Article 44, paragraph 1.e, in its entirety, i.e. there is no provision pursuant to which offences committed abroad by foreigners or stateless persons who have their habitual residence in Germany are in principle always subject to German criminal law. The kinds of cases relevant in practice are covered by section 7 (2) no. 2 of the German Criminal Code, whereby German criminal law is applicable to offences committed abroad if the offender was a foreigner or stateless at the time of the offence and is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited. However, it is conceivable that exceptional cases may arise where such prerequisites are not met.

¹¹ Andorra, Denmark, Finland, France, Monaco, Slovenia, Sweden.

¹² Poland (a reservation to Article 58), Serbia (reservations to all three paragraphs of Article 44, towards which there is the possibility to formulate reservations) and Malta (a reservation to Article 59). In the latter case, Malta withdrew this reservation a few months before the notification of its will to renew other reservations.

cannot be objected to. Secondly, the modification of the scope of the treaty by a reservation is an exception to the principle of the integrity of treaty obligations, and consequently, such an exception (as well as others) may not be interpreted broadly. Allowing free modification of reservations after 5 years or more from the moment the treaty in question is binding is a significant extension of the exception. And this is the case with the modified Polish reservation, which partly further restricted the application of the Convention (excluding from the possibility of receiving compensation, victims who hold the nationality of Poland or another EU state but do not have a permanent residence in that state). The above is also contrary to the practice of the Council of Europe. Jörg Polakiewicz outlining the Council of Europe's practice regarding modification of reservations noted:

*Reservations made at the time of ratification, acceptance, approval or accession may only be withdrawn, partially or wholly. Modifications which amount to an extension of their scope of application will not be accepted (...) Allowing such modifications would create a dangerous precedent which would jeopardise legal certainty and impair the uniform implementation of European treaties.*¹³

In addition to reservations, four states have also formulated controversial interpretative declarations, conditioning the application of the Convention to its compatibility with national law. The Convention remains silent on declarations. The 'Sharia-style' declaration by Poland reads: *The Republic of Poland declares that it will apply the Convention in accordance with the principles and the provisions of the Constitution of the Republic of Poland.* By the term 'sharia-style' I refer to the numerous reservations of Islamic states which have conditioned the application of the human rights treaty on its compliance with Sharia law.¹⁴ The Polish declaration was objected to by six states.¹⁵ All of them pointed out that this is *de facto* a general and inadmissible reservation. Similar conclusions can be drawn concerning, written in a slightly moderately way, the Croatian declaration.¹⁶ Latvia and Lithuania have formulated almost the same declarations as to the Polish declaration while signing the Convention, however, both states are not yet parties to the Convention.

More than half of the states that have at least signed the Istanbul Convention have formulated reservations. Poland's reservation to Article 30 (2), considering in particular how it was modified after 5 years, does raise at least some doubts as to whether it is admissible. Unfortunately, the lack of an explicit prohibition on interpretive declarations has resulted in a few states seemingly taking advantage of this opportunity to circumvent the generally restrictive provisions on reservations. It would seem that at least the two above circumstances would require a position to be taken by GREVIO, which under Article 79 (3) is formally part of the reservation system of the Istanbul Convention. Also in the case of the remaining reservations and declarations, one would expect a

¹³ Jörg Polakiewicz, *supra* note 4, p. 96.

¹⁴ Andrea Sassi, *General reservations to multilateral treaties*, *Comunicazioni e Studi*, Vol. 22 (2002), pp. 91–110.

¹⁵ Austria, Finland, the Netherlands, Norway, Sweden and Switzerland.

¹⁶ Which reads: *The Republic of Croatia considers that the aim of the Convention is the protection of women against all forms of violence, as well as the prevention, prosecution and elimination of violence against women and domestic violence. The Republic of Croatia considers that the provisions of the Convention do not include an obligation to introduce gender ideology into the Croatian legal and educational system, nor the obligation to modify the constitutional definition of marriage. The Republic of Croatia considers that the Convention is in accordance with the provisions of the Constitution of the Republic of Croatia, in particular with the provisions on the protection of human rights and fundamental freedoms, and shall apply the Convention taking into account the aforementioned provisions, principles and values of the constitutional order of the Republic of Croatia.*

position to be taken by a body whose task it is to analyze thoroughly how the Convention is implemented by its state parties. Unfortunately this is not the case.

3. GREVIO's practice on reservations

Under Article 79 (3) GREVIO is directly involved in the reservation system of the Istanbul Convention. First of all, it may request a party to provide an explanation of the grounds behind the decision to renew the reservations. However, even without the request from GREVIO, parties are obliged to provide these reasons when renewing reservations.¹⁷ GREVIO's core competence is to consider periodic reports submitted by parties. The initial report should concern legislative and other measures giving effect to the whole Convention by the given party (Article 68 (1)). Subsequent reports may concentrate only on selected provisions of the Istanbul Convention (Article 68 (3)). Among other competencies of GREVIO, is the adoption of general recommendations on the implementation of the Convention (Article 69). It seems that it is within these two procedures that there is room for GREVIO to take a position on reservations (and declarations).

The General Recommendations procedure has been used only once.¹⁸ However, to date GREVIO has taken a position - so-called baseline evaluation reports - on the initial reports submitted by twenty states, including ten which formulated reservations and/or declarations. It was these reports that formed the basis of the analysis. Its findings can be considered accurate and not premature because the ten indicated reports cover all possible situations of interest. By considering these reports, GREVIO was able to look at the practice of formulating reservations to all provisions listed in Article 78 (2) and (3), as well as the undoubtedly controversial (six states filed objections considering it a *de facto* reservation) Polish interpretative declaration. Some of the GREVIO reports were adopted before the deadline for the possible extension of reservations, and the others after the deadline. In the latter case, there are examples of the extension of validity, modification and withdrawal of reservations. One report deals with a situation where the state extending the reservation did not give reasons for its decision. Finally, in each of the cases, including in particular where the scope of the reservation and its implications may have been unclear, GREVIO had the opportunity to engage in dialogue with the State and clarify any doubts.

