

THE RIGHT TO PALLIATIVE CARE: A ‘MIRAGE’ IN THE JURISPRUDENCE OF THE ECTHR AND IACTHR?

IL DIRITTO ALLE CURE PALLIATIVE: UN ‘MIRAGGIO’ NELLA GIURISPRUDENZA DELLA CORTE EDU E DELLA CORTE IDU?

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“The unreasonable failure to treat pain is poor medicine, unethical practice, and is an abrogation of a fundamental human right”.

Margaret Somerville

Abstract: Palliative care has so far often been the focus of various fields of study and has to date been assessed and examined from several perspectives. Sociologists, psychologists, philosophers and, last but not least, physicians and medical experts have considered the role and the evolution of palliative care both from a theoretical and an empirical perspective. But little attention has been paid so far to the right to palliative care from an international legal viewpoint. This is despite the fact that the European Court of Human Rights (‘ECtHR’) and the Inter-American Court of Human Rights (‘IACtHR’) have been confronted with issues related to palliative care on some occasions. The purpose of this paper is to fill this gap and to assess and subsequently compare and contrast the respective approaches of the ECtHR and of the IACtHR to palliative care. The paper will address, through some relevant examples, the enduring resistance by these two human rights courts to the affirmation of a human right to palliative care. It also formulates some proposals for overcoming these difficulties, including among others: a) an interpretation of the right to life under Article 2 of the ECHR aimed at distinguishing euthanasia from palliative care; b) a care-oriented interpretation of the prohibition of inhuman and degrading treatments under Article 3 ECHR by the ECtHR; c) a constant use of the notion of the ‘vida digna’ under Article 4 of the ACHR in the medical jurisprudence of the IACtHR; d) a use of the Inter-American Convention on the Rights of Older Persons of 2014 that explicitly recognizes a right to palliative care in the ACtHR’s case-law; e) a use of the WHO recommendations related to palliative care in the medical case-law of the ECtHR and the ACtHR.

Palabras clave: palliative care, European Court of Human Rights (‘ECtHR’), the Inter-American Court of Human Rights (‘ACtHR’), ‘vida digna’, inhuman and degrading treatments, end-of-life care, medical jurisprudence, the Inter-American Convention on the Rights of Older Persons (‘ICROP’).

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Riassunto: Le cure palliative hanno sovente costituito il fulcro dell'attenzione di molteplici campi di studio e, fino ad oggi, sono state considerate ed esaminate da numerose prospettive. I sociologi, gli psicologi, i filosofi e, ultimi ma non meno importanti, medici ed esperti nell'ambito sanitario hanno vagliato il ruolo e l'evoluzione delle cure palliative da una prospettiva sia teorica che pratica. Pur tuttavia, scarsa attenzione è stata dedicata allo stato attuale al diritto alle cure palliative dal punto di vista giuridico a livello internazionale. Ciò è avvenuto nonostante la Corte Europea dei Diritti dell'Uomo ('Corte EDU') e la Corte Interamericana dei Diritti dell'Uomo ('Corte IDU') si siano interfacciate con questioni connesse alle cure palliative in alcune occasioni. Il proposito del presente articolo consiste nel colmare questa lacuna e, conseguentemente, porre a confronto i rispettivi approcci della Corte EDU e della Corte IDU verso le cure palliative. Il presente lavoro si dedica, pertanto, mediante l'analisi di una serie di casi emblematici, alle persistenti resistenze delle due corti dedite alla protezione dei diritti umani sulle quali si concentra, rispetto all'affermazione del diritto umano alle cure palliative. L'articolo formula, altresì, alcune proposte per il superamento delle difficoltà incontrate dalle Corti nell'affrontare tale compito, in particolare suggerisce: a) l'interpretazione del diritto alla vita suggellato dall'Articolo 2 della Convenzione Europea dei Diritti dell'Uomo (CEDU) finalizzata a distinguere l'eutanasia dalle cure palliative; b) lo sviluppo, da parte della Corte EDU, di un'interpretazione medicalmente orientata del divieto di trattamenti inumani e degradanti contemplato dall'Articolo 3 della CEDU; c) l'impiego costante della concezione della "vida digna" secondo l'Articolo 4 della Convenzione Interamericana dei Diritti dell'Uomo (CADU) nella giurisprudenza sanitaria della Corte IDU; d) un utilizzo della Convenzione Interamericana dei Diritti delle Persone Anziane del 2014 che riconosca espressamente il diritto alle cure palliative nella giurisprudenza della Corte IDU; e) l'uso delle raccomandazioni dell'Organizzazione Mondiale della Sanità (OMS) relative al diritto alle cure palliative nella giurisprudenza sanitaria della Corte EDU e della Corte IDU.

Parole chiave: cure palliative, Corte Europea dei Diritti dell'Uomo ('Corte EDU'), Corte Interamericana dei Diritti dell'Uomo ('Corte IDU'), 'vida digna', trattamenti inumani e degradanti, terapie per i pazienti in fase terminale, giurisprudenza sanitaria, Convenzione Interamericana sui Diritti delle Persone Anziane (CADPA).

1. Introduction

1. 'My mother was a cancer patient for nearly 20 years. She received excellent medical care for the vast majority of that time. The last week of her life was more traumatic than anything she had gone through in the previous two decades and it continues to haunt me to this day. It does not have to be this way. Had we had a palliative care team involved in her care, she would have still died of her disease, but her death would have been more peaceful for all of us'. These are the words of Dr. Leeat Granek, who, besides being a psychologist, has herself experienced the suffering of coping with a loved one's illness and bereavement.¹

2. As reported here, these words perfectly elucidate the human side of palliative cares. Moreover, and more generally, they help us understand the great attention globally attributed so far to palliative treatments, i.e. the fact that they have represented a topic of interest in several scientific fields.² In brief,

¹ See L. GRANEK, 'Palliative care is a human right' (*Huffington Post*, 10 May 2015) <http://www.huffingtonpost.com/dr-leeat-granek/palliative-care-is-a-human-right_b_8239460.html> accessed 22 November 2015.

