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Facing the Human Rights Challenge of Prisoners' and Detainees' Hunger Strikes at the Domestic Level: Guidance for Policy-Makers, Government Officials, and Legal Advisors in the Management of Hunger Strikes

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Prisoners' hunger strikes and the issue of force-feeding have become a matter of concern for many Western countries. The widespread and repeated nature of this situation, as well as its influence on prisoners' and detainees' fundamental rights, have troubled human rights scholars, governments, and international institutions and tribunals. The most intense conflict generally revolves around the set of rights protecting prisoners and detainees who freely choose to hunger strike—and put their lives in danger—and the duties of states to secure the right to life and health of persons under their custody. Though their roles are not often discussed, in practice, policymakers and various state officials are faced with serious complexities around the manage-

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ment of hunger strikes, and have a critical part in their resolution. This Article provides an in-depth analysis and a critical examination of the international human rights norms that govern hunger strike situations and assesses their application in domestic settings. Based on this analysis the Article offers practical recommendations and guidance for state officials to enhance the protection of this distinct group of persons and to assure the development of human rights-based national policies.

INTRODUCTION

On April 17, 2012, the Palestinian Prisoner Day, Israel experienced the start of what would become one of the largest prisoners' hunger strikes in its history.¹ Approximately 1,500 Palestinian prisoners and detainees² held in Israeli prisons carried out a nearly month-long mass hunger strike.³ The event unsurprisingly captured the attention of the international community: the protest's scale, as well as its length, presented a challenge for the Israeli authorities and international law experts. While the protest continued, the Israeli government made efforts to deal with the situation and find responses consistent with internal legal obligations and international standards.⁴

¹ *1,500 Palestinian Prisoners Start Hunger Strike*, CNN ONLINE, Apr. 17, 2012, available at <http://www.cnn.com/2012/04/17/world/meast/israel-hunger-strike> (last visited Jun. 25, 2015). The Palestinian Prisoner Day is an annual commemoration of Palestinian prisoners held in Israeli prisons and is marked on April 17 each year.

² Out of the 1,500 hunger strikers, only three were in a serious life-threatening situation.

³ The terms "detainee" and "prisoner" are used differently in different jurisdictions. Generally, the distinction has no significant effect on the analysis of hunger strikes or the status of a hunger striker. As long as a hunger strike qualifies as "genuine" (for the definition of a hunger striker, see Part I), the exact legal status of the striker's deprivation of liberty does not matter. Thus, this article generally uses the term "prisoners" for the analysis. When relevant, this Article follows the U.N. definition and refers to a "prisoner" as a person imprisoned following a conviction for an offence and to a "detainee" as any person detained awaiting trial or deprived of personal liberty except as a result of conviction for an offence. See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Use of Terms, G.A. res. 43/173, annex, U.N. Doc. A/RES/43/173 (Mar. 19, 1989), Use of Terms (b) and (c).

⁴ After an extensive domestic and international cover, the strike eventually ended with an agreement between the prisoners' representatives and the Israel Prison Authority, following mediation by Egyptian and Jordanian officials. Israel agreed to change some of the detention policies including allowing families' visits from Gaza. In return, Palestinian leaders signed a commitment to completely halt terrorist activity inside Israeli prisons including recruitment, practical support, funding and coordination of operations. See Harriet Sherwood, *Palestinian Prisoners End Hunger*

Yet, since then the issue continues to generate intense controversies. The task of bridging the two sources of law seems often complex and unachievable. From a domestic perspective, serious difficulties exist in translating some of the general, vague, and incoherent principles and guidelines from international law sources into practical measures that could address situations of hunger strikes.⁵ The heated debate carried out in Israel reveals that practical guidance is critically needed for state officials to both protect the rights of the prisoners and reduce the danger to their lives.⁶

The greatest tension sits between the set of rights that belongs to the prisoners who freely choose to hunger strike and thus put their very lives at risk—e.g., the rights to self-determination, to personal autonomy, to health and physical integrity, to refuse medical treatment, and the freedom from torture or forced treatment—and the positive obligation of states to secure the right to life and health of persons under their custody.

In a retrospective assessment of what occurred in Israel and after extensive research, the problem with the current international legal framework seems to be that it: (1) lacks specific reference to the unique situation of prisoners' hunger strikes, with the exception of a few cases at the European Court of Human Rights and few other sources;⁷ (2) is limited, to a large

Strike, THE GUARDIAN, May 14, 2012, available at <http://www.guardian.co.uk/world/2012/may/14/palestinian-prisoners-end-hunger-strike> (last visited Jun. 25, 2015). Since then, numerous other prisoners' hunger strikes have been held, primarily by Palestinian prisoners, though not on the same scale as the 2012 strike. A recent example is the mass hunger strike of 300 prisoners in Israel in June 2014. See Jack Khoury, *Palestinian detainees reach deal to end hunger strike*, HAARETZ, Jun. 25, 2014, available at <http://www.haaretz.com/news/diplomacy-defense/1.601002> (last visited Jun. 25, 2015).

⁵ Only few international documents are entirely dedicated to the issue of prisoners and detainees on hunger strikes.

⁶ For a similar assessment of the international legal regime on these issues, see e.g., *Prosecutor v. Seselj*, Case No. IT-03-67-T, Int'l Tribunal for Former Yugoslavia, *Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused* (Dec. 6, 2006) ("A very first preliminary review of the domestic and international legal standards applied to detainees who engage in hunger strikes already reveals a lack of uniformity.").

