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International Center on Law, Life, Faith and Family

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Under Kiska's leadership, Alliance Defending Freedom's global influence has grown considerably. Alliance Defending Freedom has obtained Special Consultative status with the United Nations and is now accredited with the European Parliament, the European Union's Fundamental Rights Agency (where he served as an elected member of the Advisory Panel), the Organization of American States, and the Organization for Security and Co-operation in Europe. Before joining Alliance Defending Freedom, Kiska served as legal counsel at the European Center for Law and Justice.

- o [The Middle Eastern and North African System](#)

He began his legal career in the Slovak Republic as an attorney with the firm of former Slovak Prime Minister Jan Carnogursky. Kiska earned

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(A) THE EUROPEAN UNION (EU) [1]

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(i) The Main Subsidiary Institutions

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1. [The European Parliament](#) Represents the citizens of the European Union and is directly elected by them every five years.

- Each Member State elects a certain number of Members of the European Parliament (MEPs) in proportion to its population. In accordance with the Lisbon Treaty,^[2] every Member State must have at least 6 MEPs and no Member State may have more than 96 MEPs.
2. *The Council of the European Union or more informally, the EU Council* consists of one national minister from each EU country who represents the government of his/her respective EU Member State.
 3. *The European Commission* consists of one Commissioner from each EU Member State and represents the interests of the Union as a whole
 4. *The European Court of Justice* is the judicial body within the EU charged with applying EU law to legal disputes. In particular, the Court of Justice “(a) rules on actions brought by a Member State, an institution or a natural or legal person; (b) gives

preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Community law or the validity of acts adopted by the institutions; (c) rules in other cases provided for in the Treaties.[\[3\]](#)

(ii) How the Institutions Function Together to Create EU Law

(1) How does the European Parliament function and in what areas?

In many areas, such as consumer protection and the environment, Parliament works with the Council of the European Union to decide the content of laws and adopt them.[\[4\]](#) This is referred to as the “ordinary legislative procedure.” This “ordinary legislative procedure” expanded under the Lisbon Treaty, and now includes the areas of agriculture, energy policy, immigration, and EU funds. For instance, the EU budget is jointly decided by the European Parliament and the Council of the European Union.

Furthermore, the European Parliament serves in a supervisory role in that it must approve of the members of the European Commission.

In plenary, the European Parliament usually makes decisions by an absolute majority of votes cast provided that a quorum (1/3 of all MEPs) is present.

The European Parliament uses the Thursday afternoon of each Strasbourg plenary session to highlight flagrant violations of human rights across the world.[\[5\]](#)

(2) How does The Council of the European Union function and in what areas?

The Council of the EU works with the Parliament in accordance with the “ordinary legislative procedure.” It also signs agreements on behalf of the EU and coordinates economic policies of EU Member States.

Decisions of the Council of the EU are made by “qualified majority voting.” This means that a majority (sometimes 2/3) of the EU Member States vote in favor and at least 260 of the possible 352 votes are cast (the bigger a country’s population, the more votes it has). For instance, Germany, France, Italy, and the UK have 29 votes respectively.[\[6\]](#)

However, “double majority voting” takes effect in 2014. This requires a majority of Member States (15) to support a measure and the countries in support must represent at least 65% of the EU population.[\[7\]](#)

Furthermore, in votes concerning sensitive topics (i.e., security, external affairs, taxation), decisions have to be unanimous, so every member of the Council of the EU has unilateral veto power.

(3) How does the European Commission function and in what areas?

The European Commission drafts proposals for EU laws and manages

the implementation of EU policies and the spending of EU funds. Essentially, it is the executive arm of the EU.

The Commission's power to propose new laws to Parliament and the Council is referred to as the "right of initiative," but this can only be done for issues that cannot be effectively dealt with on a national, regional, or local level. The principle of subsidiarity, a fundamental principle of Catholic social teaching, must, therefore, be respected by the Commission. If 14 of 28 Commissioners agree with a drafted law, it is sent to Parliament and Council for a decision as to whether to adopt it.

The Commission sets long term spending priorities for the EU in the EU "financial framework", draws up an annual budget which Parliament and Council must approve, and supervises how EU funds are spent.[\[8\]](#)

(iii) A Brief Historical Overview of the EU[\[9\]](#)

- The European Union was preceded by the European Coal and Steel Community established by the Treaty of Paris in 1951. Then in 1957, there was the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) by the Treaty of Rome, officially known as the Treaty establishing the European Economic Community (TEEC).[\[10\]](#) Subsequently, in 1959, the European Free Trade Association was established by the UK.
- Crucially, in 1963, the Court of Justice of the European Union [CJEU] issues its ruling in the case of *NV Algemene Transport- en ExpeditieOnderneming van Gend & Loos v Netherlands Inland Revenue Administration*.[\[11\]](#) In substance, this ruling states that nationals of member states can invoke European Community law before their own respective national courts.[\[12\]](#)
- An even further development in the history of the EU occurs in

1964 in the *Costa*[\[13\]](#) In summary, the CJEU ruled that European Community Laws trump national laws with which they conflict.