² See C. CAHN, *Human Rights, State Sovereignty, and Medical Ethics: Examining Struggles Around Coercive Sterilization of Romani Women* (Martinus Nijhoff Publishers 2014) 209 ff., where social action in human rights is theorized and assessed; F. BRENNAN, 'Dignity: A Unifying Concept for Palliative Care and Human Rights' (2014) 22 (2) *Progress in Palliative Care* 88-96; S. NEGRI (ed), *Self-Determination, Dignity and End-of-Life Care. Regulating Advance Directives in International and Comparative Perspective* (BRILL 2011) 3 ff; Open Society Foundation, 'Palliative Care as a Human Right: A Fact Sheet' (May 2011) <<https://www.opensocietyfoundations.org/publications/palliative-care-human-right-fact-sheet>> accessed 22 November 2015; J. STJERNSWARD, D. CLARK, 'Palliative Medicine: A global perspective' in D. DOYLE, G. HANKS, N. I. CHERRY, K. CALMAN (eds), *Oxford Textbook of Palliative Medicine* (3rd ed. Oxford University Press 2004).

it is sufficient here to recall the efforts that, in particular, medical doctors, sociologists, psychologists and philosophers³ have made towards making palliative care central to the debates on the most sensitive issues related to chronic diseases and end-of-life care.⁴ Furthermore, as reported here, Dr. Granek's above-mentioned statements also help us understand why the World Health Organization (WHO) has adopted a large number of resolutions on the topic of palliative care.⁵ Again, they aid us in understanding the rationale behind the WHO's broad definition of 'palliative care' as: 'an approach that improves the quality of life of patients and their families facing the problems associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual'.⁶ As has already been variously observed, this is a definition of palliative care consistent with the conception of health enshrined in the Preamble of the WHO's establishing agreement, which provides that: 'health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.⁷ Lastly, Dr. Granek's above-mentioned statements are also of help in perceiving the pivotal importance of a 'human dignity approach'⁸ to ethical and legal issues of palliative care and care at the end of life.⁹ Yet, a dignified existence is needed to cope with chronic and terminal illnesses, and represents one of the key goals pursued by palliative care.¹⁰

3. This paper aims first at assessing and, subsequently, at comparing and contrasting the respective contributions of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) to the widespread lack of attention paid by these bodies to the values embodied in international legal instruments on the right to palliative care. As Professor Thomas Buergenthal indirectly suggests, this type of comparative approach to the topic is strongly advisable because 'although the American Convention is modeled on the European Convention, it departs from or improves upon the latter in a number of important respects'.¹¹ In this paper, an empirical analysis is conducted on the compliance of the judicial decisions of the two regional human rights courts in Europe and the Americas with the international standards on the protection of health, especially when palliative treatment and end-of-life care are involved. This requires a comparative study of the influence of those legal instruments on the case law of the ECtHR and the IACtHR. To do so, this paper starts with a brief discussion on the relevant binding instruments that could help to provide a suitable normative basis for the effective protection and enforcement to the right to palliative care. Subsequently, the WHO standards

³ See L. GWYTHYR, F. BRENNAN, R. HARDING, 'Advancing Palliative Care as a Human Right' (2009) 38 *Journal of Pain and Symptom Management* 767-774; I. TUFFREY-WINEL, D. McLAUGHLIN, L. CURFS, A. DUSART, C. HOENGER, L. McENHILL, S. READ, K. RYAN, D. SATGÉ, B. STRAßER, B. E. WESTERGARD, D. OLIVER, 'Defining consensus norms for palliative care of people with intellectual disabilities in Europe, using Delphi methods: A White Paper from the European Association of Palliative Care' (2015) *Palliative Medicine* 1-10 <<http://pmj.sagepub.com/content/early/2015/09/06/0269216315600993.full>> accessed 22 November 2015.

⁴ See S. NEGRI, 'Cuidados Paliativos y Derecho Internacional de Los Derechos Humanos: El Derecho Universal a No Sufrir' in T. ZAMUSIO (ed), *BIOÉTICA: Herramienta de las Políticas Públicas y de los Derechos Fundamentales en el Siglo XXI* (UMSA-UNISA-ProDiversitas 2012) 237-260, 240, who deals with the difference between palliative care in general and palliative treatment administered as end of life care; Human Rights Watch, 'Please, Do Not Make Us Suffer Any More: Access to pain treatment as a human right' (*Human Rights Watch*, March 2009) p. 5 <http://www.hrw.org/en/reports/2009/03/02/please-do-not-make-us-suffer-any-more> accessed 23 January 2016.

⁵ See e.g. World Health Organization, 'WHO definition of palliative care' (WHO) <www.who.int/cancer/palliative/definition/en/> accessed 15 January 2016.

⁶ Ibid.

⁷ Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948., <http://www.who.int/governance/eb/who_constitution_en.pdf> accessed 22 November 2015.

⁸ F. BRENNAN (n 2) 92 ff.

⁹ See F. SEATZU, 'Constructing A Right To Palliative Care: The Inter-American Convention on the Rights of Older Persons' (2015) *Ius et Scientia* <<http://institucional.us.es/iusetscientia/index.php/ies/index>> accessed 15 January 2016.

¹⁰ F. BRENNAN (n 2); S. NEGRI (n 4).

¹¹ T. BUERGENTHAL, 'The American and European Conventions on Human Rights: Similarities and Differences' (1981) 34 *AUL Rev* 156.

are taken into consideration, together with the significant universal and regional soft law sources on the issue, such as Principle 24 of the UN Principles on the Protection of All Persons Subject to Any Form of Detention or Prison and the Recommendations adopted in the framework of the Council of Europe. In this framework, particular attention is paid to the Inter-American Convention on the Human Rights of Older Persons, which explicitly provides for the right to palliative care on the landscape of international binding instruments for the very first time.