⁷ See James Welsh, *Responding to Food Refusal: Striking the Human Rights Balance*, in INTERROGATIONS, FORCED FEEDINGS, AND THE ROLE OF HEALTH PROFESSIONALS: NEW PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN LAW, AND ETHICS (eds. Ryan Goodman & Mindy J. Roseman), at 143, 153 (noting that there has been "little discussion of the human rights analysis of hunger strikes" and that none of the numerous human rights treaties and guiding principles touch on the issue of hunger strikes per se, though they do emphasize the general need for

extent, to addressing aspects of the *medical management* of hunger strikes and the role of health professionals,⁸ without sufficiently addressing the role of officials in other capacities; and lastly, (3) largely ignores state obligations and domestic law considerations, as well as broader issues of national policy.⁹ These three factors comprise the primary threats to prisoners' rights and make the implementation of international norms at the national level almost impossible.

This Article is written in response to this problem. Undoubtedly, Israel's challenges in dealing with hunger strikes are not unique; hunger strikes constitute a worldwide phenomenon that has affected many Western countries.¹⁰ Prisoners' hunger

protecting prisoners' rights); *see also* Nevmerzhitsky v. Ukraine, no. 54825/00, Eur. Ct. H.R. (Apr. 5, 2005); Ciorap v. Moldova, no. 12066/02, Eur. Ct. H.R. (Jun. 19, 2007). The Court's ruling in *Nevmerzhitsky* is considered the leading decision on the issue. Other cases brought before the Court include *Herczegfalvy v. Austria* (1992), *Ilijkov v. Bulgaria* (1997), and *Wilkinson v. UK* (2006).

⁸ Considerable analysis and advocacy around the set of rights of prisoners on hunger strikes exists in the medical literature. In addition, many legal publications address medical aspects or the role of physicians mainly focusing on and advocating for a response consistent with World Medical Association standards. *See also* Pauline Jacobs, *FORCE-FEEDING OF PRISONERS AND DETAINEES ON HUNGER STRIKE: RIGHT TO SELF-DETERMINATION VERSUS RIGHT TO INTERVENTION* (2012), at 4 (noting that publications on the topic of force-feeding focus to a large extent on medical ethics. Jacobs mentions that "an in-depth study into the human rights aspects of the issue of force-feeding prisoners and detainees on hunger strike from a European and international perspective is, as yet, sorely lacking."); *see, e.g.*, for literature on medical aspects of hunger strikes Scott A. Allen & Hernán Reyes, *Clinical And Operational Issues in the Medical Management Of Hunger Strikes, Interrogations, Forced Feedings, and the Role of Health Professionals*, in *INTERROGATIONS, FORCED FEEDINGS, AND THE ROLE OF HEALTH PROFESSIONALS: NEW PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN LAW, AND ETHICS* (ed. Ryan Goodman & Mindy Jane Roseman) (2009); Hernán Reyes, *Force-Feeding and Coercion: No Physician Complicity* (hereinafter Reyes, *Force Feeding and Coercion*), *AM. MED. ASS'N J. ETHICS* 9 (2007) (aiming at explaining physicians the issue of hunger strikes, their responsibilities and the revised WMA declarations); Ryan Goodman & Mindy J. Roseman, *INTERROGATIONS, FORCED FEEDINGS, AND THE ROLE OF HEALTH PROFESSIONALS: NEW PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN LAW, AND ETHICS* (2009); Sondra S. Crosby, Caroline M. Apovian & Michael S. Grodin, *Hunger Strikes, Force-Feeding, and Physicians' Responsibilities*, 298 *J. AM. MED. ASS'N* 563 (2007); Hernán Reyes, George J. Annas & Scott A. Allen, *Physicians and Hunger Strikes in Prison: Confrontation, Manipulation, Medicalization and Medical Ethics (part I)*, *WORLD MED. J.*, Feb. 2013, Vol. 59 Issue 1, p.27.

⁹ With the exception of the European Court of Human Rights ("ECtHR") jurisprudence, which is elaborated in parts II–III.

¹⁰ *See* Mara Silver, *Testing Cruzan: Prisoners and the Constitutional Questions of Self-Starvation*, 58 *STAN. L. REV.* 631, 632–36 (2005) (exploring hunger strikes in the U.S. and abroad, stressing they have become increasingly common in prisons across the U.S. and throughout the world); *see also* Hernán Reyes, *Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture*, in *Maltreatment and Torture*, (Manfred Oehmichen ed., Schmidt-Römhild 1998), available at <http://www.icrc.org/eng/resources/documents/article/other/health-article->

strikes have become increasingly common and their attendant ethical, legal and medical issues have been an issue of heated debate.

The phenomenon of hunger strikes has opened the debate on prisoners' rights and state actions, yielding extensive scholarship and significant response from the international community, namely international human rights institutions and organizations, governments, and courts. However, analysis and advocacy around the rights of prisoners on hunger strikes are found chiefly in the medical literature, and to some extent centered on the unique situation of the detainees held by the United States at Guantanamo Bay.¹¹ Of the literature published in legal publications, many address the medical aspects or the role of physicians, often focusing on and advocating for a response consistent with the medical and ethical rules provided by the World Medical Association ("WMA").¹²

However, government officials—including legislators, legal advisors and policymakers belonging to different government departments and ministries (e.g. of health services, justice, public security, the national prison authority and police forces)—are often the most influential parties in securing prisoners' human rights and in making crucial decisions as hunger strikes occur. Accordingly, addressing their role and providing them with guidance is essential. Government officials also have an important role in promoting legislation and domestic standardization, which can effectively advise physicians to act in ac-

010198.htm (last visited July 30, 2015) [hereinafter Reyes, *Medical and Ethical Aspects of Hunger Strikes*].