So far, GREVIO's general approach to reservations can be described as very restrained, inconsistent, and even chaotic in some cases. GREVIO's restraint has been clearly seen. Except for one instance where it analyzed the implications of a reservation in quite some detail and explicitly called for its reconsideration, GREVIO generally only notes reservations or is completely silent on them. The only case for which GREVIO addressed the reservation in detail is Monaco's reservation to Article 59, concerning the residence status of the victims of violence. GREVIO devoted as many as five paragraphs of its report to analyzing the implications of this reservation.¹⁹ It set out its position in para. 164:

GREVIO understands Monaco's reservation to be justified by the fact that Monaco's legal system (...). GREVIO nevertheless observes that, in practice, if a marriage or a relationship is dissolved,

¹⁷ On two occasions GREVIO seemed to suggest that reasons should be given only on its request (see GREVIO Baseline Evaluation Report – Serbia – GREVIO/Inf (2019) 20, p. 9 and GREVIO Baseline Evaluation Report – Finland – GREVIO/Inf(2019)9, p. 9). However, neither state practice nor a literal interpretation of Article 79 (3) support this position.

¹⁸ GREVIO General Recommendation No. 1 on the digital dimension of violence against women, GREVIO(2021)20.

¹⁹ GREVIO/Inf(2017)3, paras. 161-165.

a foreign woman may run the risk of being unable to renew her residence permit if she finds herself without the means to prove sufficient financial resources. GREVIO is concerned about the consequences that this may have for women who are victims of violence in terms of a higher risk of exposure to violence, an obstacle to pressing charges and the problems that they may face in regaining control of their lives, particularly after divorce proceedings.

Unfortunately, in the vast majority of cases, only the introduction to the report lists the formulated reservations and then, occasionally some reservations (but not all)²⁰ are repeated later in the main part of the report. Examples of merely listing reservations in the introduction without referring to them later are the reports concerning France²¹ Finland²² and Sweden.²³

In the cases of Denmark,²⁴ Monaco,²⁵ Serbia,²⁶ Malta,²⁷ Poland²⁸ and Slovenia,²⁹ GREVIO listed all reservations in the introductory parts to the respective reports and then referred to some of them (omitting others) in the main part of the reports. The references are at varying levels of detail but do not even come close to the comprehensiveness of the analysis towards Monaco's above-mentioned reservation. In some cases there is only a statement of fact of the reservation, some circumstances behind it are given,³⁰ and sometimes they are supplemented by a general call to ensure the widest

²⁰ With the exception of the report on Andorra. This state formulated a reservation only to Article 30 (2) and this fact was mentioned in the introduction (p. 10), and then was mentioned again in the main part of the report (paras. 144-145) - GREVIO/Inf(2020)18.

²¹ The only reference to reservations is as follows: *France signed the Istanbul Convention on 11 May 2011, the day it was opened for signature, and ratified it on 4 July 2014. At the time of the deposit of its instrument of ratification and in accordance with Article 78, paragraph 2, of the convention, France made reservations to Articles 44 and 58. The convention entered into force for France on 1 November 2014* - GREVIO/Inf(2019)16, p. 9.

²² The main reference to reservations is as follows: *Finland ratified the Istanbul Convention on 17 April 2015. In accordance with Article 78, paragraph 2, of the convention, Finland reserves the right not to apply the provisions laid down in Article 55, paragraph 1, in respect of Article 35 of the convention* - GREVIO/Inf(2019)9, p. 9.

²³ The only reference to reservations is as follows: *Sweden ratified the Istanbul Convention on 1 July 2014. In accordance with Article 78, paragraph 2, of the convention, Sweden reserves the right not to apply the provisions laid down in Article 44, paragraph 3, and Article 58 of the convention* - GREVIO/Inf(2018)15, p. 10.

²⁴ GREVIO/Inf(2017)14, p. 10 and para. 173.

²⁵ Supra note 16, p. 8, para. 105 and 161-165.

²⁶ GREVIO/Inf(2019)20, p. 9 and paras. 164-165.

²⁷ GREVIO/Inf(2020)17, p. 10 and para. 148, para. 150 and para. 238.

²⁸ GREVIO/Inf(2021)5, p. 10 and paras. 181-182 and para. 297.

²⁹ GREVIO/Inf(2021)7, p. 9 and para. 230, paras. 351-352, and para. 372.

³⁰ See, i.a., the report regarding Serbia: 164. *As regards compensation paid by the state, GREVIO notes that Serbia entered a reservation with regard to Article 30, paragraph 2. As a result, victims of violent crimes, which includes victims of violence against women and domestic violence, cannot seek compensation from the state. In addition, Serbia has not ratified the European Convention on Compensation of Victims of Violent Crimes, which it signed in October 2010, or Malta: 148. Malta has reserved the right not to apply Article 30, paragraph 2, of the convention, choosing instead to apply its legislation regarding state compensation under the Criminal Injuries Compensation Regulations, which implement the EU Directive relating to compensation to crime victims. These regulations allow for the payment of up to €23 300 to the victim of a violent crime. The violent crimes referred to in the regulations, however, do not include forced abortion (Article 241 of the Criminal Code), enforced sterilisation (Article 251F) and private violence (Article 251). State compensation would thus not be granted in these cases. To receive state compensation, the victim should submit an application, along with a police report, within one year of when the violent crime was committed. If the court orders compensation of the victim, the government is subrogated in the rights of the victim against the perpetrator and will be considered part of the civil damages sustained. No evidence has been provided, however, as to whether such compensation has been awarded to women for the offences provided under the Istanbul Convention (other than those offences that have previously been commented on)* - GREVIO/Inf(2019)20.

possible implementation of the Convention and/or by a call for further studies on the consequences of the current state of the law³¹.