- However, on January 30 1966, the power of the European Community was diminished by the Luxembourg Agreement, which essentially provides a national veto power in specific situations of particular importance to a member state.[\[14\]](#)
- But the process of European integration continued with the Merger Treaty or Brussels Treaty which merged the institutions of the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom), and the European Economic Community (EEC). Subsequently in 1979, direct elections to the European Parliament took place.
- Demonstrating the continued relevance of EU law, the CJEU then ruled in the *Cassis-de-Dijon* case[\[15\]](#) that a German law

restricting the free movement of goods violated Article 30 of the Treaty establishing the European Economic Community. The significance of this ruling is that it led to the principle of mutual recognition.[\[16\]](#)

- Continuing the process of European integration, the Single European Act (SEA) of 1986 revised the Treaties of Rome in an attempt to add new momentum to the integration process and to complete the internal market. It amended the rules governing the operation of the institutions discussed above and enlarged Community powers, including in the field of research and development, the environment and common foreign policy.
- Then in 1991, in *Francovich*[\[17\]](#), the CJEU ruled that Member States can be liable for inadequate implementation of European Community Law. This left in no doubt the primacy of EU law over domestic law and the liability of a State for failing to properly implement, in that case, an EU directive into domestic

law.

- Subsequently, the Treaty on the European Union, or informally, the Maastricht Treaty took effect in 1993. From this point forward, the European Community was replaced by the “European Union.” The Treaty introduced elements of political union such as European citizenship as opposed to just national citizenship. Of vital importance, the co-decision procedure[\[18\]](#) was created by this Treaty, thus increasing the role of The European Parliament. In 1999, the Treaty of Amsterdam[\[19\]](#) came into force, which further increased the role of The European Parliament.[\[20\]](#)
- It was against this backdrop of greater and greater integration, that the Federal Constitutional Court of Germany reasserted Germany’s state sovereignty in the case of *Brunner*.[\[21\]](#)
- However, in December of 2009, the Lisbon Treaty took effect.

Among other things, it provides for a new form of participatory democracy called the European Citizens Initiative (ECI). As set forth in Article 11(4) of the Consolidated Texts of the EU Treaties as Amended by the Treaty of Lisbon, “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.” This initiative procedure is evidently an attempt to make the EU more responsive to its citizens and give it greater democratic legitimacy.

- Furthermore, with the entrance into force of the Lisbon Treaty, the Charter of Fundamental Rights of the EU acquired the same status as other EU Treaties and is binding on EU Member States. Furthermore, the EU acceded to the European Convention on

Human Rights and so the fundamental rights recognized in the European Convention are general principles of Community law.[\[22\]](#) Consequently, the ability of the EU to implement laws and policies which affect the family and human rights was greatly extended by the Lisbon Treaty.

(IV) Court of Justice of the European Union (CJEU) Jurisprudence Affecting Human Life and the Family

- In the *Romer decision*[\[23\]](#) of the CJEU in 2011, a pensioner who entered into a registered life partnership with a person of the same sex under German law was denied a supplementary retirement pension equal to that of a married person. The CJEU ruled that this differential treatment violated Directive 2000/78/EC in cases where a Member State provides for some form of registered partnership for same sex couples.[\[24\]](#) This decision of the CJEU makes clear that for EU Member States which recognize same sex

unions, whether a partnership or “same sex marriage,” the effect of EU law can be significant.

- +[\[25\]](#)In the *Brüstle case*,[\[26\]](#) the issue was the definition of an embryo under Directive 98/44/EC Article 6(2)(c)[\[27\]](#). Under that provision, inventions are unpatentable when they involve the “use of human embryos for industrial or commercial purposes.” The CJEU crucially ruled in *Brüstle* that “Article 6(2)(c) of that directive must be interpreted as excluding an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.”[\[28\]](#) Furthermore, within the context of Article 6 of Directive 98/44/EC, the term “embryo” is given a broad definition, the Court having ruled that, “any human ovum must,

as soon as fertilised, be regarded as a ‘human embryo’ within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive, since that fertilisation is such as to commence the process of development of a human being.”[\[29\]](#) This favorable definition of an embryo can be used as persuasive authority to argue analogously in other contexts threatening the human embryo, such as abortion or assisted reproduction.

(V) Other EU Issues Affecting Human Life and the Family

- The **One of Us initiative**: Asks the EU to prohibit the financing of activities which presuppose the destruction of a human embryo, especially in the areas of research, development aid, and public health. This initiative takes advantage of the European Citizens Initiative[\[30\]](#) and has been very successful, far surpassing the required number of signatures reaching more than 1,800,000 signatures from twenty different countries.[\[31\]](#) On

April 10, 2014, a public hearing was held before the European Parliament concerning the One of Us initiative. “The European Commission (EU) must decide before May 28 on how it intends to take action concerning the request of the European Citizens’ Initiative ‘One of Us’ to introduce into the European regulatory an ethics clause explicitly excluding European Union funding any activity that destroys or involves the destruction of human life at the embryonic or foetal stage. This applies in particular to the European funding for research involving the destruction of human embryos, and financing abortions in the context of aid to developing countries.”[\[32\]](#) The hope was that the Commission would forward the initiative to the European Parliament and the Council for a joint decision passing a law strictly prohibiting the EU from financing any activity that destroys or involves the destruction of human life at the embryonic or fetal stage. But the Commission refused to take any action, so now the organizers of

One of Us have filed a lawsuit against the EU's Executive before the General Court of the European Union.[\[33\]](#)

- **Report entitled: “The Funding of Abortion through EU Development Aid: An Analysis of EU’s Sexual and Reproductive Health Policy”[\[34\]](#) (European Dignity Watch):** Documents the EU’s funding of abortions by giving money to the world’s two largest abortion providers, the International Planned Parenthood Federation (IPPF) and Marie Stopes International (MSI), under the guise of funding projects related to “sexual and reproductive health.”
- **The Estrela Report on Sexual and Reproductive Health and Rights[\[35\]](#) was defeated in the European Parliament in December 2013.** The report claimed a right to abortion, promoted sex education for children, and infringed on conscience rights for medical doctors and nurses who refuse to perform abortion.