¹¹ See *supra* note 8. It is important to note that a large part of the literature on the subject was written in response to grave human rights violations of prisoners refusing nutrition (most often alleging torture). The most recent scholarship, for example, was provoked by the situation of detainees the U.S. held at Guantanamo Bay. See also Welsh, *supra* note 7, at 165 ("The current discussion of hunger strikes is undoubtedly driven by human rights scandals such as the imposition of forcible feeding at Guantanamo"); see, e.g., George J. Annas, *Hunger Strikes at Guantanamo: Medical Ethics and Human Rights in a 'Legal Black Hole,'* NEW ENG. J. MED. 355 (2007) [hereinafter *Hunger Strikes at Guantanamo*].

¹² Specifically, the WMA standards on hunger strikes can be found in the Declaration of Malta on Hunger Strikes [hereinafter Declaration of Malta], Nov. 1991, available at <http://www.wma.net/en/30publications/10policies/h31/> (last visited Jun. 22, 2015); Declaration of Malta: A Background Paper on the Ethical Management of Hunger Strikes, WORLD MED. J. 52 (2006) [hereinafter Declaration of Malta Background Paper], available at http://www.medicaljustice.org.uk/images/stories/texts/wmj_background%20paper_glossary.pdf (last visited Jun. 22, 2015); and the Declaration of Tokyo Concerning Doctors' Participation In Torture And Other Cruel Treatment Of Detainees [hereinafter Declaration of Tokyo], Oct. 1975 (specifically stipulating that prisoners on hunger strikes shall not be force-fed under article 5).

cordance with medical ethics principles and to assume their role in protecting prisoners' rights during hunger strikes.

This research aims to (a) provide state officials background on the international norms and case law on hunger strikes (Parts I and II); (b) shift the focus from the role of medical professionals to the role of other relevant government officials, and from the narrow medical aspects to the larger policy issues and state-level considerations (Part III), and lastly, (c) explore operational guidelines that are applicable in practice for the implementation of international human rights standards. This Article will show why it is in states' interest to promote a human rights-based approach in these situations, primarily advocating for the adoption of the European Court of Human Rights ("ECtHR") jurisprudence, which established an extensive legal test to tackle the issue of prisoners' hunger strikes as a base-line model for the development of national policies (Part IV).

More specifically, Part I explores the normative legal framework in international law regarding prisoners' rights and food refusal in custodial settings and concludes that there is no coherent principal standard or clear guidance on an international level, making it difficult to implement the existing norms and theories in practice. Part II examines the jurisprudence of two international tribunals—the ECtHR and the International Criminal Tribunal for the former Yugoslavia—that touch upon the issue of prisoners' hunger strikes in a few, yet precedential, cases. Significantly, the ECtHR has provided a legal framework from which state officials and prison administrations can derive guidance on the management of hunger strikes and implementation at the domestic level. The rulings highlight the difficulty of adjudicating and making actual decisions based on international law standards and underscore the obstacles that states are faced with when attempting to apply medical ethics principles. Part III considers domestic issues and argues for a more developed understanding of the role of state officials in shaping national policies on prisoners' hunger strikes as well as the recognition, to some extent, of state obligations to protect the health of prisoners. Finally, Part IV turns to the practice: it advocates for the adequacy of the ECtHR model as a basis for the implementation of international human rights norms in states' laws and further provides practical mechanisms for states in the path to adopt human rights-based national policies on the issue.

I. GETTING FAMILIAR WITH INTERNATIONAL HUMAN RIGHTS NORMS RELEVANT TO PRISONERS' HUNGER STRIKES

Prisoners' hunger strikes are problematic because prisoners are in the custody of the state. Prisoners fall under the responsibility of the state, and as such, the state is entrusted with ensuring their health and lives. Prisoners' hunger strikes inherently present a fundamental challenge to this responsibility because they aim to deny the state the ability to carry out its custodial responsibilities.

This situation raises critical practical legal and ethical questions: what are the rights that protect prisoners who choose to hunger strike? What kind of governmental duties and obligations arise from these rights? Can a state posit interests or obligations that prevail over prisoners' rights in order to intervene in a prisoner's choice to hunger strike? If indeed such interests exist, is intervention aimed at stopping the hunger strike or at providing the prisoner with the medical treatment allowed? Assuming that the medical treatment for the benefit of prisoner's health is allowed, at what point is it appropriate to give a prisoner such treatment? What happens when a prisoner consciously and voluntarily refuses medical treatment? Under what circumstances, if any, is force-feeding or involuntary artificial feeding allowed and how should it be practically administered? And lastly, should the same standards apply when the situation involves a group hunger strike rather than an individual hunger strike? These are only a few examples of the questions government officials are required to confront when managing hunger strikes, notwithstanding the national and international pressures that need to be considered as well.

As stated above, with the exception of the legal rule established by the ECtHR, the international standards on the rights of prisoners in human rights instruments and treaties provide only basic and general guidance to answer these questions. Nevertheless, understanding this legal framework and exploring the existing norms on hunger strikes enshrined in international law sources is vital for officials dealing with these situations.

A. *Defining Prisoners' Hunger Strike and Basic Issues*

1. *Key Elements in the Definition of a Hunger Strike*

As a first step, it is necessary to define hunger strikes. The World Medical Association (WMA) Declaration of Malta on Hunger Strikes¹³ generally characterizes hunger strike as “often a form of protest by people who lack other ways of making their demands known.”¹⁴ According to the Declaration, in the course of a hunger strike, a person mentally capable of making his or her own health care decisions refuses nutrition for a significant period, in hope of obtaining certain goals by inflicting negative publicity on the authorities, and expresses true intention to strike. The intention element needs to be ascertained especially in collective hunger strikes or peer pressure situations, as opposed to a singular striker whose intention is usually clear and easier to ascertain.¹⁵

In their leading article for the World Medical Journal, Reyes, Allen, and Annas suggested that determining a real hunger strike largely depends on its duration, whether it involves “total fasting” (i.e. with no solid food and only ingestion of water) or partial fasting (i.e. non-total fasting that includes a partial intake of nutrition).¹⁶ In fact, most hunger strikes involve less-than-total fasting. Even though the tendency is to dismiss or take less seriously non-total fasting, the hunger striker may be just as determined and the results of such fasting may be just as fatal, only appearing at a much later stage.¹⁷

¹³ World Medical Association (WMA), Declaration of Malta on Hunger Strikes (hereinafter Declaration of Malta), Nov. 1991, *available at* <http://www.wma.net/en/30publications/10policies/h31/> (last visited Jun. 25, 2015).