What is striking is the fact that GREVIO does not develop its analysis of the reservations formulated to Articles 44 (jurisdiction) and 58 (statute of limitation) of the Convention. GREVIO – in six cases so far – after noting the reservations in the introduction, has remained silent about them in the main part of the reports.³² Unfortunately, GREVIO also remains indifferent towards the Polish “Sharia-style” interpretative declaration, as well as the doubtful way that Poland modified its reservation to Article 30 (2).³³ A final example of GREVIO’s restrained or even indifferent position towards reservation is the way this body has reacted towards renewal of reservations without providing explanation. In the case of Slovenia, GREVIO only declared that it was not able to examine the implementation of the provisions towards which renewed reservations had been formulated.³⁴ It seems that in such cases GREVIO should make a direct request for the justification (to which it is entitled under Article 79 (3)), or alternatively, seek clarification from the representatives of the State concerned during the procedure of examining the report. At the moment, GREVIO is indirectly sending a signal that the lack of justification regarding the renewal of reservations may even be advantageous for the state in question, or at least not meet with any stronger reactions from GREVIO. This undermines the idea that such reservations to the Istanbul Convention should only be of a temporary nature.

The above analysis alone is a confirmation of GREVIO’s lack of consistency and even chaotic approach towards reservations. Another example is the manner in which GREVIO has communicated the need to provide reasons behind the decision to renew reservations in cases where the report had been adopted before the 5-year validity period of reservations ended. For example, with regard to Malta, GREVIO simply noted the following:

GREVIO notes that under Article 79, paragraph 3, of the Istanbul Convention, the Maltese authorities will be required to provide GREVIO with an explanation of the grounds for the

³¹ See, i.a., the report regarding Poland and its reservation to Article 30 (2): 182. *GREVIO strongly encourages the Polish authorities to take all available measures in order to ensure that wider use is made of the legal possibilities to grant compensation to women victims of any of the forms of violence covered by the Istanbul Convention, in particular by examining and addressing the reasons for the low number of compensatory measures ordered in domestic violence cases under Article 46, paragraph 1, of the Polish Criminal Code. GREVIO furthermore encourages the Polish authorities to collect data on the number of women victims who have requested and obtained compensation either from the perpetrator or from the state - GREVIO/Inf(2021)5.*

³² This was the case for Monaco, Sweden, Serbia, Malta, Poland, and Slovenia.

³³ GREVIO limited itself to stating: 181. *The reservation originally entered by Poland in respect of Article 30, paragraph 2, was modified in January 2021 to allow the application of this provision in respect of anyone habitually residing in Poland or another member state of the European Union, whereas previously it was limited to nationals of Poland or another EU member state. According to the explanation provided, this modification was due to a change in national legislation which provides the legal basis for the granting of state compensation - GREVIO/Inf(2021)5.*

³⁴ For instance with regards to a reservation to Article 55, GREVIO stated: 352. *The initial reservation for a period of five years was renewed for a period of the same duration by a declaration from the Slovenian authorities in February 2020. As the Slovenian Government did not provide an explanation on the grounds justifying the continuation of the reservation as required by Article 79, paragraph 3, of the convention, GREVIO was not able to examine the implementation of Article 55 of the Istanbul Convention in relation to minor offences - GREVIO/Inf(2021)7.*

*reservation entered in relation to state compensation (Article 30, paragraph 2) upon expiry of its period of validity and prior to its renewal.*³⁵

However, in two other cases (Finland and Serbia) GREVIO added a reminder about the temporary nature of the reservations and its future role in the procedure:

*[t]his reservation is valid for a period of five years from the day of the entry into force of the convention in respect of Serbia and may be renewed. GREVIO may request an explanation of the grounds on which continuance of the reservation is justified and may make suggestions and proposals accordingly. GREVIO takes the view that working towards the lifting of reservations in order to ensure full implementation of the convention's provisions is an integral element of the evaluation procedure.*³⁶

Similar wording, including the role of GREVIO, was not repeated in any other report. This lack of consistency is not the result of a change in practice over the years. Although the reports on Finland and Serbia were adopted in the same year (2019), in the reports adopted later, there are no such references. Similarly, in the case of the very detailed analysis of Monaco's reservation, this had taken place in 2017, and after that date GREVIO adopted nine reports on states that had also made reservations, and in these it did not repeat such a detailed analysis.³⁷

GREVIO's inconsistent and sometimes even chaotic practice to date confirms its distancing from the issue of reservations and its failure to see its role as more dynamic. It also proves that to date no pattern has been developed as to how to address reservations in GREVIO's reports. It seems that in light of the general role to be fulfilled by this body (to monitor the implementation of this Convention by the Parties - Article 66 (1)), and in conjunction with its direct competence towards reservations (Article 79 (3)), one could expect from GREVIO, in the case of all reservations, analyses similar to the one carried out for Monaco's reservation to Article 59.

It is also incomprehensible not to take a stand on Poland's dubious interpretative declaration. One consequence of this omission is that a substantial part of Poland's response to the GREVIO report is based on that declaration. The introductory remarks to this response already noted:

[w]hen ratifying the Convention, Poland made the following declaration: "The Republic of Poland declares that it will implement the Convention in accordance with the principles and provisions of the Constitution of the Republic of Poland". This declaration means that Poland has reserved the right to implement the Convention in accordance with the Constitution of the Republic of Poland, in particular to take measures for its implementation in accordance with the following constitutional principles (...).

³⁵ GREVIO/Inf(2020)17, para. 150.

³⁶ GREVIO/Inf(2019)20, p. 9. An identical paragraph was also included in the report on Finland - GREVIO/Inf(2019)9, p. 9.

³⁷ In the case of Monaco, there were detailed comments concerned a reservation to article 59 (residence status of the victim). A reservation to the same provision was also formulated (and subsequently renewed) by Slovenia. As already mentioned, Slovenia did not provide reasons for this decision, and GREVIO limited itself to stating that it was therefore unable to assess the situation – see: GREVIO/Inf(2021)7, para. 372.