Instead of adopting the report, the European Parliament adopted an alternative resolution stating, “The formulation and implementation of policies on sexual and reproductive health and rights and on sex education in schools is a competence of the member states.”[\[36\]](#) It is important to realize, as well, that even if the Estrela Report were adopted, it was an “own initiative report,” a non-binding text outside the competence of the European Union,[\[37\]](#) so it would not have been binding on the EU. However, such reports aim to influence the policies of Member States and can be significant in terms of policy development.

- **The Lunacek Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity**[\[38\]](#) **was passed by the European Parliament.** This report dangerously contradicts the principle of universal human rights set forth in the Universal Declaration of Human Rights and, instead, creates rights based on

“sexual orientation and gender identity.” Like the Estrela Report, the Lunacek Report is not legally binding.

- **Council Decision 2010/405/EU authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation**[\[39\]](#) is an attempt to extend the EU’s jurisdiction so as to cover family law, which is within the proper jurisdiction of EU Member States.

(B) THE COUNCIL OF EUROPE (CoE)

(i) The Main Subsidiary Institutions and their Functions[\[40\]](#)

(1) The *Parliamentary Assembly of the Council of Europe (PACE)* is the consultative body of the CoE and consists of 318 representatives appointed by their respective national parliaments. The Assembly votes

on three types of texts: (1) Recommendations addressed to the Committee of Ministers; (2) Resolutions expressing the viewpoint of the Assembly; (3) Opinions on draft treaties or other issues referred to it.[\[41\]](#)

(2) The *Committee of Ministers of the Council of Europe (CM)* is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of the respective Member States or their permanent diplomatic representatives in Strasbourg. Among other things, the Committee of Ministers approves Treaties prior to their being open for signature and ratification by Member States. This requires a 2/3 majority of members casting a vote and a majority of those entitled to vote.

(3) The *Commissioner for Human Rights* is entrusted with the promotion of human rights throughout the 47 Member States of the Council of Europe. The Commissioner's mandate comes from

Resolution (99) 50 of the Committee of Ministers.^[42] The Commissioner has essentially an advisory role within the CoE system.

(4) *The European Court of Human Rights*^[43] is established by Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights or ECHR).^[44] Its jurisdiction extends to “all matters concerning the interpretation and application of the Convention and the protocols thereto.”^[45] The Court serves to interpret the Convention and to ensure that it is respected by all State parties.

(ii) How the Council of Europe Operates

It is vitally important to understand that unlike the subsidiary institutions of the EU, **the Parliamentary Assembly of the Council of Europe and the Committee of Ministers of the Council of Europe do not make law.** Instead, the Council of Europe creates laws by

encouraging Member States to sign treaties.[\[46\]](#) Unlike the EU system, there is no delegation of power from the Member States to a regional level. Instead, the States in the Council of Europe bind themselves to treaties approved by the Committee of Ministers. The Council of Europe is far more expansive than the EU covering 47 countries, but it operates at a lower level of integration.

(iii) European Court of Human Rights Jurisprudence Affecting Human Life and the Family

- In the **case of *Haas v. Switzerland***,[\[47\]](#) according to the Court, there is a “right” to assisted suicide under Article 8 of the European Convention as coming within the limits of the right to respect for one’s private life insofar as the decision is freely made and insofar as the person making the decision has the capacity to carry it out. But this negative right does not oblige the State to affirmatively assist a person in ending their life, especially in light

of Article 2(1) of the European Convention which provides, “Everyone’s right to life shall be protected by law.” This decision is good insofar as it affirms that Article 8 of the European Convention does not require States to legalize assisted suicide. A more authentic reading of Article 8 would prohibit States from legalizing assisted suicide precisely because such laws contravene Article 2 of the European Convention, which guarantees that the right to life will be respected by law.

- In *A, B, and C v Ireland*,[\[48\]](#) the European Court of Human Rights ruled that although Article 8 does not confer a right to abortion, “the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant’s alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8.”[\[49\]](#) With respect to the

first and second applicants, the Court concluded, “Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State.”[\[50\]](#) Thus, Ireland may prohibit abortion for health and well being reasons without running afoul of ECHR Article 8. With respect to the third applicant, the Court concluded that the Irish authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant

could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the [Irish] Constitution.”[\[51\]](#) Thus, where abortion is legal in a State, an obligation exists to ensure that abortion is practically and not merely theoretically accessible.