¹⁴ *Id.*, preamble.

¹⁵ *Id.* (“Physicians need to ascertain the individual’s true intention, especially in collective strikes or situations where peer pressure may be a factor.”). *See also* Reyes, Annas & Allen, *supra* note 8, at 29 (similarly, in their recent article for the World Medical Journal, the authors have clarified that “a ‘hunger striker’ ... is thus a prisoner who uses fasting as a way of protesting, and is willing to place his health – and perhaps his life – ‘on the line’, so as to be heard by an authority that does not allow any other meaningful way for him to make his grievances known”).

¹⁶ Reyes, Annas & Allen, *supra* note 8, at 30 (“The determination and hence ‘seriousness’ of a hunger strike depends on its duration and not alone on its being total or not”).

¹⁷ *Id.* at 30–31 (noting that the majority of hunger strikes involve less-than-total fasting and that “the determination and hence ‘seriousness’ of a hunger strike depends on its duration and not alone on its being total or not”); *see also* Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10 (There, in his earlier essay, Reyes noted that a hunger strike is “voluntary total fast,” but made a different distinction between total fasting as opposed to occasional fasting to determine whether the hunger strike is real. Hence, a short-lived, often episodic, fasting does not qualify as hunger strike, but a form of food refusal).

Thus, it can be concluded that a hunger strike must: (1) involve total or partial fasting, (2) be voluntary, (3) be pursued for a specific purpose,¹⁸ and (4) last for a substantial period of time.¹⁹ Under these criteria, “mentally ill or otherwise incapable of unimpaired rational judgment and decision-making cannot be considered real hunger strikers.”²⁰

2. *Food Refusers vs. Actual Hunger Strikers*

With these factors, it may help to differentiate between “food refusers,” who have no intention of fasting to death, and “actual hunger strikers,” who are prisoners that undergo an extended period of voluntary fasting (as opposed to occasional, short-lived fasts).²¹ James Welsh, a health and human rights scholar at Amnesty International, highlights that “food refusers” refuse to eat in reaction to some event, but with no “particular strategy or commitment to longer term food refusal,” while true hunger strikers would be prepared to continue refusing food to achieve particular goals.²² Here, too, the duration of food refusal is a key defining factor.

3. *Basic Time Frames for Hunger Strikes*

There are no clear criteria to determine the minimum period of time necessary for a hunger strike to occur. However, the assessment can and should be based on physiological grounds.²³ In the majority of cases, total fasting (i.e. taking water only) for longer than 72 hours qualifies as a hunger strike in the case of a healthy adult.²⁴ After that period of time, a person’s health begins to deteriorate and the hunger strike be-

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 5.

²⁰ Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10, at 3; see also Declaration of Malta, *supra* note 12, guideline 1.

²¹ Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10, at 5.

²² Welsh, *supra* note 7, at 144–45; Reyes, Annas & Allen, *supra* note 8, at 30.

²³ Reyes, Annas & Allen, *supra* note 8, at 30–32 (detailing the clinical and practical aspects of the different types of fasting and the time frames that help define a hunger strike).

²⁴ *Id.* at 31 (“A healthy, normally nourished adult, without any medical contraindication to prolonged fasting, should have no problem whatsoever fasting totally (i.e. taking only water) for around 72 hours... as a simple ‘rule of thumb’, total fasting ... for longer than 72 hours qualifies on metabolic grounds for the term hunger strike.”).

comes fatal beyond approximately six weeks.²⁵ While fatalities are rare, following the six week period, the hunger striker may progressively become incapable of clear discernment (72 days are the maximum a hunger striker taking only water can survive).²⁶ In other less certain cases, especially when the fasting is partial, physicians and health personnel monitoring and treating the prisoner determine the stage at which a prisoner's health conditions begins to deteriorate.

These benchmarks, and more importantly the responsible physicians' medical evaluations of the prisoner's conditions, are useful to define the timeframes and different stages of a hunger strike. They may alert officials of the situation and assist their decision-making in managing a hunger strike.

4. *Intentions and Goals*

It is important to stress that these determined strikers, though prepared to die for their cause, are not suicidal since death is not a desired outcome in their view. Hernán Reyes, of the International Committee of the Red Cross ("ICRC"), compares them to other protesters in other circumstances who are willing to put their lives in jeopardy but do not wish to die.²⁷ According to Reyes, the actual hunger striker acts in despair by the only means he or she can think of—a hunger strike.²⁸

Welsh points out that distinguishing between these two types of strikers and determining who is pursuing a goal to the point of death as opposed to actually seeking death may not always be clear and of limited use, especially to those not in direct contact with the prisoner.²⁹ In many cases, non-governmental organizations like Amnesty International prefer

²⁵ *Id.* ("Death caused by ingesting only water does not occur before six weeks, and usually later if the person was in good health at the start of the fasting...").

²⁶ *Id.* at 31-32.

²⁷ Reyes, *Force Feeding and Coercion*, *supra* note 8, n.6, 703-08 (noting the need to differentiate hunger strikes from suicide as strikers only want to obtain recognition for their demands and are willing to sacrifice their lives for that purpose); *see, e.g.*, Welsh, *supra* note 7, at 144 ("Determined hunger strikers should not be regarded as suicidal, even if prepared to die for their cause"); *see also* Reyes, Annas & Allen, *supra* note 8, at 29-30 ("It is paramount to realize that the hunger striker, in the vast majority of cases, does not fast with the intention of dying! Thus, to compare hunger strikes to 'suicidal behaviour' is a major error, made by many, including judges and senior physicians who should know it better. Going on a hunger strike is not an attempt to commit suicide.").