The subsequently mentioned provisions of the Polish Constitution are then repeatedly referred to when rejecting or disputing many of the GREVIO's recommendations on particular provisions of the Convention.³⁸

4. Historical overview of how other human rights treaty bodies have approached their role concerning reservations

In the center of the discussion on reservations to human rights treaties that have occupied several international bodies and many legal scholars over the last few decades are three questions: What (if any) are the legal effects of reservations that are perceived as invalid? Who is entitled to make this assessment? And what are the legal implications of such an assessment? The two latter questions are directly linked to the question of the role of treaty monitoring or adjudication body, if there is any for a given treaty. Moreover, the progressive practice in this field of some of these bodies has inspired even more interest in the issue and the temperature of the debate itself. In 1995 Alain Pellet, acting as the UN International Law Commission (hereinafter: ILC) Special Rapporteur on the topic 'Law and practice relating to reservations to treaties,' in his first (of 17) report on this issue, pointed out this question, observing that: *[m]ore so than other treaties, human rights treaties include monitoring mechanisms and the question is whether these bodies are competent to assess the validity of reservations.* He further noted that, i.a., the European Commission of Human Rights and the European Court of Human Rights, as well as the UN Human Rights Committee have already recognized their own competence in this regard.³⁹

In order to demonstrate GREVIO's fundamental indifference (particularly striking due to the fact that this is the only body with direct authority in this field) to the question of reservations in the proper context, it is necessary to rather briefly (as the practice of several bodies has been discussed many times before)⁴⁰ outline the approach of other human rights treaty monitoring bodies.

The Inter-American Court of Human Rights⁴¹ took up this problem in its 1982 Advisory Opinion, but only implicitly suggested that it could decide on this issue at the request of a State Party based on the mechanisms established by the 1969 American Convention on Human Rights (hereinafter: the ACHR).⁴² The Court stated that: *[t]he States Parties have a legitimate interest, of course, in barring reservations incompatible with the object and purpose of the Convention. They are free to assert that*

³⁸ *Comments submitted by Poland on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report) - GREVIO/Inf(2021)10.*

³⁹ *First report on the law and practice relating to reservations to treaties, by Mr. Alain Pellet, Special Rapporteur - UN Doc. A/CN.4/470, para. 140.* In the same report Alain Pellet also indicated why the question of reservations is particularly controversial in the context of human rights treaties: *Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity, a concept difficult to transpose to the field of human rights or indeed to other fields. As they are intended to apply without discrimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-à-vis citizens of the reserving State - para. 138.*

⁴⁰ Starting with the second report by Alain Pellet from 1996 - *Second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur - A/CN.4/477 & Corr. 1 & 2 and Add. 1 & Corr. 1-4, paras. 177-251.* References to further literature will be presented later in this section.

⁴¹ More on the position of this Court towards reservations - see, i.a., Andrés E. Montalvo, *supra* note 2; Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, AJIL, Vol. 79 (1985), Issue 1, pp. 1-27.

⁴² O.A.S Treaty Series No 36.

interest through the adjudicatory and advisory machinery established by the Convention.⁴³ Such an assessment by the Court *de facto* happened the following year in the 1983 Advisory Opinion on restrictions on the death penalty.⁴⁴ The Court discussed the possibility of formulating reservations to non-derogable rights and the extent of a given reservation. This was in connection with Guatemala's reservation to Article 4 (4) of the American Convention on Human Rights. Following this opinion, this state withdrew its reservation.⁴⁵

In the 1980s, the issue of reservations was also examined by the European Commission of Human Rights and the European Court of Human Rights.⁴⁶ The background for these events was the late ratification in 1950 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR)⁴⁷ by Switzerland, supplemented by reservations made to Article 6. In the *Temeltasch*⁴⁸ and *Belilos*⁴⁹ cases, the ECHR bodies explicitly gave themselves such powers of assessment, including the power to invalidate inadmissible reservations. Both these and other decisions and judgments of the ECHR bodies regarding reservations and interpretative declarations were subject to extensive comments and analysis in the legal literature.⁵⁰ Since then the European Court of Human Rights has followed this position (i.a. *Jėčius* case).⁵¹

Both within the ACHR and the ECHR systems, the final, binding decisions are taken by the adjudication bodies - the Inter-American Court of Human Rights and the European Court of Human Rights respectively. This feature distinguishes these two cases from other human rights treaties with supervisory organs which do not possess the characteristics of the international courts and, as a general rule, have different competencies. That is the case with the UN model of human rights treaties bodies and also with some non-ECHR, human rights treaties adopted within the Council of Europe.

⁴³ *The effect of reservations on the entry into force of the American Convention (Article 74 and 75)*, Advisory Opinion OC-2/82, para. 38.

⁴⁴ *Restrictions on the death penalty (Articles 4(2) and (4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83.

⁴⁵ Susan Marks, *Three regional human rights treaties and their experience of reservations*, in: Christine Chinkin and others, J. P. Gardner (ed.), *Human rights as general norms and a state's right to opt out*, B.I.I.C.L. 1997, p. 59.

⁴⁶ These two bodies operated until the entry into force of the Protocol No. 11 (E.T.S. No. 153), and the establishment of the Court as a sole organ – see: Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11 - Entry into Force and First Year of Application*, *Human Rights Law Journal*, Vol. 21 (2000), pp. 357-379.

⁴⁷ E.T.S. No. 5.

⁴⁸ Application No. 9116/80, *Temeltasch v. Switzerland*, Commission's report of 5 Mar. 1983, Decisions and Reports, vol. 31 (1983).

⁴⁹ Application No. 10328/83, *Marlene Belilos v Switzerland*, Commission's report of 7 May 1986, Decisions and Reports, Vol. 44 (1985), Court's judgment of 29 April 1988, available via the HUDOC database.