2. A Survey of the International Standards on the Protection of the Right to Palliative Care.

4. Our starting point here is that the right to palliative care was ignored by international binding law until the adoption of the Inter-American Convention on the Human Rights of the Older Persons (ICROP) in June 2015.¹² This is notwithstanding the undisputed importance of palliative care as a tool for improving the quality of life of the patients and their family.¹³ This is also notwithstanding the attention that has been globally devoted to the right to palliative care by several international sources of soft law such as the Prague Charter for Palliative Care¹⁴ and Recommendation Rec 24 (2003) of the Committee of Ministers of the Council of Europe to its member States on the organization of palliative care.¹⁵

5. Nevertheless, despite the ‘silence’ of international binding law on palliative treatments (including of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹⁶ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁷ the UN Convention on the Rights of the Child (CRC)¹⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁹ both the UN Committee on the Rights of the Child²⁰ and the UN Committee on Economic, Social and Cultural Rights²¹ have urged the adoption of

¹² Organization of the American States, Inter-American Convention on Protecting the Human Rights of Older Persons, 15 June 2015, A-70. The text of the Inter-American Convention on the Rights of Older Persons, in English, is also available at OAS’ official website: <http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp>.

¹³ See F. BRENNAN (n 2); S. NEGRI (n 4). World Health Organization, ‘WHO definition of palliative care’ (n 5).

¹⁴ Prague Charter for Palliative Care [2013]. The text of the Charter, in English, is also available at: <https://secure.avaaz.org/en/petition/The_Prague_Charter_Relieving_suffering/> accessed 14 October 2015.

¹⁵ Council of Europe, Recommendation Rec (2003) 24 of the Committee of Ministers to member states on the organisation of palliative care. Adopted by the Committee of Ministers on 12 November 2003 at the 860th meeting of the Ministers’ Deputies <[http://www.coe.int/t/dg3/health/Source/Rec\(2003\)24_en.pdf](http://www.coe.int/t/dg3/health/Source/Rec(2003)24_en.pdf)> accessed 6 December 2015.

¹⁶ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195 <<http://www.refworld.org/docid/3ae6b3940.html>> accessed 22 January 2016.

¹⁷ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 <<http://www.refworld.org/docid/3ae6b3970.html>> accessed 22 January 2016.

¹⁸ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 <<http://www.refworld.org/docid/3ae6b38f0.html>> accessed 22 January 2016.

¹⁹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 6 December 2015.

²⁰ In particular, UN Committee on the Rights of the Child, Fifty-sixth session. Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Belarus, paras. 54-56. In this respect, see N. CHERNY, M. FALLON, S. KAASA, R. K. PORTENOY, D. C. CURROW, *Oxford Textbook of Palliative Medicine* (5th edn, Oxford University Press 2015) 274.

²¹ UN Committee on Economic, Social and Cultural Rights (CESCR), see in particular General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4 <<http://www.refworld.org/docid/4538838d0.html>> accessed 6 December 2015. See e.g. BRENNAN (n 2) 92 (stressing inter alia that when General Comment no. 14 on Article 12 of the ICESCR was issued in 2000, the Committee on Economic, Social and Cultural Rights explicitly recognized palliative care as integral part of healthcare (i.e. palliative treatment was said to fall within the scope of application of the right to health enshrined in the ICESCR). See also S. NEGRI, ‘Universal Human Rights and End-of-Life Care’ in S. NEGRI, J. TAUPITZ, A. SALKIC, A. ZWICK (eds), *Advance Care Decision Making in Germany and Italy. A Comparative, European and International Law Perspective* (Springer 2013) 1-37; S. NEGRI (n 4) 258 ff.; Open Society Foundation, ‘Palliative Care as a Human Right: A Fact Sheet’ (Open Society Foundation, May 2011) <<https://www.opensocietyfoundations.org/publications/palliative-care-human-right-fact-sheet>> accessed 22 November 2015.

measures to ensure the accessibility and availability of palliative care, at least on some occasions.²² The reason for this is clear and straightforward: the CRC and the ICESCR *can* be interpreted as protecting the right to palliative care. With the CRC, there are some provisions that suggest this conclusion. A first provision is Article 6, which protects the right to life and sets the obligation on States to ensure ‘to the maximum extent possible the survival and development of the child’. Another provision is Article 24, which protects the right to health of children. Similar considerations also apply to the ICESCR in general, and to Article 12 of the ICESCR in particular. As a confirmation of this, one may recall that in its General Comment no. 14, the CESCR advanced an interpretation of Article 12 of the ICESCR which considered equal access to palliative care as the object of a State duty under the Covenant as well as a means of protecting human dignity when chronic or terminal illnesses jeopardize it.²³ Of significance here is also the fact that, along with the CESCR and UN Committee on the Rights of the Child, the UN Special Rapporteur against Torture has urged States to adopt the indispensable measures in order to ensure accessibility and availability of palliative treatments.²⁴ Starting from the correct premise that the denial of palliative treatments may amount to cruel, inhuman or degrading treatment, it has interpreted Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which sets the prohibition of torture and other inhuman and degrading treatment, as the normative basis for the elaboration of the standards that States shall meet as far as it concerns health care.²⁵ Moreover, equally significant here is that the UN Special Rapporteur against Torture has explicitly extended the right of palliative care to infant and young children paediatric patients.²⁶

6. The rest of the paragraph provides a survey of the main international health care standards. To ascertain and critically evaluate the nexus between, on the one side, the ECHR and ACHR and, on

²² In particular, see the Comments of the Committee on the Convention on the Rights of the Child on Swaziland (2006), Uganda (2005) and Botswana (2004) of the UN Committee on the Rights of the Child (CRC); these sources do not explicitly refer to palliative treatment but urge States to improve the health assistance given to children affected by HIV. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 12. <<http://www.refworld.org/docid/4538838d0.html>> accessed 6 December 2015.

²³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 34 <<http://www.refworld.org/docid/4538838d0.html>> accessed 6 December 2015 (stressing that: ‘States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons [...] to preventive, curative and palliative health services’.)