²⁸ Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10, at 5.

²⁹ Welsh, *supra* note 7, at 145.

to proceed with the assumption that the act is a hunger strike unless otherwise proven.³⁰

5. *Voluntary Hunger Strike*

In addition, Reyes emphasizes the importance of whether individual participants of a strike are fasting voluntarily. He views the prisoner's true consent as a key factor in determining the actions doctors will have to take during the strike, especially if the fasting prolongs and seriously influences the striker's condition. Reyes explains that the ICRC's field experience shows that "prisoners are often not free to make decisions within their group."³¹ Such prisoners may have been "volunteered by the group leadership and may have been subjected to many pressures."³² Aside from peer-group pressure, Reyes also warns about the impact of external pressures from the prison authorities, family members, and media attention—either to stop or continue the strike—on the prisoner's freedom of decision in these situations.³³ Thus, he concludes, consent determination is essential for the medical decisions and recommendations that physicians make during the strike. According to Reyes, strikers who have no intention of endangering their health may in fact "rely on the prison doctor to intervene and take any action necessary to keep them in good health."³⁴

All of these factors should be considered not only by doctors but also by state officials when differentiating between a hunger strike and other forms of protest in order to determine a proper course of action.

³⁰ *Id.*

³¹ Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10 ("Inside the world of the prison, individuals may be subjected to many pressures. An individual prisoner's margin of freedom allowing him to refuse, orders from his internal hierarchy may be slim or non-existent.").

³² *Id.*

³³ *Id.*

³⁴ *Id.* Note that Reyes refers only to the role of the doctors to consider such factors and further stresses that any doctor who deals with hunger strikers must take these factors into consideration; *see also* Pauline Jacobs, *supra* note 8, at 313 (Jacobs suggests that hunger strikes undertaken in groups may lead to a decision to transfer individual hunger strikers to a different ward to appease the situation).

B. *International Human Rights Standards*

Numerous human rights treaties and United Nations instruments have set principles to protect the rights and health of prisoners. Some touch upon the situation of hunger strike, but only few international documents directly address it.³⁵ The existing norms refer mainly to the role of the health personnel, particularly physicians, and address the principles of medical ethics, rather than broadly addressing all the parties and issues involved.³⁶ In addition, human rights mechanisms such as treaty bodies and special rapporteurs, offer more insight and have set guidelines and norms that are useful to assess hunger strike situations. Since many treaties and documents refer to prisoners' rights and might be somehow related, this Article will briefly underscore the principal relevant sources on the issue and point out their relevancy and connection to hunger strikes.

As a preliminary note it should be stressed that the international human rights community has found a clear link between force-feeding prisoners on hunger strikes and coercion or torture. There is a genuine concern that under certain circumstances, involuntary medical treatment, involuntary feeding, or force-feeding administered by state authorities could constitute cruel, inhumane or degrading treatment or punishment, and even torture—e.g., by use of instruments such as handcuffs, chains, large feeding tubes, or constraint chairs.³⁷

³⁵ See *supra* note 7 and accompanying text; see, e.g., Welsh, *supra* note 7, at 143, 153 (noting that there has been “little discussion of the human rights analysis of hunger strikes” and that none of the numerous human rights treaties and guiding principles touch on the issue of hunger strikes per se, though they do emphasize the general need for protecting prisoners’ rights); see also Pauline Jacobs, *supra* note 8, at 147 (Jacobs offers an extensive analysis of international and European documents and case law on force-feeding prisoners and detainees on hunger strike. She claims that “only few documents, such as the WMA Declaration of Malta, are entirely devoted to the issue of force-feeding. In other documents, provisions can be found that, for instance, concern the regulation of force feeding within prison or other place of detention, the instruments of restraint, or the possibilities for forced medical treatment, issues that indirectly concern the issue of force-feeding.”).

³⁶ See *supra* note 8 and accompanying text; see also U.N. Office of the High Commission for Human Rights, “Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” G.A. Res. 37/194, December 18, 1982, U.N. Doc. A/RES/37/194.

³⁷ See Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10, at 9–10 (exploring the sources and reasons for the link between force-feeding and torture); see also Declaration of Tokyo, *supra* note 12 (specifically stipulating that prisoners on hunger strikes shall not be force-fed under article 5).

Pertinent to the situation of detained persons are the International Covenant on Civil and Political Rights (ICCPR),³⁸ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (CAT),³⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁰ Some of the provisions of these treaties reflect norms of customary international law and, most importantly, the prohibition on torture is considered *jus cogens*.⁴¹ Furthermore, the U.N. Resolution of 1990 on the Basic Principles for the Treatment of Prisoners specifically determines that prisoners retain the human rights set out in any of the U.N. conventions.⁴²

1. *The International Covenant on Civil and Political Rights*

First, Article 2 of the ICCPR affirms the obligation of state parties to “respect and ensure” the rights recognized by the Convention to *all persons* within their territory, including prisoners, without distinction of any kind, and to adopt such legislative or other measures as maybe necessary to achieve that goal.⁴³ Article 6 ensures the inherent right of every human being to life.⁴⁴ Notably, in its assessment of force-feeding during hunger strikes, the ECtHR interpreted the right to life as inclusive of the lives of prisoners and determined that the right should be assessed against a prisoner’s right to be free from

³⁸ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

³⁹ Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85 (1987) [hereinafter CAT].

⁴⁰ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 171 [hereinafter ICESCR].