⁵⁰ See, i.a.: Pierre-Henri Imbert, *Reservations to the European Convention on Human Rights before the Strasbourg Commission: The Temeltasch Case*, *International and Comparative Law Quarterly*, Vol. 33 (1984), Issue 3, pp. 558-595; Susan Marks, *Reservations Unhinged: The BELILOS Case before the European Court of Human Rights*, *The International and Comparative Law Quarterly*, Vol. 39 (1990), Issue 2, pp. 300-327; Iain Cameron, Frank Horn, *Reservations to the European Convention on Human Rights: The Belilos Case*, *German Yearbook of International Law*, Vol. 33 (1990), pp. 69-129; Jochen Abr Frowein, *supra* note 3; Henry J. Bourguignon, *The Belilos Case: new light on reservations to multilateral treaties*, *Virginia Journal of International Law*, Vol. 29 (1989), pp. 385-386; Ronald St. John MacDonald, *Reservations under the European Convention on Human Rights*, *Revue Belge de Droit International*, Vol. 21 (1998), pp. 429-450.

⁵¹ Application No. 34578/1997, *Jėčius v. Lithuania*, Court's judgment of 31 July 2003, available via the HUDOC database.

At the UN level, the most prominent position on reservations was - of course - that taken by the Human Rights Committee, which, in the face of the ICCPR's⁵² silence on reservations and in the face of numerous far-reaching reservations, issued its General Comment No. 24 in 1994.⁵³ The Human Rights Committee recognized its competence in this regard, including the power to declare inadmissible reservations as null and void.⁵⁴ This position was also vividly discussed by representatives of the legal doctrine, who overwhelmingly expressed their approval of the Committee's position.⁵⁵ However, the acceptance of prominent representatives of the doctrine did not influence the governments of three powerful states (France, the United States, and the United Kingdom), which officially took a critical position on General Comment No. 24, including their opinion that the Committee should not assign to itself powers that do not derive from the Covenant.⁵⁶ Despite this critique, the Committee maintains its position. Well-known evidence of this fact can be found in, among other examples, its decision to declare the reservation null and void which was taken in individual communication procedures in 1999 in the case of *Kennedy v Trinidad and Tobago*.⁵⁷ Andreas Zimmermann and Nils-Hendrik Grohmann have recently reviewed the current practice of the Committee with regard to reservations. They have observed that the Committee rarely explicitly indicates that a reservation is invalid. In most cases, when discussing a given state's reports and adopting its Concluding Observations, it limits itself to only suggesting that the questionable reservation should be withdrawn. However, they further pointed out two recent instances when the Committee explicitly indicated that a reservation was invalid (the reservation of Pakistan to Article 40 and the reservation of Germany seeking to exclude the application of Article 26).⁵⁸

The other UN Committees have not yet taken a similar far-reaching position on reservations. Long before General Comment No. 24 was issued, the CERD Committee and the CEDAW Committee consulted with the UN Office for Legal Affairs on the issue of reservations and received the response that they could not assess the validity of reservations. This position was later accepted by these

⁵² The 1966 International Covenant on Civil and Political Rights – U.N.T.S., Vol. 999 (1976), p. 171.

⁵³ UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.

⁵⁴ *Ibid.*, para. 18.

⁵⁵ Ulf Linderfalk, *Reservations to Treaties and Norms of Jus Cogens - a Comment on Human Rights General Comment No. 24*, in: Inteta Ziemele (ed.), *Reservations to human rights treaties and the Vienna convention regime: conflict, harmony of reconciliation*, Martinus Nijhof 2004, pp. 213-234; Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No.24 (52)*, *International and Comparative Law Quarterly*, Vol. 46 (1997), Issue 2, pp. 390-412; Martin Scheinin, *Reservations by States under the International Covenant on Civil and Political Rights and Its Optional Protocols, and the Practice of the Human Rights Committee*, in: Inteta Ziemele (ed.), *Reservations to human rights treaties and the Vienna convention regime: conflict, harmony of reconciliation*, Martinus Nijhof 2004, pp. 41-58; Bruno Simma, *Reservations to human rights treaties: some recent developments*, in: Gerhard Hafner et al. (eds.), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in honour of his 80th Birthday*, Kluwer 1998, pp. 659-682; William A. Schabas, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, *Canadian Yearbook of International Law*, Vol. 32 (1994), pp. 39-81.

⁵⁶ All three positions are published as an appendix to the publication: Christine Chinkin and others, J. P. Gardner (ed.), *supra* note 45, pp. 193-207. The Committee itself has not officially responded to this criticism. However, Rosalyn Higgins, who - as a member of the UN Human Rights Committee at that time - participated in the adoption of the General Commentary (and is seen as its main author - see: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary*, N.P. Engel, Kehl 2005, p. XXX), responded to these critics in a different role - see: Rosalyn Higgins, *Introduction*, in: Christine Chinkin and others, J. P. Gardner (ed.), *supra* note 45, pp. XV-XXIV.

⁵⁷ Communication No. 845/1999; U.N. Doc. CCPR/C/67/D/845/1999.

⁵⁸ Andreas Zimmermann, Nils-Hendrik Grohmann, *Silence of States in the Framework of Human Rights Treaties: the example of the ICCPR*, *forthcoming*.

Committees.⁵⁹ However, this does not mean that these Committees are silent on reservations. To the contrary, in their Concluding Observations to the reports, they frequently call for the withdrawal of questionable reservations.⁶⁰ The other UN Committees follow this pattern and regularly call (in their Concluding Observations to state's reports) for the withdrawal of reservations which they consider doubtful.⁶¹

Unlike in the case of GREVIO and the ECHR organs, the practice of other human rights monitoring bodies operating under the treaties adopted within the Council of Europe is more modest. The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁶² contains a clause prohibiting reservations (Article 21), so the inactivity of European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is fully understandable. This is also the case for the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.⁶³ Under Article 45, no other reservations are allowed apart from one provision concerning jurisdiction. So the lack of practice in this regard by the Group of Experts on Action against Trafficking in Human Beings (GRETA) is also justified. Of the other human rights treaty bodies, it is necessary to discuss the practices of the European Committee of Social Rights (hereinafter: ECSR) and the Advisory Committee on the Framework Convention for the Protection of National Minorities (hereinafter: Advisory Committee). Both of the above-mentioned bodies have encountered reservations in their practice.