- In *Tysiack v. Poland*,[\[52\]](#) the applicant alleged that she should have been permitted to abort her pregnancy under Polish law because it threatened her health, thus violating Article 8 of the European Convention on Human Rights. “The Court concludes that it has not been demonstrated that Polish law as applied to the applicant’s case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming

delivery for her health. The Court is further of the opinion that the provisions of the civil law on tort as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have vindicated her right to respect for her private life. The civil-law remedy was solely of a retroactive and compensatory character. It could only, if the applicant had been successful, have resulted in the courts granting damages to cover the irreparable damage to her health which had come to light after the delivery. . . [I]t cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion. The Court therefore dismisses the Government's preliminary objection and concludes that the authorities failed to comply with their positive obligations to

secure to the applicant the effective respect for her private life. The Court concludes that there has been a breach of Article 8 of the Convention.”[\[53\]](#)

- In *H. and Others v Austria*,[\[54\]](#)“the applicants alleged that the provisions of the Austrian Artificial Procreation Act, which prohibited the use of ova and sperm from donors for in-vitro fertilisation, violated their rights under Article 8 of the Convention read alone and in conjunction with Article 14. In-vitro fertilisation, using a sperm donor was the only medical technique by which the first two applicants could successfully conceive children. The European Court of Human Rights concluded that a complete ban on this was not proportionate unless it was the only means of effectively preventing serious repercussions. The Court considered that this was not true in the present case as the restrictions were not the only or least intrusive means of pursuing what it acknowledged were legitimate aims in

combatting the possibility of abuse including the ‘selection’ of children. More positive was the dissenting judgment of Judge Jebens in which the margin of appreciation afforded to States in protecting the human person is affirmed and no violation found.[\[55\]](#)

- In *Kozak v Poland*,[\[56\]](#)“the applicant submitted that his homosexual orientation had been the single ground on which he had been denied the right to succeed to the tenancy of the flat in which he had lived with the late T.B. He had been refused the status of a person who had remained in actual marital cohabitation only because they had formed a same-sex couple. In contrast to heterosexual common-law partners, who could, at the material time enjoy the right to succeed to a tenancy, homosexual relationships had been excluded on the basis of the well-established and categorical interpretation of the notion ‘de facto marital cohabitation’ as covering only a different-sex

relationship.” The Court held that, “a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense . . . Nor have any convincing or compelling reasons been advanced by the Polish Government to justify the distinction in treatment of heterosexual and homosexual partners at the material time . . . In view of the foregoing, the Court finds that the Polish authorities, in rejecting the applicant’s claim on grounds related to the homosexual nature of his relationship with T.B. failed to maintain a reasonable relationship of proportionality between the aim sought and the means employed. The impugned distinction was not, therefore, compatible with the standards under the Convention.”[\[57\]](#) This case is concerning because of the special status it affords to “sexual orientation” as a prohibited category of discrimination and a source of rights.

- In *Schalk and Kopf v Austria*,[\[58\]](#) the European Court of Human Rights was asked to decide whether Article 8 in conjunction with Article 14 of the European Convention on Human Rights mandated that ratifying States legalize same sex marriage. The Court noted that as Article 12 does not require ratifying States to legalize “same sex marriage,” Article 14 in conjunction with Article 8, a provision more general in scope, certainly does not require States to legalize “same sex marriage.”[\[59\]](#) This case clearly affirms the right of States to define marriage in accordance with human nature, the complimentary union of one man and one woman.
- In *Lautsi and Others v Italy*,[\[60\]](#) the applicants contended that an Italian law requiring the presence of crucifixes in public classrooms violated Article 9 and Protocol 1, Article 2 of the European Convention on Human Rights. The Court concluded, “The fact remains that the Contracting States enjoy a margin of

appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions . . . That applies to organisation of the school environment and to the setting and planning of the curriculum . . . The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination. The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools . . . speaks in favour of that approach.”[\[61\]](#) This case is very positive because it protects the

autonomy of States in giving public expression to religious conviction. This is particularly crucial because religion is not a private affair but a fundamental reality in the life of believers and society as a whole.

(iv) Other Council of Europe Documents Affecting Human Life and the Family

(1) + *Parliamentary Assembly Resolution 1763 (2010) The right to conscientious objection in lawful medical care*[\[62\]](#): Although non-binding, this resolution provides comprehensive protection for the conscience rights of health care workers. It is an important political affirmation that human persons maintain their conscience rights regardless of their profession and regardless of the “need” for abortion and other human rights abuses.

(C) THE OFFICE FOR SECURITY AND COOPERATION IN

EUROPE (OSCE)

(i) The Three Dimensions of the OSCE

The Organization for Security and Co-operation in Europe was founded in 1973, principally as a forum for dialogue between the East and West during the Cold War. Nowadays, whilst retaining a role in early warning and conflict prevention, the OSCE deals with many more issues than its name would suggest. It is involved in human rights issues including freedom of religion, freedom of expression, freedom of assembly and non-discrimination. Additionally, despite its name, the organization counts among its participating states [\[63\]](#) non-European countries including the USA and Canada.