⁴¹ *Jus cogens* is a term used in international law to describe a norm from which no derogation is ever permitted and is of binding nature and obligatory international law.

⁴² Basic Principles for the Treatment of Prisoners, G.A. Res. A/RES/45/111, U.N. Doc. A/RES/45/111 (1990), art. 5 (“Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”).

⁴³ ICCPR, *supra* note 38, arts 2(1)–(2).

⁴⁴ *Id.*, art. 6.

torture (and not subjected to force-feeding).⁴⁵ Article 7 of the ICCPR prohibits any act of torture, noting 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.”⁴⁶ The Covenant further specifically addresses the rights of all persons deprived of their liberty to be “treated with humanity and with respect for the inherent dignity of the human person.”⁴⁷

In addition, because hunger strikes are perceived as the only form of effective protest that prisoners can carry out,⁴⁸ it is relevant that the ICCPR guarantees the right of any person to hold opinions without interference, as well as freedom of expression, which includes the freedom to “seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁴⁹

2. *The International Covenant on Economic, Social and Cultural Rights*

The ICESCR is also relevant to the discussion as it recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁵⁰ According to Article 2(2) of the Covenant, this right applies without discrimination of any kind to *all persons*.⁵¹ The Committee established under the ICESCR asserted that the right to

⁴⁵ See ECtHR's rulings in *Nevmerzhitsky* and *Ciorap* cases, *infra* notes 60 and 128. Note that the ECtHR refers to the right to life as enshrined in article 2 of the European Convention for the Protection of Human Rights and not to the ICCPR.

⁴⁶ ICCPR, *supra* note 38, art. 7.

⁴⁷ *Id.*, art. 10(1).

⁴⁸ See Declaration of Malta, *supra* note 12, preamble (hunger strikes are “often a form of protest by people who lack other ways of making their demands known”); see also Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10, at 1 (hunger strikes may be a last resort for prisoners wanting to protest against their situation); see also George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 BOSTON U. L. REV. 427, 445 (“The only form of protest they [hunger strikers at Guantanamo] have been able to mount has been through hunger strikes”) [hereinafter *Human Rights Outlaws*].

⁴⁹ ICCPR, *supra* note 38, art. 19(1–2). However, this right may be subject to certain restrictions that are provided by law and are necessary for the protection of the rights of others, or of national security, public order, public health or morals. *Id.*, art. 19(3).

⁵⁰ ICESCR, *supra* note 40, art. 12.

⁵¹ *Id.*, art. 2(2).

health includes “the right to be free from torture, non-consensual medical treatment and experimentation” and applies to “all persons, including prisoners or detainees.”⁵² Based on this General Comment, the Special Rapporteur on the Right to Health noted, in the context of a U.N. report on detainees’ hunger strikes in Guantanamo bay (see section E henceforth), that force-feeding or any medical treatment to a competent detainee without his or her consent violates the detainee’s right to health.⁵³ Although the U.N. report is a non-binding document, it constitutes one of the few sources that specifically address the rights protecting detainees on hunger strikes. Nonetheless, the U.N. report suffers a crucial shortcoming: it has not yet been addressed in other sources and its impact on ground level policies remains uncertain.⁵⁴

3. *The Convention Against Torture*

Finally, the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines “torture” as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.⁵⁵

The prohibition against torture is affirmed by several international human rights treaties and is considered *jus cogens*. The U.N. Human Rights Committee and the Committee against

⁵² Committee on Economic, Social and Cultural Rights, General Comment No. 14, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), ¶¶ 8, 34.

⁵³ U.N. Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120, (Feb. 27, 2006), ¶¶ 72–82, available at <http://www.unhcr.org/refworld/docid/45377b0b0.html> (last visited Jun. 17, 2015) [hereinafter *Situation of Detainees at Guantanamo Bay*].

⁵⁴ See Welsh, *supra* note 7, at 159.

⁵⁵ See CAT, *supra* note 39, art. 1(1).

Torture, established under the U.N. Convention against Torture, have both consistently noted the “absolute character” of the prohibition of torture and emphasized that it cannot be derogated in any way.⁵⁶ However, aside from proscribing torture or cruel, inhuman, or degrading treatment, there is no specific reference or guidance on hunger strikes. The link between torture and the use of force-feeding during hunger strikes is mostly informed by the European context and the Guantanamo Bay experience. Thus, for instance, the ECtHR’s assessment of force-feeding practices considers a balance between the prohibition on torture under Article 3 of the European Convention on Human Rights⁵⁷ and the protection on the right to life.⁵⁸ Specifically, according to the Court, on one side is a prisoner’s right to physical integrity, which is directly related to his or her freedom from torture, inhuman, or degrading treatment or punishment, and on the other, the positive obligation of a state to secure the right to life of persons under its custody.

Additionally, the use of force-feeding techniques by physicians during the Guantanamo Bay hunger strikes was widely condemned⁵⁹ and considered illegal, unethical, and forbidden, such that it constituted an act of torture or cruel, inhuman, and degrading treatment.⁶⁰ The specific circumstances in which the use of force-feeding was considered illegal, as well as the rules and boundaries for action in such cases, is discussed henceforth. This understanding of the practice is crucial for the development of a human rights-based approach in domestic settings.

⁵⁶ See *Situation of Detainees at Guantanamo Bay*, *supra* note 53, ¶ 42.

⁵⁷ European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*], art. 3 (Prohibition of Torture).

⁵⁸ *Id.*, art. 2 (Right to Life).

⁵⁹ See, e.g., Annas, *Human Rights Outlaws*, *supra* note 48; *Situation of Detainees at Guantanamo Bay*, *supra* note 53, ¶¶ 79–82; Luke Mitchell, *God Mode*, HARPER’S MAG., Aug. 2006, at 9, 9–10; David J. Nicholl et al., Correspondence, *Force feeding and Restraint of Guantanamo Bay Hunger Strikers*, 367 LANCET 811, 811 (2006); Nancy Sherman, *Holding Doctors Responsible at Guantánamo*, 16 KENNEDY INST. ETHICS J. 199, 200–02 (2006).