The issue of reservations is relatively less important for acceding states in the context of the 1961 European Social Charter,⁶⁴ the 1988 Additional Protocol (adding four extra rights),⁶⁵ and the 1996 European Social Charter (revised).⁶⁶ All those treaties remain silent on reservations but establish a 'à la carte system' of ratification, which enables parties to choose the scope of their factual obligations. However, despite this fact, several reservations have been formulated for each of them.⁶⁷

⁵⁹ Liesbeth Lijnzaad, *supra* note 1, p. 412; Morten Kjærum, *Approaches to Reservations by the Committee on the Elimination of Racial Discrimination*, in: Inteta Ziemele (ed.), *supra* note 55, pp. 66-77. See also: *Preliminary Opinion of the Committee on the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights*, UN Doc. CERD/C/62/Misc.20/Rev.3, 13 March 2003; CEDAW - *General Recommendation No 4 – 1987 and General Recommendation No 20 – 1992*.

⁶⁰ For an analysis of the practice of the CEDAW Committee see: Hanna Beate Schöpp-Schilling, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: An Unresolved Issue or (No) New Developments?*, in: Inteta Ziemele (ed.), *supra* note 55, pp. 29-35. The Concluding Observations on Monaco's report, which were adopted by the CERD Committee in 2010, contains the example of the same practice by this Committee: *The Committee is concerned by the fact that the State party maintains its reservations to article 2, paragraph 1, and article 4 of the Convention. The Committee recommends that the State party consider withdrawing its reservations to article 2, paragraph 1, and article 4 of the Convention, given the developments in its legislation since its ratification of the Convention (art. 1) – see: UN Doc. CERD/C/MCO/CO/6, para. 7.*

⁶¹ See, i.a., *Concluding Observations of the Committee on the Rights of the Child, Bangladesh*, UN Doc. CRC/C/15/Add.221 (2003), para. 28, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and the Members of Their Families, Egypt*, UN Doc. CMW/C/EGY/CO/1 (2006), para. 11.

⁶² E.T.S. No. 126.

⁶³ E.T.S. No. 197.

⁶⁴ E.T.S. No 35.

⁶⁵ E.T.S. No. 128.

⁶⁶ E.T.S. No. 163.

⁶⁷ In the case of the 1961 Charter, after France withdrew its reservation, only Norway and Portugal upheld their reservations. Several states formulated also 'declarations', which legal status are not always clear. In the case of the 1988 Protocol, France formulated a reservation and Italy a 'declaration'. In the case of the 1996 Charter, Germany, the Netherlands, and Denmark formulated reservations to several articles, and Greece and Portugal to only one. There are also 'interpretative declarations' and other 'declarations' formulated by several states.

The European Committee of Social Rights over the years developed its own practice in this regards. The evolution of its position in the context of reporting procedures can be tracked when analyzing the way how the Committee dealt with a reservation to Article 6 (4) of the 1961 Charter formulated by the Netherlands. In 1989 the ECSR stated: *the Committee wished to make it clear that it was not within its competence to suggest that a government withdraws a reservation formulated at the time of ratifying the Social Charter.*⁶⁸ Two years later the ECSR expressed its satisfaction with the fact that the Netherlands had declared its plans to withdraw this reservation.⁶⁹ However, noting lack of progress in this process on a few other occasions,⁷⁰ in 1998 the ESCR observed:

*[t]he Committee notes with regret from the present report that there were no developments during the reference period. It underlines that in view of the fundamental importance of this provision and of the fact that the large majority of the Contracting Parties grant the right to strike also to civil servants, lifting the reservation would represent significant progress.*⁷¹

A rather restrained position in the reporting procedure is not followed in the collective complaints procedure. This position was recently summarized by the Committee in the decision on the admissibility of the complaint lodged against Norway:

*[t]he Committee recalls that despite the 1961 Charter containing no reservation clause, the Committee has in the past accepted that reservations may be made under the Charter, subject to certain conditions; in particular that the minimum number of provisions foreseen under Article 20 of the 1961 Charter, are accepted (...). It also considers that in accordance with a general principle of international law, as codified in the 1969 Vienna Convention of the Law on Treaties Article 19 (c), reservations must not infringe the object and purpose of the Charter, and should not be too general in nature.*⁷²

In consequence, the European Committee of Social Rights has recognized its authority to assess reservations formulated to both charters, and it exercises this power.

The Framework Convention for the Protection of National Minorities⁷³ is also silent on reservations. Many of the state parties have decided to formulate ‘declarations’ and only two (Malta and Belgium) identified their statements incorporated in the acts of signature/ratification as reservations.⁷⁴ Malta’s reservation, specific and narrowly crafted, does not raise any concerns, and as such has only been noted by the Advisory Committee.⁷⁵ The legal character of these ‘declarations’ were examined

⁶⁸ Conclusions XI-1 - Pays-Bas - Article 6-4, XI-1/def/NLD/6/4/EN.

⁶⁹ Conclusions XII-1 - Pays-Bas - Article 6-4, XII-1/def/NLD/6/4/EN.

⁷⁰ Conclusions XIII-1 - Pays-Bas - Article 6-4, XIII-1/def/NLD/6/4/EN, Conclusions XIII-3 - Pays-Bas - Article 6-4, XII-3/def/NLD/6/4/EN.

⁷¹ Conclusions XIV-1 - Pays-Bas - Article 6-4, XIV-1/def/NLD/6/4/EN.

⁷² Decision on admissibility (18 October 2016), *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 120/2016, para. 12.

⁷³ E.T.S. No. 157.