As a security organization, the OSCE would not seem at first glance to be relevant to the development of human rights norms and principles. But the OSCE takes a broad view of security which encompasses

human rights. In particular, the three dimensions of the OSCE are now (1) politico-military; (2) economic and environmental; and (3) human rights and democracy (referred to as “the human dimension”).[\[64\]](#)

Whilst not an organization which imposes any legal obligations on its states, it can exert significant political pressure. This much is recognised by ILGA-Europe, a prominent organization advocating the homosexual agenda, which states that “The OSCE’s relevance ... has increased in the past year as the OSCE has taken on an expanded mandate in the area of tolerance and non-discrimination. Although not all OSCE States agree that LGBT people should be included in the new mandate, many OSCE Missions and institutions are open to the involvement of LGBT people in the tolerance programme.”[\[65\]](#)

There are a number of decision-making bodies, the most relevant of which will be outlined below. Decision making at the OSCE is by consensus. This singularity perhaps explains why, among the

international institutions, the OSCE has generally retained a more conservative position on the issues of family the life given the inability of small but yet powerful groups to easily push their agendas. That said, there is political will to advance, for example, the homosexual agenda at the OSCE as evidenced by the EU Strategic Framework and Action Plan on Human Rights and Democracy [\[66\]](#), adopted by the Council of Ministers in June 2012. Action point 22 states that one of the priorities is “promoting adoption of commitments in the area of human rights of LGBT within the OSCE.”

(ii) The Main Subsidiary Institutions

- The *Ministerial Council* [\[67\]](#) established by the Charter of Paris for a New Europe (1990) is the central decision making and governing body of the OSCE. Its members are the Foreign Ministers of the OSCE participating States and it meets between the summits. It meets once each year and passes a number of

decisions. These are not binding but are considered to be expressions of political will. Positive decisions have come out of the Ministerial Council which, in 2013, passed a decision on Freedom of Thought, Conscience, Religion or Belief.^[68] This called on Participating States, amongst other things, to “[f]ully implement OSCE commitments on the freedom of thought, conscience, religion or belief” and “[t]ake effective measures to prevent and eliminate discrimination against individuals or religious or belief communities on the basis of religion or belief.”

- During *Summits*,^[69] Heads of State set priorities at the highest political level. The first summit took place in 1975 and there have been seven others since. Each has resulted in a declarative statement for the OSCE. Setting the OSCE apart from the Council of Europe and the United Nations is the fact that homosexual agenda issues are not explicitly mentioned in any of the commitments or decisions adopted at the numerous summits and

councils held since 1975.

- The ***Permanent Council***,[\[70\]](#) the main regular decision-making body of the Organization, convenes weekly to discuss current developments in the OSCE area and to make appropriate decisions. OSCE decisions are made by consensus and so a decision can only become politically binding once all the delegates are in agreement.
- The ***Parliamentary Assembly*** was established in 1990 to promote greater involvement in the OSCE by national parliaments. The assembly has several meetings per year and an annual session held each July. At the end of the annual session, the Assembly produces a Final Declaration and adopts a number of resolutions. These resolutions do not have any binding authority. The Parliamentary Assembly contains three General Committees which relate to the three defined areas of the OSCE's work: the

General Committee on Political Affairs and Security; the General Committee on Economic Affairs, Science, Technology and Environment; and, the General Committee on Democracy, Human Rights and Humanitarian Questions.

- The **Chairman-in-Office** goes to a different Member State each year and is headed by a Chairman-in-Office – the Foreign Minister of the state in question. The Chair-in-Office is assisted by the former Chair and succeeding Chair. Together, the three form the OSCE Troika. The Chair-in-Office has the ability to influence the agenda and set priorities but what comes of this ultimately depends on whether consensus can be reached. As the OSCE is primarily a security organization, most chairmanships focus on this. However that is not universally true; at the end of the Dublin Ministerial Council, the Irish Minister for Foreign Affairs and Trade stated, after no agreements could be reached, that he would “work tirelessly to... combat discrimination of all

kinds, including discrimination against our LGBT fellow citizen.”[\[71\]](#)

- The ***OSCE Office for Democratic Institutions and Human Rights (ODIHR)*** is the most relevant OSCE body for our purposes, especially since many OSCE issues fall outside the realm of life and family issues. This body “provides support, assistance and expertise to participating States and civil society to promote democracy, rule of law, human rights and tolerance and non-discrimination. ODIHR observes elections, reviews legislation and advises governments on how to develop and sustain democratic institutions. The Office conducts training programs for government and law-enforcement officials and non-governmental organizations on how to uphold, promote and monitor human rights.”[\[72\]](#) Part of its work is organizing the annual Human Dimension Implementation Meeting (HDIM) – a two-week human rights conference to review governments’

progress in putting their commitments into practice.

(iii) Parliamentary Assembly activity which affects Human Life and the Family

- *Annual Declarations* are adopted at the conclusion of each session of the Parliamentary Assembly. The Oslo Declaration [\[73\]](#) containing the resolutions adopted during the 2010 annual session of the Parliamentary Assembly includes a “Resolution on Women’s Rights and Reproductive Health.” That resolution contains the language that the Assembly is “[d]eeply concerned that the high rates of preventable maternal mortality in the OSCE area are related to the presence of gender inequalities which include; ... unsafe abortions or lack of access to abortion...” and further “acknowledging that the full and equal exercise by women of their human rights, including the right to sexual and reproductive health, is essential to achieve a more peaceful,

prosperous and democratic development of the OSCE area...” It is noteworthy that the subsequent 2011 Belgrade Declaration, 2012 Monaco declaration and 2013 Istanbul declaration contained no such language.