²⁴ The Special Rapporteur has stressed that ‘the failure to ensure access to controlled medications for pain and suffering threatens fundamental rights to health and to protection against cruel, inhuman and degrading treatment’. Letter from Manfred Nowak, Special Rapporteur on Torture, and Anand Grover, Special Rapporteur on the right to the highest attainable standard of health, to Her Excellency Ms. Selma Ashipala-Musavyi, Chairperson of the 52nd Session of the Commission on Narcotic Drugs, 10 December 2008, p. 4 <http://www.hrw.org/sites/default/files/related_material/12.10.2008%20Letter%20to%20CND%20fromSpecial%20Rapporteurs.pdf> accessed 22 January 2016. In this respect, also see Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/10/44, 14 January 2009 <<http://daccessdds.un.org/doc/UNDOC/GEN/G09/103/12/PDF/G0910312.pdf?OpenElement>> accessed 22 November 2015. N. BURKE-SHYNE, ‘Ukraine applies Anti-Torture Standards to Health Care’ (*Open Society Foundation*, 1 September 2015) <<https://www.opensocietyfoundations.org/voices/ukraine-investigates-health-care-abuses-torture>> accessed 22 November 2015. This article explains how, given the findings set out in the Report on Ukraine issued by the Special Rapporteur against Torture and Other Inhuman and Degrading treatment, Ukraine has adopted an appropriate policy, aimed at preventing inhuman and degrading treatment, in line with the view expressed in the Report.

²⁵ Article 7 of the ICCPR provides that: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation’.

²⁶ As far as it concerns paediatric palliative care, the UN Special Rapporteurs on Health and Torture has clearly stated that ‘palliative care for young children is an obligatory part of health-care services . . . [They] have the right to receive the necessary physical, social, psychosocial and spiritual care to ensure their development and promote their best possible quality of life . . . Health systems must have adequately trained professionals to assess and treat pain in children of different ages and developmental stages and ensure the availability of paediatric diagnostic procedures and palliative care medicines in paediatric formulations . . .’ In this respect, see Report of the UN Special Rapporteur on the right to the highest attainable standard of health, Dainius Puras, A/70/213, 30 July 2015, para. 52, <<http://ohchr.org/EN/Issues/Health/Pages/SRRrightHealthIndex.aspx#>> accessed 23 January 2016. For a closer view on the state of art on paediatric palliative care, see J. MARSTON, ‘Children Around the World Aren’t Getting the Palliative Care They Need’ (*Open Society Foundation*, 8 October 2015) <<https://www.opensocietyfoundations.org/voices/children-around-world-aren-t-getting-palliative-care-they-need>> accessed 22 November 2015.

the other side, the international standards and general principles dealing with health care issues, it is useful to consider in particular those standards and principles that have succeeded in clarifying the most complex issues, and in particular those related to the human right to palliative care.

7. A broad and heterogeneous spectrum of international legal rules on the right to health care has existed for the international community at least since the early 1990s. The origins and main features of the standards and principles that are, objectively speaking, the most useful for interpreting and applying the most relevant ECHR and ACHR articles in the field of medical and health care are briefly outlined below.

8. The first modern (non-legally binding) international standards for the protection of health care were adopted in 1990 by the WHO after several years of study. The most noteworthy feature of these standards, the so-called WHO National Cancer Control Programmes, is their detailed elaboration of a wide range of models for States, aimed at easing the integration of palliative treatments into national health care systems. A second aspect of these standards that is worthy of being listed here is the statement according to which: ‘freedom from cancer pain must be regarded as a human right issue’.²⁷ A third aspect of these standards to be recalled is their utility in defining WHO Member States’ duties to provide relief treatments. In this respect, it is sufficient to indicate that: ‘the government of each WHO Member State has as responsibility’.²⁸ A fourth and last aspect worthy of being mentioned is that ensuring palliative care is perceived by the drafters of these standards as a priority that cannot be sacrificed because of low resource levels.

9. A similar approach, *mutatis mutandis*, can also be found in other international legal instruments that deal with the protection of the right to health care. Among these is the Prague Charter for Palliative Care as a Human Right, promulgated by the European Association of Palliative Care in collaboration with other organizations, which significantly defines ‘health’ as encompassing the health of people with life-limiting illness;²⁹ the Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe on the ‘Protection of the human rights and dignity of the terminally ill and the dying’, adopted in March 2002 at the 790th meeting of the Ministers’ Deputies of the Council of Europe; the Recommendation 1796 (2007) of the Parliamentary Assembly on the situation of elderly persons in Europe, adopted by the Standing Committee, acting on behalf of the Assembly of the Council of Europe on 24 May 2007 and more recently the Inter-American Convention on the Human Rights of Older Persons (ICROP),³⁰ the first international binding instrument that expressly provides the human right to palliative care from various standpoints by making explicit reference to the WHO National Cancer Control Programmes.

3. Health Care Issues before the European Court of Human Rights (‘ECtHR’).

10. Little attention has been paid thus far to the human right to palliative care in the case-law of the European Court of Human Rights (‘ECtHR’). This is notwithstanding the fact that this Court has been confronted with issues related to palliative care on several occasions.

²⁷ World Health Organization, 1998b; World Health Organization, ‘Approaches to Cancer Control’, p. 88 <<http://www.who.int/cancer/media/en/411.pdf>> accessed 22 January 2016.

²⁸ World Health Organization, ‘National cancer control programmes: policies and managerial guidelines’ (WHO, 2nd ed., 2002) p. 113 <www.who.int/cancer/media/en/408.pdf> accessed 6 December 2015.

²⁹ The text of the Charter, in English, is also available at <https://secure.avaaz.org/en/petition/The_Prague_Charter_Relieving_suffering> accessed 14 October 2015. On the subject, see E. SCHMIDLIN, D. OLIVER, ‘Palliative care as a human right: what has the Prague Charter achieved?’, (2014) 22 (3) *Eur J Pall Med* 141 – 143; L. RADBRUCH, L. DE LIMA, D. LOHMANN, E. GWYTHYR, S. PAYNE, ‘The Prague Charter: Urging governments to relieve suffering and ensure the right to palliative care’ (2013) 27 (12) *Palliative Medicine* 101-102.

³⁰ The Inter-American Convention on the Rights of Older Persons (n 12). On the subject, see F. SEATZU, ‘Sulla Convenzione dell’Organizzazione degli Stati Americani sui Diritti’ (2015) 31 *Anuario español de derecho internacional* 349 ff.

11. *D v. the United Kingdom* counts, undoubtedly, as among the most exemplary decisions in this regard.³¹ Not only does it not provide any input on the right to palliative care, as would have been possible considering the object of the decision of the Court, it also fails to sufficiently clarify when the denial of palliative treatment amounts to a violation of Art. 3 of the ECHR, which prohibits torture, and ‘inhuman or degrading treatment or punishment’. Most importantly, it fails to place the right to palliative care in the mainstream of the fundamental rights protected by the ECHR.