⁷⁴ Malta formulated a reservation to Article 15. Belgium’s reservation, being general in its scope, brings *prima facie* concerns, but as this state only signed the Convention and is not a party to the Convention, the Advisory Committee is not in a position to comment on it.

⁷⁵ Opinion on Malta, adopted on 30 November 2000, ACFC/INF/OP/I(2001)6, para. 5.

in detail by Jochen Abr. Frowein and Roland Bank.⁷⁶ The authors convincingly demonstrate that at least some of the declarations are *de facto* reservations and in this context observed that in the case of inadmissible reservations: *[t]he Advisory Committee has the competence to determine the invalidity since it otherwise could not properly fulfil its advisory functions towards the Committee of Ministers.*⁷⁷ The beginnings of exercising this authority towards ‘declarations’ was discussed a few years later by Reiner Hofmann. The author showed that the Advisory Committee indeed uses this power to render its opinion on doubtful ‘declarations’, including declaring some of them not compatible with the Conventions. What is more important, the analysis showed that this position taken by the Advisory Committee was unchallenged both by state parties and the Committee of Ministers.⁷⁸ In conclusion, the author made more general observations:

*As far as Council of Europe human rights instruments are concerned, there seems to be unanimous acceptance of the competencies of monitoring bodies to examine the compatibility of reservations, declarations or other acts defining – and, thereby, most frequently restricting – the geographical, personal or temporal scope of application of such instruments, and further added: there is evidence for the existence of a norm of regional customary law empowering monitoring bodies under human rights instruments fully to examine reservations and other acts (...) as to their compatibility with the general principles of international law and the specific principles enshrined in the respective human rights instruments.*⁷⁹

This statement may well also serve as a conclusion to this section of the article.

This practice has been acknowledged by the ILC. Special Rapporteur – Alain Pellet devoted a significant part of his second report on reservations to this issue. Despite taking a generally rather restrictive position, in his conclusions he observed,

Although no provision is made for this in their statutes, these bodies have undertaken to determine the permissibility of reservations to their constituent instruments. Their competence to do so must be recognized: it is a prerequisite for the exercise of the general monitoring functions with which they are invested,

as well as,

*The legal force of the findings made by these bodies in the exercise of this determination power cannot exceed that resulting from the powers given them for the performance of their general monitoring role; in all cases, however, the States must examine these findings in good faith and, where necessary, rectify the factors found to exist which render the reservation impermissible.*⁸⁰

⁷⁶ Jochen Abr. Frowein, Roland Bank, *The Effect of Member States' Declarations Defining "National Minorities" upon Signature or Ratification of the Council of Europe's Framework Convention*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 59 (1999), pp. 649-675.

⁷⁷ *Ibid.*, p. 675. The Committee of Ministers is mentioned in this quote because the results of the expert work within the Advisory Committee ('opinion') referred to this body, which at the end of this procedure published a 'resolution'.

⁷⁸ Rainer Hofmann, *Declarations to the Council of Europe Framework Convention for the Protection of National Minorities: Practice of the Advisory Committee*, in: Inteta Ziemele (ed.), *supra* note 55, pp. 133-146.

⁷⁹ *Ibid.*, p. 145.

⁸⁰ *Second report on...*, *supra* note 40, para. 252(b) and (d).

The final product of the Commission's 18 years of work on this issue confirms the above-mentioned Special Rapporteur's position from 1996. The ILC 2011 *Guide to practice on reservations to treaties*⁸¹ indicates that treaty monitoring bodies may assess reservations, but *the assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it* (3.2.1.) and further, *States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations* (3.2.3).

5. Possible reasons behind GREVIO's restrained position on reservation

Why has GREVIO not, to this point, chosen to join other bodies that are more progressive in dealing with reservations/declarations that may raise legitimate concerns or simply act in line with the ILC *Guide to Practice* and at least present its non-binding assessment of reservations/declarations? The first reason may be very prosaic – a lack of expertise and staff shortages. Overall, the subject of reservations to human rights treaties is a very complex and detailed issue. At the same time, there are very few lawyers among the current GREVIO members (currently 4 out of 15 members), and none of them specialized in international law. Of course, the scope of the Istanbul Convention and its comprehensive approach to violence against women and domestic violence fully justifies the different experiences and expertise of the GREVIO members. However, the lack of a specialist in international law among them may be one of the reasons for this highly insufficient approach to reservations. GREVIO's members are supported by a Secretariat, which according to the First General Report on GREVIO's activities, covering the period from 2015 to 2019⁸² and the budget for 2018-2019⁸³, was allocated only 6.5 posts. As to the overall budget for the operation of the mechanism, GREVIO itself observed in very diplomatic words:

*It is therefore essential that adequate human and financial resources continue to be provided to the Istanbul Convention monitoring mechanism in the future, responding to the growth in volume of its activity and reflecting its priority nature for the Council of Europe. In this respect, GREVIO notably welcomes the initiatives aiming at ensuring that non-member states becoming party to the Istanbul Convention contribute to the financing of its monitoring mechanism. GREVIO also wishes to thank member states who supported the work in this area through voluntary contributions, scholarships and other schemes, and to encourage states to continue providing such support, including where appropriate under the form of staff secondments.*⁸⁴

The second reason seems to be the general discussion and atmosphere around the Istanbul Convention. To list just a few events:

- the denunciation of the Convention by Turkey (the first state which ratified the Convention and the host state of the conference when the final text was adopted) in 2021. The withdrawal

⁸¹ Yearbook of the International Law Commission, Vol. 2 (2011), Part Two.

⁸² *First General Report on GREVIO's activities covering the period from June 2015 to May 2019*, IC/Inf(2020)1, para. 54.

⁸³ CM(2018)1-rev-2, 2.10.2018, p. 36.