- ***The Yogyakarta Principles.*** [\[74\]](#) In June 2013, a resolution was tabled by Belgium calling upon the OSCE to formally recognize the Yogyakarta Principles. This radical document specifically addresses sexual orientation and gender identity and includes such controversial principals as no. 13 which specifies that “states shall: (a) take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation of gender identity, to social security and other social protection measures...health insurance or care or benefits (including for body modifications related to gender identity)...”The reality of just how far this document, which purports to simply apply international human rights standards to

address the abuse of those practicing homosexual behavior goes, is perhaps best demonstrated by the fact that the Deputy Head of the American delegation led the opposition to the resolution which was ultimately voted down by a 23 to 4 vote.[\[75\]](#) Whether the United States would react in the same way if a similar resolution were tabled now is yet to be seen following the appointment of an Ambassador practicing homosexual behavior as Head of the US Mission to the OSCE.[\[76\]](#)

(iii) Initiatives of the ODIHR Which Affect Human Life and the Family

- ***Guidelines on Human Rights Education for Health Workers:*** In relation to the life issue, the impact of civil society at the ODIHR can be seen in the September 2013 “Guidelines on Human Rights Education for Health Workers”.[\[77\]](#) This document provides guidance on how to educate health workers in human rights. It

does not adopt the principles of human rights set forth in the Universal Declaration of Human Rights, but instead refers to novel “rights” such as “sexual and reproductive rights.”[\[78\]](#)

Under the heading, “Core Competencies: Knowledge and Understanding”, a reference to “sexual and reproductive rights, such as family planning, contraception, pregnancy, etc” appears. Most alarmingly, the term “sexual and reproductive rights” is footnoted with reference to a policy document by the abortion provider and lobby group International Planned Parenthood Federation called “Sexual rights: an IPPF Declaration.”[\[79\]](#) This document includes, under its Article 9 that “all women have the right to information, education and services necessary for the protection of reproductive health, safe motherhood and safe abortion, which are accessible, affordable, acceptable and convenient to all users.”

- The ***Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools***[\[80\]](#): This document provides guidelines which, if applied, weaken parental rights with respect to the education of their children. The opt-out rights of parents apply only when “states provide for the teachings of religions or beliefs”[\[81\]](#) and parents object to the teaching on a conscientious basis. But when states provide for “teaching *about* religions or beliefs” in “an appropriate manner,” states may make such teaching “compulsory,” denying parents any opt-out rights.[\[82\]](#)
- The ***Tolerance and Non-Discrimination Department***: Despite an ongoing debate concerning to what extent or not the demands of homosexual behavior advocates are contained within the OSCE mandate, it has been argued that ODIHR has tried to push such issues forwards with the creation of a Tolerance and Non-Discrimination Department which has included discrimination based on sexual orientation in its working definition of “hate”

crime. It further included homophobia as a ‘key issue’ within the publicly accessible online database, TANDIS (Tolerance and Non-Discrimination Information System). The Holy See, having full participant status at the OSCE – almost uniquely so when compared to other international institutions – only acquiesced to this after “Intolerance against Christians” was similarly included.[\[83\]](#)

(D) GENERAL DOCUMENTS AFFECTING HUMAN LIFE AND THE FAMILY

- **Parliamentarians Declaration on the Rights of the Family[\[84\]](#):** Protects the natural family based on the union of one man and one woman in marriage as the fundamental unit of society entitled to protection by society and the State, and promotes the anthropological foundation of human rights set forth in the Universal Declaration of Human Rights, that is, the inherent

dignity of the human person.

[1] There are 28 EU Member States and it has an annual budget of \$151 billion. European Commission, ‘Q&As On EU Budget 2013’ (12 December 2012) <http://europa.eu/rapid/press-release_MEMO-12-975_en.htm> accessed 11 May 2014.

[2] For consolidated texts, see: ‘Consolidated Texts Of The EU Treaties As Amended By The Treaty Of Lisbon’ (2008) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228848/7310.pdf> accessed 12 May 2014.

[3] Treaty on European Union, Article 19(3).

[4] See generally: ‘EUROPA – European Parliament’, <http://europa.eu/about-eu/institutions-bodies/european-parliament/index_en.htm> accessed 12 May 2014.

[5] European Parliament, ‘About Human Rights And Democracy’, <http://www.europarl.europa.eu/aboutparliament/en/0039c6d1f9/Human-rights.html#infography_defendinghumanrights> accessed 12 May 2014.

[6] See generally: Gerhard Sabathil and others, *The European Commission: An Essential Guide To The Institution, The Procedures And The Policies* (Kogan Page Publishers 2008) ch 1.

[7] *ibid* 16

[8] See: <http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm> accessed 10 May 2014.

[9] This historical overview of the European Union follows the development of EU law as set out in: Alex Warleigh-Lack, *European Union* (Routledge 2008) ch 2.

[10] Treaty Establishing the European Economic Community, 298 UNTS 11. Factsheet available at <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm> accessed 9 May 2014.

[11] *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] Case no 26–62 (European Court of Justice, 5 February 1963).