12. This jurisprudence was also applied in the case *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,³² concerning the death of an HIV-positive, intellectually disabled man of Roma ethnicity. In that case, the Court admittedly ascertained the violation of Articles 2 and 3 of the ECHR, when Romania failed to provide the indispensable medical assistance to Mr. Campeanu on behalf of whom the application was submitted to the ECtHR. However it is also true that very few considerations – if at all – were made by the Court on the parallel issue of whether the failure to provide palliative treatments to Mr. Campeanu also resulted in the breach of Articles 2 and 3 of the ECHR.

13. A similar approach, *mutatis mutandis*, may be found in *Sanles Sanles v. Spain*, an earlier case where the Court did not go much further than stating the obvious: ‘providing improved conditions or care might help alleviating the suffering ended by terminal patients’.³³ Again, a similar attitude was taken by the Court with respect to the right to private and family life under Art. 8 of the ECHR in *McGlinchey v the United Kingdom*,³⁴ a case involving the death of a heroin addict as a result of an alleged lack of medical care during her detention. Moreover, and more recently, a similar attitude of the ECtHR may be detected in *Lambert v. France*, a case about end-of-life decision-making on behalf of a persistently incompetent patient.³⁵ Some adjustments to this jurisprudence may be found, however, in *Koch v. Germany*, where the ECtHR implicitly acknowledged the role of palliative cares as a value-added complement to avoid assisted suicide.³⁶ But this acknowledgment was most likely motivated by the special circumstance that in this case: ‘doctors overwhelmingly concurred that palliative care improvements rendered assisted suicide unnecessary’.³⁷

14. Having stated this, since the ECtHR has thus far adopted an overall cautious attitude towards the recognition of a right to palliative care within the ECHR framework, the ECtHR would benefit from referring to the above-mentioned and far more detailed international standards and guidelines as major (if not indispensable) resources for the protection of the right to palliative care. It is true that in themselves these instruments (with the main exception of the ICROP) are not legally binding. Nevertheless they contain various and important clarifications on issues such as the notion of palliative care that has been defined in detail in the Preamble of the ICROP as: ‘the active, comprehensive and interdisciplinary treatment of patients whose illness not responding to curative treatment or who are suffering avoidable pain, in order to improve their quality of life until the last days of their lives’,³⁸ as well as on the duties of both public and private health care institutions to provide access to palliative cares, including access to essential pain medications for older persons. Moreover, these guidelines, standards and provisions may also aid the Court in developing feasible solutions and elaborating effective paths for recognizing and affirming palliative care as a fundamental right. Yet this is certainly true when referring in particular

³¹ *D. v the United Kingdom* (1997) 24 EHRR 423.

³² *Case of Centre for Legal Resources on Behalf Of Valentin Câmpeanu v Romania* ECHR 2014 xxx.

³³ *Sanles Sanles v Spain* ECHR 2000-XI 479, and see *Pretty v the United Kingdom* ECHR 2002-III 155, para. 55.

³⁴ *McGlinchey v the United Kingdom* ECHR 2003-V 183. For a broader perspective on the protection of the right to health in prison, F. SEATZU, S. FANNI, ‘A Comparative Approach to Prisoners’ Rights in the European Court of Human Rights and Inter-American Court of Human Rights Jurisprudence’ forthcoming in the *Denver Journal of International Law & Policy*.

³⁵ *Lambert and Others v France* ECHR 2015 xxx.

³⁶ *Koch v Germany* App no 497//09 (ECHR, 19 July 2012).

³⁷ *Ibid.* para. 64.

³⁸ See Organization of the American States, Inter-American Convention on Protecting the Human Rights of Older Persons (n 12), Art. 2.

to the WHO National Cancer Control Programmes, which can be useful since they openly affirm that ‘freedom from cancer pain shall be regarded as a human right issue’.³⁹ Mutatis mutandis, this is also true when referring to the Prague Charter for Palliative Care, which promotes the idea that health must be interpreted broadly as also encompassing the health of people with life-limiting illness. Furthermore, and more specifically, they could help the Court to affirm that even the lack or denial of palliative treatments could be conceived as ‘ill treatment’, of course provided they meet the minimum level of severity required by Art. 3 ECHR.

15. The next question is therefore why the ECtHR in its health-related jurisprudence has never referred to the Prague Charter, the WHO Guidelines, or other international legal standards dealing with the right to palliative care despite their above-mentioned advantages.

16. Perhaps at least four explanations may be provided for the rejection of those instruments as interpretative tools of the ECHR provisions. A first explanation is the ECtHR’s desire to prevent the emergence of a human right to palliative care in its case-law. This is notwithstanding the contribution that the recognition of such a right might give to the development and further consolidation of the ECtHR’s jurisprudence on the right to health that is currently at an early stage of maturity.⁴⁰ Direct evidence of this Court’s above-illustrated negative attitude towards accepting protection for the right to palliative care arises from several, even recent, judicial pronouncements, some of them already indicated above. For instance, this emerges from two leading judgments, respectively in *Lambert v. France*⁴¹ and *Pretty v. the United Kingdom*.⁴² A second explanation lies in the difficulties of selecting – from among the different standards, general principles and guidelines currently existing on the right to palliative treatments – the ones most appropriate for the interpretation of the ECHR provisions. This is mainly because of the diversity existing between such instruments. A third (although indirect) explanation can be found in the challenge of shaping a right to palliative care as a fundamental right. The magnitude of this challenge is evident if one considers that health activists, policy experts, academics, and others have advanced a multiplicity of interpretations of this right but no precise definition has attained widespread acceptance.⁴³ Yet much of this discussion on definition was only at an abstract philosophical and legal level of discourse (i.e. with little reference to the experience of the large majority of patients).⁴⁴ A final explanation is that none of the ECHR provisions refers explicitly to the possibility for the ECtHR to make reference to international legal tools, whether binding or non-binding.