⁶⁰ According to ECtHR, a measure such as force-feeding could not be considered degrading if it was medically necessary to save a person’s life and the manner in which it is applied complies with the safeguards set out in the case. *Nevmerzhitsky v. Ukraine*, No. 54825/00 ECHR 210 (April 5, 2005).

4. *Relevant Documents for the Protection of Prisoners' Rights*

Complementing the human rights treaties, other instruments underscore the need for special protections to prisoners and detainees and set general rules for their well-being and health. These rules also do not directly refer to hunger strikes or the practice of force-feeding, but they do emphasize the wide protections granted to detainees and prisoners and concern the regulation of force in prisons, including the use of constraint instruments. Hence, they provide some specific guidance that can be applied in the context of hunger strikes.

The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment sets an obligation not to derogate from any human rights of these persons who are protected under other legal instruments and conventions (Principle 3). The Body of Principles also ensures a broad protection of freedom from torture and cruel treatment (Principle 6), as well as a right to proper medical examination (Principle 24), a right to request second medical opinion (Principle 25), a right to proper medical records including access to records (Principle 26), and a right to request or complaint a treatment (Principle 33.1).⁶¹

⁶¹ "Body of Principles for the Protection of All Persons under Any Form of detention or Imprisonment," G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49), U.N. Doc. A/43/49 (1988). *See, e.g.*, Principle 3 ("There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent"); Principle 6 ("No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."); Principle 22 ("No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health."); Principle 24 ("A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."); Principle 25 ("A detained or imprisoned person or his counsel shall... have the right to request or petition a judicial or other authority for a second medical examination or opinion."); Principle 26 ("The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results

Similarly, the Standard Minimum Rules for the Treatment of Prisoners explore in detail important safeguards for appropriate detention conditions, including standards on medical services (Articles 22-26), restrictions on the use of discipline and punishment in custodial settings (Articles 27-32), and prohibition on the use of restraints such as handcuffs, chains, irons and strait-jacket as a form of punishment (Article 33).⁶² Though not referring to hunger strikes or force-feeding, the Standard Minimum Rules specifically stress that other instruments of restraint may be used “on medical grounds by direction of the medical officer” and “by order of the director, if other forms of control fail, in order to prevent a prisoner from injuring himself or others or damaging property,” for instance, in Articles 33(b) and (c).⁶³ Under Article 34, such instrument must not be applied for any longer than is strictly necessary.⁶⁴

To conclude, a review of the U.N. human rights treaties and treaty bodies’ commentaries leave unanswered many of the questions set forth in the beginning of this Part. The lack of specific reference to hunger strikes in these sources makes it challenging to address occurrences of hunger strikes in practice. The general principles leave too big of a gap for states to fill in with efforts to tackle prisoners’ hunger strikes. This gap

of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefor shall be in accordance with relevant rules of domestic law.”); Principle 33.1 (“A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.”).

⁶² “Standard Minimum Rules for the Treatment of Prisoners,” (1955), *available at* <http://www.unhcr.org/refworld/docid/3ae6b36e8.html> (accessed Jun. 25, 2015), art. 22(1) (“At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry.”); art. 27 (“Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.”); and art. 33 (“Instruments of restraint, such as handcuffs, chains, irons and strait-jacket, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances: [...] (b) On medical grounds by direction of the medical officer; (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.”).

⁶³ *Id.*, art. 33(b)-(c).

⁶⁴ *Id.*, art. 34 (“The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.”).

also puts at stake the development of a robust human rights-based approach at the domestic policy level, thereby endangering the protection of prisoners.⁶⁵

C. *Humanitarian Law*

Similarly to the international sources discussed before, humanitarian law does not specifically address hunger strikes of prisoners. In situations of armed conflict, the international humanitarian law treaties pertinent to hunger strikes are primarily the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)⁶⁶ and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).⁶⁷ Both conventions include rights and special protections for prisoners who enjoy the protected status under customary international law.

Particularly, Common Article 3 of the Geneva Conventions, which constitutes a minimum standard during armed conflicts, prohibits “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁶⁸ One interpretation of Common Article 3 is that it prohibits the deliberate infliction of suffering, which could encompass the intentional, painful administration of food or medical treatment against the will of a prisoner.⁶⁹

The Third and the Fourth Conventions further ensure special protections to prisoners of war and “protected persons”⁷⁰ (generally referred to here as “prisoners”) and demand respect

⁶⁵ See also Welsh, *supra* note 7, at 154 (noting the lack of substantial human rights commentary and citing several reports of European institutions on the issue of hunger strikes within European countries).

⁶⁶ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

⁶⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

⁶⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, art. 3; Third Geneva Convention, *supra* note 66, art. 3; Fourth Geneva Convention, *supra* note 67, art. 3. The text of Article 3 is referred to as “Common Article 3” since it appears in all four of the 1949 Geneva Conventions.

⁶⁹ Welsh, *supra* note 7, at 153.