[12] The judgment of the Court is summarized as follows: “According to the spirit, the general scheme and the wording of the EEC Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.”

[13] *Flaminio Costa v ENEL* [1964] Case no 6–64 (European Court of Justice, 15 July 1964).

[14] In particular, the Luxembourg agreement provides, “Where, in the

case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavor, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community” See summary at: <http://europa.eu/legislation_summaries/glossary/luxembourg_compromise_en.htm> accessed 9 May 2014.

[15] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] Case no 120–78 (European Court of Justice, 20 February 1979).

[16] “In intra-EU trade in goods, mutual recognition is the principle that a product lawfully marketed in one Member State and not subject to Union harmonisation should be allowed to be marketed in any other Member State, even when the product does not fully comply with the technical rules of the Member State of destination. There is one exception to this principle: the Member State of destination may refuse

the marketing of a product in its current form only where it can show that this is strictly necessary for the protection of, for example, public safety, health or environment. In that case, the Member State of destination must also demonstrate that its measure is the least trade-restrictive measure.” Definition taken from: <http://ec.europa.eu/enterprise/policies/single-market-goods/free-movement-non-harmonised-sectors/mutual-recognition/index_en.htm> accessed 10 May 2014.

[\[17\]](#) *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] Case no C-6/90 and C-9/90 (Court of Justice of the European Union, 19 November 1991).

[\[18\]](#) The procedure is based on the principle of parity and means that neither institution (European Parliament or Council) may adopt legislation without the other’s assent.

[19] Treaty on European Union (Consolidated Version), Treaty of Amsterdam (entered into force 1 May 1999) <<http://www.refworld.org/docid/3dec906d4.html>> accessed 8 May 2014.

[20] Andrew Moravcsik and Kalypso Nicolaidis, 'Explaining The Treaty Of Amsterdam: Interests, Influence, Institutions' (1999) 37 *Journal of Common Market Studies* 59, p. 80.

[21] *Brunner v European Union Treaty* [1993] Case no BVerfGE 89 (de German Constitutional Court, 1993). In particular, in paragraph 22 of its judgment, the Federal Constitutional Court states, 'If common actions and measures under Titles V and VI TEU impose obligations on member-States, binding in international law, to make constitutionally relevant encroachments on private rights, all such encroachments, if they occur in Germany, will be subject to review in full by the German courts. In that respect, the protection of fundamental rights provided by the German constitution is not displaced by supra-national law that

could claim precedence. Just as with any traditional international treaty, in so far as its implementation internally would infringe constitutional rights it is prohibited by German constitutional law.’

[\[22\]](#) ‘Consolidated Texts of the EU Treaties as Amended by the Treaty of Lisbon’ (n 2), Art. 6(2) (as amended).

[\[23\]](#) *Jürgen Römer v City of Hamburg* [2011] Case no C–147/08 (European Court of Justice, 10 May 2011).

[\[24\]](#) It should also be noted that the Charter of Fundamental Rights of the European Union Article 21(1) prohibits discrimination based on “sexual orientation.”

[\[25\]](#) The “+” indicates a positive development.

[\[26\]](#) *Oliver Brüstle v Greenpeace eV* [2011] Case no C–34/10 (Court of

Justice of the European Union, 18 October 2011).

[27] Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998L0044>> accessed 9 May 2014.

[28] *Oliver Brüstle v Greenpeace eV* (n 26), para 4.

[29] *ibid*, para 35.

[30] Cf. *infra*. (A)(iii).

[31] Further information available at: <<http://www.oneofus.eu>> accessed 9 May 2014.

[32] One of Us, ‘Citizens’ Initiative “One Of Us” For The Respect Of Human Life. Next Step: European Commission Decision.’ (28 April 2014) <<http://www.oneofus.eu/citizens-initiative-one-of-us-for-the->

respect-of-human-life-next-step-european-commission-decision/>
accessed 13 May 2014.

[33] <http://www.turtlebayandbeyond.org/2014/ippf/the-european-citizens-initiative-one-of-us-challenges-the-european-institutions-before-the-general-court-of-the-european-union/>.

[34] European Dignity Watch, ‘The Funding Of Abortion Through EU Development Aid’ (March 2012).

[35] Edite Estrela, ‘Report On Sexual And Reproductive Health And Rights’ (2 December 2013).

[36] JC von Krempach, ‘European Parliament Dismisses Estrela-Report’ (*Turtle Bay and Beyond*, 10 December 2013)
<<http://www.turtlebayandbeyond.org/2013/abortion/european-parliament-dismisses-estrela-report-a-triumph-for-human-rights-and->

democracy-and-a-resounding-defeat-for-the-abortion-and-gay-rights-lobbies/> accessed 13 May 2014.

[37] Sophia Kuby, ‘How The Defeat Of A Radical Pro-Abort EU Proposal Has Strengthened European Activists’ (*LifeSiteNews*, 10 January 2014) <<http://www.lifesitenews.com/news/how-the-defeat-of-a-radical-pro-abortion-eu-proposal-has-strengthened-european>> accessed 13 May 2014.

[38] Ulrike Lunacek, ‘Report On The EU Roadmap Against Homophobia And Discrimination On Grounds Of Sexual Orientation And Gender Identity’ (8 January 2014).