17. All these difficulties are not to be underestimated, at least as regards the Prague Charter and the Council of Europe’s Recommendation on the protection of the human rights and dignity of the terminally ill and the dying. However, this is not a justification for excluding these and other correspondent standards and principles as interpretative tools of ECHR provisions. To the contrary, the recognition, since the 1990s, that the rules of public international law may be used as supporting

³⁹ World Health Organization, 1998b (n 27); World Health Organization, ‘Approaches to Cancer Control’ (n 27), p. 88.

⁴⁰ J. McHALE, ‘Fundamental Rights and Health Care’ in E. MOSSIALOS, G. PERMANAND, R. BAETEN, T. K. HERVEY (eds), *Health Systems Governance in Europe - The Role of European Union Law and Policy* (Cambridge University Press 2010) 282-314, 286.

⁴¹ *Lambert and Others v France* (n 35).

⁴² *Pretty v the United Kingdom* ECHR 2002-III 155.

⁴³ An exception might be the WHO Definition of Palliative Care, according to which: ‘Palliative care is an approach that improves the quality of life of patients and their families facing the problem associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual’. In this respect, see World Health Organization, ‘WHO definition of palliative care’ (n 5). See F. SEATZU, ‘Constructing a Right to Palliative Care: the Inter-American Convention on the Rights of Older Persons’ (2015) 1 (1) *Ius et Scientia* 25-40, 27; H. TEN HAVE, R. JANSSENS, *Palliative Care in Europe: Concepts and Policies* (IOS Press 2001).

⁴⁴ F. SEATZU (n 43); R. BECKER, ‘Palliative care 1: Principles of palliative care nursing and end-of-life care’ (2013) 105 *Nurs Times* <<http://www.nursingtimes.net/clinical-subjects/end-of-life-and-palliative-care/palliative-care-1-principles-of-palliative-care-nursing-and-end-of-life-care/2007480.fullarticle>> accessed 23 January 2016; F. RANDALL, R. SILCOCK DOWNIE, *The Philosophy of Palliative Care: Critique and Reconstruction* (Oxford University Press 2006) 10 ff.

evidence for expanding the applicability of the ECHR articles,⁴⁵ and above all, the fact that promoting the ‘provision of palliative care as a human right is admirable advocacy’, shows that such standards and general principles can indeed be used as interpretative tools of ECHR provisions in general and of Articles 2, 3 and 8 of the ECHR in particular.⁴⁶ In other words, given the utility of the ICROP and WHO National Cancer Control Programmes in clarifying the significance and operational character of the human right to palliative care as well as in drawing a distinction between palliative treatments and euthanasia,⁴⁷ the ECtHR’s approach, especially in the interpretation of the right to life under Article 2 of the ECHR and the prohibition of inhuman and degrading treatments under Article 3 of the ECHR, must be based on not an occasional, but on a systematic and frequent reference to these instruments.

18. Generally speaking, by interpreting ECHR provisions independently of the international guidelines and general principles on the protection of health care, the ECtHR failed to consider, for instance, that end-of-life care encompasses palliative care, which focuses on managing pain and other disturbing symptoms by offering psychological aid to patients.⁴⁸ More generally, it failed to acknowledge that the rights guaranteed by the ECHR are minimum rights; their exercise cannot be limited to a greater extent than that allowed by other international instruments, including the international instruments indicated above. In other words, as any obligation undertaken by a State under other international human rights instruments is of the maximum importance and its coexistence with the duties under the ECHR must therefore be taken into account to guarantee results that are most favourable to the individual, the ECHR must interpret the Convention in general, and Articles 2, 3 and 8 in particular, in a manner consistent with the tools of international human rights, including the binding and non-legally binding principles on the right to palliative care such as the ICROP, WHO National Cancer Control Programmes and the Prague Charter for Palliative Care. Further, although indirect, confirmation is the fact that by complying with such rules – notably with the WHO National Cancer Control Programmes that aim to lay down universal standards binding outside any treaty process, and therefore applicable without regard to specific acceptance by States, which can be invoked by any fundamental rights supervisory mechanism – the ECHR may expand its health care case-law. Moreover, it could also comply with its own jurisprudence on Art. 2 of the ECHR according to which this Article contains not only negative but also positive obligations.⁴⁹ Furthermore, it could adopt an approach coherent with its own statements and defence of the quality of life in the *Pretty* case, since improvement of the quality of life is clearly one of the essential aims of palliative treatments.

19. To sum up, as the case-law under Articles 2, 3 and 8 of the ECHR clearly indicates, the consequences of the negative approach of the ECHR towards the aforementioned standards and general principles on health care cannot be underestimated. This is so even though these consequences have not been universally recognized as being particularly relevant in practice.

⁴⁵ *Gustafsson v Sweden* ECHR 1996-II 655. F. SEATZU, S. FANNI, ‘The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine’ (2015) 31(81) *Utrecht Journal of International and European Law* <<http://www.utrechtjournal.org/articles/10.5334/ujiel.da/>> accessed 23 January 2016.

⁴⁶ J. McHALE (n 40) 286. G. REPETTO, ‘The Right to Health in the Case Law of the European Court of Human Rights’ (Academia.edu) <https://www.academia.edu/9605747/Right_to_Health_in_the_case_law_of_the_European_Court_of_Human_Rights> accessed 23 January 2016.

⁴⁷ F. SEATZU (n 43); Margaret Somerville, *Death Talk: The Case against Euthanasia and Physician-Assisted Suicide* (2nd edn, McGill-Queen’s University Press 2014); R. DWORKIN, *Life’s domination: An argument about abortion and euthanasia* (Knopf 1993) 240.

⁴⁸ S. B. MATH, S. K. CHATURVEDI, ‘Euthanasia: Right to life vs right to die’ (2012) 136 (6) *Indian J Med* 899–902; V. IVONE, ‘Exploring Self-Determination and Informed Consent in Advance Directive in light of the Italian Legal System’ in S. NEGRI (n 2) 402 ff.; P. MIERZEWSKI, ‘The Need for More Palliative Care’ in *Euthanasia: National and European perspectives* (Council of Europe 2004) 153 ff.

⁴⁹ J. F. AKANDJI-KOMBE, *A guide to the implementation of the European Convention on Human Rights – Human Rights Handbook n. 7* (Council of Europe 2007) 20 ff. <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d>> accessed 23 January 2016. Also see *Case of Centre for Legal Resources on Behalf Of Valentin Câmpeanu V. Romania* ECHR 2014 xxx, paras. 130 ff.