⁸⁴ *First General Report on GREVIO's activities*, supra note 18, para. 56.

was preceded by the campaign of several religion-based conservative groups supported by the government,⁸⁵

- the judgment of the Constitutional Court of Bulgaria declaring the Convention unconstitutional,⁸⁶

or

- the possible denunciation by Poland. There is a case – initiated by the Prime Minister – pending before the Polish Constitutional Court. The motion called the Court to declare the Istanbul Convention unconstitutional on several grounds. The motion has already been supported by other state officials, i.a., the Minister of Justice, the Prosecutor General, and the Minister of Foreign Affairs.⁸⁷

Similar developments and critics are also present in other states, both those who are party to it and those who have not decided to ratify.⁸⁸ It seems, however, that the controversies in these states are not so much due to the Convention's provisions as to a combination of global trends, manifested in the form of extreme conservatism, populism and anti-democratic changes.⁸⁹ The Istanbul Convention itself serves primarily as a "scapegoat". In the light of direct attempts to undermine the Convention itself, there is probably no will at the GREVIO level to fight over detailed and less significant issues hidden behind puzzling questions of reservations and declarations.

6. Final remarks

Even if the above reasons are at least partially true, GREVIO's practice to date regarding reservations is disappointing. From the analysis of other human rights treaty monitoring and adjudications bodies, the conclusions are clear. Back in the 1980s, the ACHR, and the ECHR recognized their competence to assess reservations. In the 1990s, a similar position of the UN Human Rights Committee resounded strongly. The European Court of Human Rights and the Human Rights Committee additionally have taken the position that they can also declare reservations that they consider inadmissible to be null and void. Even if such a display of institutional ambition, as it was called by Martti Koskenniemi and Päivi Leino,⁹⁰ was not fully shared by other human rights treaties bodies (which, in contrast, do not remain silent, as the practice of adopting, i.a., Concluding Observations showed), the impact of this practice on the issue of reservations to human rights

⁸⁵ Fatma Karakas-Dogan, *Turkey and the Istanbul Convention: An Evaluation of How Human Rights and Criminal Law Interact*, Archiv des Völkerrechts, Vol. 59 (2021), Issue 3, pp. 300-327, 325.

⁸⁶ Ruzha Smilova, *Promoting 'Gender Ideology': Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional*, Oxford Human Rights Hub (22 August 2018), <https://ohrh.law.ox.ac.uk/promoting-gender-ideology-constitutional-court-of-bulgaria-declares-istanbul-convention-unconstitutional/> (accessed: 16.03.2022).

⁸⁷ Julia Kapelańska-Pręgowska, *Istanbul Convention in Poland: From Ratification to Unconstitutionality*, IACL-AIDC Blog (11 February 2021), <https://blog-iacl-aidc.org/gender/2021/2/11/istanbul-convention-in-poland-from-ratification-to-unconstitutionality> (accessed: 1.03.2022).

⁸⁸ In depth analysis of the critics in Hungary, Poland, Croatia, and Bulgaria – see: Andrea Krizsán, Conny Roggeband, *Politicizing Gender and Democracy in the Context of the Istanbul Convention*, Palgrave Macmillan 2021.

⁸⁹ Elżbieta Korolczuk, Agnieszka Graff, *Gender as "Ebola from Brussels": The Anticolonial Frame and the Rise of Illiberal Populism*, Signs: Journal of Women in Culture and Society, Vol. 43 (2018), Issue 4, pp. 797-821.

⁹⁰ Martti Koskenniemi, Päivi Leino, *Fragmentation of international law? Postmodern anxieties*, Leiden Journal of International Law, Vol. 15 (2022), Issue 3, pp. 567-570.

treaties is evident and has been confirmed by the ILC. The practice of the Advisory Committee and the ECSR show that other treaty monitoring bodies operating within the Council of Europe can serve as direct sources of inspiration for GREVIO. What is particularly significant in the context of GREVIO's very limited activity concerning reservations is that the ILC's position that human rights (and other) treaty monitoring bodies can assess reservations, and that their assessment should be taken into account by those formulating them, was based on the practice of bodies that did not have this explicit competence.

In the context of the baseline reports adopted by GREVIO so far, it is particularly unfortunate that GREVIO has not shown more courage and consequently has not referred to Poland's declarations at all, or has not referred in more detail to those reservations. In this context, GREVIO's assessment can be expected only in the next round of evaluation of Poland's implementation of the Convention. However, the next round is to focus only on selected aspects; it would be worthwhile to include among them the general question about the scope of Poland's obligation under the Istanbul Convention. In the context of other States whose reports are yet to be or are currently under consideration, it would be appropriate to postulate that GREVIO should follow its own example, i.e., how it assessed Monaco's reservation formulated to Article 59.

The possibility of adopting general recommendations offers a clear opportunity to change its current position regarding reservations. Perhaps, for example, following the example of the UN Human Rights Committee, GREVIO should present its role concerning reservations (and declarations) in such a form, and then put it into practice while considering subsequent state reports. Either way, it is high time that GREVIO changes their previous practice regarding reservations to more closely resemble that of other human rights treaty monitoring bodies.

The Author



Wojciech Burek is an Assistant Professor (Adjunct) at the Institute of European Studies, Jagiellonian University in Cracow (Poland). Currently, he is a Humboldt Fellow at the MenschenRechtsZentrum of the University of Potsdam (Humboldt Research Fellowship for experienced researchers).

He holds a PhD in Legal Sciences with a specialisation in public international law (2008). He also obtained diplomas from the American Law Program organised by the Catholic University of America Columbus School of Law and Jagiellonian University (2004) and from the Helsinki Foundation for Human Rights School of Human Rights (2004). He was the recipient of the Stanislaw Kutrzeba Human Rights in Europe Prize (2008) and The Ryoichi Sasakawa Young Leaders Fellowship (founded by Tokio Foundation - 2007). Since 2014 he's been editor-in-chief of PWMP - Review of International, European and Comparative Law (see here). He has authored reports and analyses, and cooperates with several non-governmental organisations.

His academic and professional interests include international human rights law, diplomatic and consular law, EU anti-discrimination law.

The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