[39] OJ L 189, 12 July 2010, pp. 12-13.

[40] These subsidiary institutions derive their respective powers from the Statute of the Council of Europe [1949] COETS 1 (5 May 1949).

[41] See: <http://website-pace.net/en_GB/web/apce/how-it-works> accessed 11 May 2014.

[42] Committee of Ministers of the Council of Europe, ‘Resolution (99) 50 On The Council Of Europe Commissioner For Human Rights’ (7 May 1999).

[43] For a comparative analysis of the differing jurisprudence of the European Court of Justice (the Luxembourg Court) and the European Court of Human Rights (the Strasbourg Court), see: European Parliament Directorate-General for Internal Policies, ‘Main Trends In The Recent Case Law Of The EU Court Of Justice And The European Court Of Human Rights In The Field Of Fundamental Rights’ (2012).

[44] Council of Europe, ‘European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14’, 4 November 1950, ETS 5.

[45] Ibid, Art. 32.

[46] For a list of Council of Europe treaties. See <http://www.conventions.coe.int/Treaty/Commun/ListsTraites.asp?CM=8&CL=ENG> accessed 11 May 2014.

[47] *Haas v Switzerland* (2011) 53 EHRR 33 (ECtHR).

[48] *A, B and C v Ireland* (2011) 53 EHRR 13 (ECtHR).

[49] Ibid, § 214.

[50] Ibid, § 241.

[51] Ibid, § 267.

[52] *Tysiac v Poland* (2007) 45 EHRR 42 (ECtHR).

[53] *Ibid*, §§ 124-130.

[54] *SH v Austria* (2011) 52 EHRR 6 (ECtHR).

[55] *Ibid*, §§ 111-118.

[56] *Kozak v Poland* (2010) 51 EHRR 16 (ECtHR).

[57] *Ibid*, § 99.

[58] *Schalk v Austria* (2011) 53 EHRR 20 (ECtHR).

[59] Par. 101.

[60] *Lautsi v Italy [GC]* (2012) 54 EHRR 3 (ECtHR).

[61] *Ibid*, §§ 69-70.

[62] Parliamentary Assembly of the Council of Europe, ‘Resolution 1763 (2010)’ (7 October 2010).

[63] For a list of participating states, see: <<http://www.osce.org/who/83>> accessed 11 May 2014.

[64] Office for Democratic Institutions and Human Rights, ‘What Is The Human Dimension?’ (no date) <<http://www.osce.org/odihr/43546>> accessed 13 May 2014.

[65] See: <http://www.ilga-europe.org/home/guide_europe/osce/relevance_to_lgbt_rights> accessed 12 May 2014.

[66] Council of the European Union, ‘EU Strategic Framework And Action Plan On Human Rights And Democracy’ (25 June 2012).

[67] See generally: <<http://www.osce.org/mc>> accessed 10 May 2014.

[68] Ministerial Council of the OSCE, ‘Decision No. 3/13 On Freedom Of Thought, Conscience, Religion Or Belief’ (6 December 2013).

[69] See generally: <<http://www.osce.org/summits>> accessed 12 May 2014.

[70] See generally: <<http://www.osce.org/pc/108282>> accessed 12 May 2014.

[71] Eamon Gilmore TD, ‘Closing Statement By The Chairperson-In-Office Of The OSCE’ (19th OSCE Ministerial Council, 7 December 2012).

[72] See generally: <<http://www.osce.org/odihr>> accessed 13 May 2014.

[73] Parliamentary Assembly of the OSCE, ‘Oslo Declaration’ (19th

Annual Session, 10 July 2010).

[74] Principles available online at:

<www.yogyakartaprinciples.org/principles_en.pdf> accessed 10 May 2014.

[75] The Family Watch, 'Family Watch International Newsletter' (9 July 2013) <<http://www.familywatchinternational.org/fwi/newsletter/0655.cfm>> accessed 13 May 2014.

[76] James Nichols, 'Daniel Baer, Openly Gay U.S. Ambassador, Introduces Himself To The World' (*Huffington Post*, 16 September 2013) <http://www.huffingtonpost.com/2013/09/16/daniel-baer-openly-gay-ambassador_n_3935554.html> accessed 13 May 2014.

[77] OSCE ODIHR, *Guidelines On Human Rights Education For Health Workers* (2013).

[78] Ibid, p. 31.

[79] “Sexual rights: an IPPF Declaration”, International Planned Parenthood Federation <<http://www.ippf.org/en/Resources/Statements/Sexual+rights+an+IPPF+declaration.htm>> accessed 10 May 2014.

[80] Office for Democratic Institutions and Human Rights, *Toledo Guiding Principles On Teaching About Religions And Beliefs In Public Schools: Prepared By The ODHIR Advisory Council Of Experts On Freedom Of Religion Or Belief* (OSCE Office for Democratic Institutions and Human Rights 2007).

[81] *ibid*, p. 69.

[82] *ibid*.

[83] Cees Van Beek, ‘The Politics Of LGBT Rights: A Comparison

Between The United Nations, The OSCE And The Council Of Europe’ (Leiden University 2013), p. 43.

[\[84\]](#)This document can be signed by elected legislative representatives from Parliaments across the world. It is an instrument of unity and substantive clarity.

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