4. Health Care Issues before the Inter-American Court of Human Rights ('IACtHR').

20. The IACtHR has developed a rich jurisprudence on health care matters under Art. 5, paras. 1 and 2 of the ACHR, which respectively protect the right not to be subject to torture and inhuman or degrading treatment.

21. The possibility of using Art. 5, para. 1 for this purpose was first recognized in 2004, when the Court explained that: 'pursuant to Art. 5 of the ACHR the State has the obligation to provide regular medical examinations and care to prisoners, and also adequate treatment when this is required'.⁵⁰ Moreover, in the same judgment, the Court also said that: 'the State must allow and facilitate prisoners being treated by the physician chosen by themselves or by those who exercise their legal representation or guardianship'.⁵¹ The same line of reasoning was applied by the IACtHR in some of its subsequent rulings, such as *Ximenes Lopes v. Brazil*⁵², *Vélez Lóor v. Panama*⁵³ and *Vera Vera v. Ecuador*.⁵⁴

22. The IACtHR's judgment in *Vera Vera* is particular exemplary in this regard, since it recognized that: '...the medical negligence of State authorities in this case generated violations to Mr. Vera Vera's rights to personal integrity and life, and as such [...] the Ecuadorian State violated Article 5 (1), 5 (2) and 4 of the Convention, in conjunction with Article 1 (1) thereof, to the detriment of Mr. Pedro Miguel Vera Vera'.⁵⁵ Moreover, and more generally, it explicitly stated that: 'the rights to life and personal integrity are directly and closely linked with human health care'.⁵⁶ Two other exemplary cases are the *Yakye Axa*⁵⁷ and *Alban Cornejo*⁵⁸ cases, where some achievements were made in terms of protecting the indigenous communities' right to health in the framework of Art. 4 of the ACHR on the right to live a 'vida digna'.⁵⁹

23. If considered from a comparative perspective with the ECtHR, one might easily discover that the ACtHR has occasionally referred to international legal instruments dealing with health care as interpretative tools of Articles 4 and 5, paras. (1) (2) of the ACHR and of Art. 10 of the Protocol of San Salvador. In *Artavia Murillo*, for instance, the ACtHR made some references to the WHO establishing agreement, and incorporated the notion of health that this treaty provides in its legal reasoning.⁶⁰ Moreover,

⁵⁰ IACtHR, *Case of De la Cruz-Flores v. Perú*. Merits, Reparations and Costs. Judgment of 18 November 18, 2004. Series C No. 115, para. 132.

⁵¹ *Ibid.*

⁵² IACtHR, *Case of Ximenes-Lopes v. Brazil*. Merits, Reparations and Costs. Judgment of 4 July 2006. Series C No. 149.

⁵³ IACtHR, *Case of Vélez Lóor v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of 23 November 2010 Series C No. 218.

⁵⁴ IACtHR *Case of Ver-Vera et al. v Ecuador*, Preliminary Objection, Merits, Reparations and Costs. Judgement of 19 May 2011. Series C No. 226.

⁵⁵ *Ibid.* para. 79.

⁵⁶ *Ibid.* para. 43.

⁵⁷ IACtHR, *Case of the Yakye Axa Indigenous Community v Paraguay*. Merits, Reparations and Costs. Judgment of 1 June 2005. Series C No. 125.

⁵⁸ IACtHR, *Case of Albán Cornejo et al. v Ecuador*. Merits, Reparations, and Costs. Judgment of 22 November 2007, Series C No. 171.

⁵⁹ *Case of the Yakye Axa Indigenous Community v Paraguay* (n 57), paras. 166, 167. On this occasion, the IACtHR defined the scope of the right to health by incorporating the 'highest attainable standards of health' contemplated by the UN CESCR General Comment n.14, and provided an interpretation of the right to health, in close connection with the right to food and access to clean water, as a means for preserving indigenous communities' cultural identity and deep relationship with their ancestral lands, in the framework of *vida digna*. By so doing, the Court stated that in this respect 'special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water'.

⁶⁰ IACtHR, *Case of Artavia Murillo et al. (in vitro fertilization) v Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 November 2012, Series C No. 257, para. 148, which incorporated the notion of health enshrined in the Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June 1946, Official Records of the World Health Organization, no. 2, p. 100.

this was done with the purpose of defining the scope and contents of the rights to personal integrity, personal liberty, and private and family life that were relevant in those cases. More precisely, in *Artavia Murillo*, the Court integrated the scope of the relevant provisions of the ACHR by incorporating the definition of ‘reproductive health’ embodied in the Conference’s Programme of Action.⁶¹ This allowed it in particular to affirm that: ‘reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity – in all matters relating to the reproductive system and to its functions and processes’,⁶² as well as to state that: ‘the right to reproductive health entails the rights of men and women to be informed and to have free choice of and access to methods to regulate fertility, that are safe, effective, easily accessible and acceptable’.⁶³ Nevertheless, as even a quick glance at the case-law of the IACtHR on health care shows, there are also some notable exceptions to this approach.

24. For instance, one exception to the use of external sources of law for supporting a purposive interpretation of Art. 5 of the ACHR may be found in the above-mentioned *Vera Vera* case relating to the death of Mr. Vera as a result of medical negligence. In its decision on the case, the IACtHR noted that providing appropriate treatment: ‘in a timely manner [...] was an obligation of the authorities that had custody over the applicant’.⁶⁴ For this reason, it alleged violation of Art. 5, para. 2 of the ACHR relating to human dignity and personal integrity. Of special interest here is that the IACtHR, however, referred neither to the CESCR General Comment No. 14 dealing with the right to health care as set forth in Art. 12 of the ICESCR⁶⁵ nor to the establishing agreement of the World Health Organization (WHO) that conceptualizes ‘health’ as a: ‘state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’ in its reasoning on the violation of Art. 5 of the ACHR. But in so doing the IACtHR missed a precious opportunity – note that in none of its cases has the IACtHR yet ruled out the possibility that the State might be under a positive obligation to provide palliative care – to hold persuasively in favour of the existence of a human right to palliative care within the framework of the ACHR. The supporting argument of this view is clear if one pays attention to the circumstance that the WHO establishing agreement has considered the provision of palliative care, where appropriate, as part of ‘a continuum of health care for all persons’.⁶⁶ Another exception is in *Sawhoyamaxa Indigenous Community v. Paraguay* relating to indigenous people’s rights.⁶⁷ In this case, too, the Court reached its conclusion without referring to other sources of law (the ACHR) to support its interpretation, but did so exclusively through recourse to its interpretation instruments.

5. Final Remarks

25. Will there ever be a systematic use of the above-named guidelines, general principles and standards on the right to palliative care in the jurisprudence of the ECtHR and of the ACtHR?

26. Our answer must be no, at least for the following reasons. Starting with the ECtHR, this is firstly because this Court only sporadically referred to other international law as supporting evidence

⁶¹ Programme of Action of the International Conference on Population and Development, Cairo, 1994, para. 7.2; UN A/CONF.171/13/Rev.1 (1995).

⁶² *Case of Artavia Murillo et al. (in vitro fertilization) v Costa Rica* (n 60), para. 148.

⁶³ *Ibid.* para. 149.

⁶⁴ *Case of Ver-Vera et al. v Ecuador* (n 54), para. 78.

⁶⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4 <<http://www.refworld.org/docid/4538838d0.html>> accessed 14 January 2016.

⁶⁶ World Health Organization, ‘WHO global strategy on people-centred and integrated health services’ (WHO, 2015) <<http://www.who.int/servicedeliverysafety/areas/people-centred-care/global-strategy/en/>> accessed 23 January 2016.

⁶⁷ IACtHR, *Case of the Sawhoyamaxa Indigenous Community v Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

for extending the applicability of the ECtHR's provisions.⁶⁸ This is true, although two good and recent examples of a use of other international law sources by the ECtHR may be found in *Konstantin Markin v. Russia*⁶⁹ and *Evans v. the United Kingdom*.⁷⁰ Here, the ECtHR used respectively the European Social Charter⁷¹ and the European Convention on Human Rights and Biomedicine (also called the Oviedo Convention)⁷² to widen the scope of application of the ECHR provisions. Moreover, the ECtHR's decision on the *Güvec* case, where the Court referred to the international standards enshrined in the CRC for affirming that juvenile prisoners are to be kept separately from adults, also provides an example of the use of other international law sources for interpretative purposes.⁷³ Secondly, another reason for a negative answer to the question may be that the margin of appreciation accorded to Contracting States in the field of health care (including end-of-life care) operates as an obstacle for the Strasbourg Court in referring to other legal sources (including the ICROP, the WHO National Cancer Control Programmes and the Prague Charter for Palliative Care). Thirdly, the above-stated negative answer is indirectly suggested by that the ECtHR's case-law on health care is still far from being well developed. Fourthly and lastly, it is suggested by the above-illustrated difficulties of defining the right to palliative care in a way that is not detached from the experience of the large majority of patients.⁷⁴

27. Consideration of some of these reasons suggests that the same conclusion applies to the IACtHR. Yet it is in principle difficult to imagine any dramatic changes in the Court of San José's overall approach to international legal standards and general principles on palliative treatments. However, considerations of other reasons like the *pro-homine* interpretation (e.g. the idea that the ACHR shall be interpreted in the way that is most protective of human rights),⁷⁵ the fact that health related issues were often taken into consideration by the ACtHR in its case-law especially in relation to vulnerable categories such as prisoners and indigenous communities, the use of diverse external sources (including soft law sources) in the interpretation and application of the rights guaranteed by the ACHR, a rich jurisprudence on health-care matters under Art. 5, paras. 1 and 2 of the ACHR and, perhaps most importantly, the adoption of the ICROP, suggest that some opportunities exist for a different, less radical and negative attitude by the ACtHR toward the international legal tools that could be of assistance in recognizing protection for the human right to palliative treatments.

⁶⁸ See, for example, *Konstantin Markin v Russia* ECHR 2012-III 1, *Güvec v Turkey* ECHR 2009-I 231 and *Gustafsson v Sweden* ECHR 1996-II 655. F. SEATZU, S. FANNI (n 45).

⁶⁹ Cf. the decision of the European Court of Human Rights: *Konstantin Markin v Russia* (n 68). On the subject, see e.g. F. SEATZU, 'Enhancing a Principled Justificatory Model of Adjudication for the Protection of Human Rights in the Socio-Economic Sphere: The Impact of the European Social Charter on the Case Law of the European Court of Human Rights', in *The Global Community Yearbook of International Law and Jurisprudence*, 2016 (on file with the author); V. STARZHENETSKII, 'Assessing Human Rights in Russia: Not to Miss the Forest for the Trees A Response to Preclik, Schönfeld and Hallinan' (2012) 37 (2-3) *Review of Central and East European Law* 349-356.

⁷⁰ *Evans v the United Kingdom* ECHR 2007-I 353.

⁷¹ Council of Europe, European Social Charter, 18 October 1961, ETS 35 <<http://www.refworld.org/docid/3ae6b3784.html>> accessed 15 January 2016.

⁷² Council of Europe, Convention for the Protection of Human Rights and of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine or the Oviedo Convention), adopted in Oviedo on 4 April 1997, CETS n. 164, entered into force on 1 December 1999, <http://www.coe.int/t/dg3/healthbioethic/Activities/01_Oviedo%20Convention/> accessed 23 January 2016.

⁷³ *Güvec v Turkey* ECHR 2009-I 231, para. 83. See F. SEATZU, S. FANNI (n 34) 30.

⁷⁴ Amplius F. SEATZU (n 9).

⁷⁵ See, among others, L. LIXINSKI, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 (3) *European Journal of International Law* 585-604, who also stresses that this declared 'bias' of the court is another means of advancing interpretation in accordance with the purpose of the treaty. See also a detailed analysis of the pro homine method in A. UBEDA DE TORRES, *Democracia y derechos humanos en Europa y en América: estudio comparado de los sistemas europeo e interamericano de protección de los derechos humanos*, [Democracy and Human Rights in Europe and in America: a Comparative Study in the European and Inter-American Systems of Protection of Human Rights] (Reus 2007) 340 ff.