⁷⁰ The term “protected persons” refers to persons covered by Art. 4 of the Fourth Geneva Convention.

for “their persons and their honour.”⁷¹ States are bound by the Conventions to provide free medical attention as required by the prisoner’s state of health.⁷² Both prohibit any form of torture or cruelty.⁷³ Generally, torture and inhuman treatment are considered as “grave breaches” of the Conventions.⁷⁴ In addition, the Fourth Geneva Convention ensures that “no physical or moral coercion shall be exercised against protected persons,” although the Third Convention does not include such a general provision.⁷⁵

Beyond the above prohibitions and protections, Article 16 of Additional Protocol I to the Geneva Conventions of 1977 specifically protects physicians and provides that “under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom;” in addition, persons engaged in medical activities shall not be forced to act or refrain from action, against ethical principles or other medical rules for the benefit of their patient.⁷⁶ Similarly, Article 10 of Additional Protocol II also contains such provisions and requires respect for medical ethics and rules.⁷⁷

⁷¹ Third Geneva Convention, *supra* note 66, art. 14; Fourth Geneva Convention, *supra* note 67, art. 27.

⁷² Third Geneva Convention, *supra* note 66, art. 15; Fourth Geneva Convention, *supra* note 67, arts. 76, 91.

⁷³ Third Geneva Convention, *supra* note 66, art. 87; Fourth Geneva Convention, *supra* note 67, art. 32. The Fourth Geneva Convention extends the general prohibition on torture and proscribes any measure of such a character as to cause the physical suffering of protected persons, which applies not only to murder and torture but also to any measures of brutality. *Id.* at art. 32.

⁷⁴ Third Geneva Convention, *supra* note 66, art. 130; Fourth Geneva Convention, *supra* note 67, art. 147.

⁷⁵ Fourth Geneva Convention, *supra* note 67, art. 31. Article 17 of the Third Convention specifically deals with investigation circumstances in which no form of coercion shall be exercised. *See* Third Geneva Convention, *supra* note 66, art. 17.

⁷⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), art. 16, Jun. 8, 1977, 1125 U.N.T.S. 3. *See also* Annas, *Human Rights Outlaws*, *supra* note 48, at 442 (noting physicians have to act as human rights monitors. In addition, discussing the issue of “Torture and the Geneva Convention” with regard to the treatment of prisoners during the Bush administration and the American war on terror).

⁷⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”), art. 10, Jun. 8, 1977, 1125 U.N.T.S. 609.

D. *Medical Ethics and Hunger Strikers*

Complementing human rights and humanitarian law are the international medical standards on the ethical obligations of physicians in the course of prisoners' hunger strikes.

Since 1975, the World Medical Association took action and set guidance for a human rights-based policy on hunger strikes. Its two declarations—the Declaration of Malta on Hunger Strikes and the Declaration of Tokyo (“Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment”)—preceded other international instruments and still serve as the most significant references for the international community on the issue of hunger strikes.⁷⁸ As stressed by James Welsh, “it seems that medical ethics is leading policy on hunger strikes while human rights and law follow.”⁷⁹

Unquestionably, health personnel, and physicians in particular play an instrumental role in the management of hunger strikes. Their involvement is pivotal in promoting, protecting, and fulfilling the rights of prisoners refusing nutrition.⁸⁰ Therefore, it is no surprise that the WMA declarations and the medical literature on hunger strikes constitute such an important source of reference for the international community to establish norms on prisoners' food refusal situations and have led to the development of important legal and ethical rules on the subject.

Physicians are involved throughout the whole process of the hunger strike. Some of their main responsibilities are: (a) to provide the striker with information and advice on the potential health consequences of persistent fasting,⁸¹ (b) to assess the striker's mental capacity and ability to make health care decisions,⁸² (c) to learn the medical history of the striker and conduct a thorough initial examination of his or her health condition,⁸³ and lastly (d) to monitor the striker's state of health during the strike as well as to administer medical treatment or feed

⁷⁸ See generally Welsh, *supra* note 7, at 143–44, 169–70.

⁷⁹ *Id.*, at 170.

⁸⁰ See for an extensive discussion, *Situation of Detainees at Guantanamo Bay*, *supra* note 53, ¶¶ 72–74.

⁸¹ Declaration of Malta, *supra* note 12, guideline 2.

⁸² *Id.*, guideline 1.

⁸³ *Id.*, guideline 3.

the prisoner under certain circumstances (with the striker's implicit or explicit consent).⁸⁴

Generally, the declarations establish a set of medical ethics rules that broadly rejects any use of coercion or force-feeding during hunger strikes and consider the participation of physicians in such practices to be unethical. At the heart of these ethical standards lies the principle of a competent prisoner's right to not consent to medical treatment, such that "it is ethical to allow a determined hunger striker to die in dignity rather than submit that person to repeated interventions against his or her will."⁸⁵

Both declarations underline that "forcible feeding is never ethically acceptable," even when intended to benefit the prisoner.⁸⁶ While the Tokyo Declaration on Torture Circumstances prohibits any form of feeding, including forcible feeding or artificial feeding, to a prisoner refusing nourishment, the Malta Declaration on hunger strikes makes a distinction between the two types of feeding and allows "artificial feeding" under specific circumstances.

The Tokyo Declaration's ban on feeding of hunger strikers was included to specifically address a situation in which a strike started in response to torture. Thus, the Tokyo Declaration requires that doctors respect a prisoner's decision to strike in protest against torture, rather than to administer feeding and enable the torture to continue.⁸⁷

The 1991 Malta Declaration, which was revised in October 2006, a few months after the Tokyo Declaration, specifically addresses the issue of prisoners' hunger strikes and takes into consideration the complexities involved. Accompanying the declaration is the WMA Background Paper on the Ethical

⁸⁴ See generally Declaration of Malta, *supra* note 12 (for example, principle No. 2, guideline 2-4).

⁸⁵ *Id.*, guideline 11.

⁸⁶ *Id.*, guideline 13; see also Declaration of Tokyo, *supra* note 12, guideline 6 ("where a prisoner refuses nourishment ... he or she shall not be fed artificially.").

⁸⁷ See Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10 (indicating that the inclusion of the ban on force-feeding referred to situations of tortures such that "if a prisoner undergoing torture decided to protest against his plight by going on a hunger strike, a doctor should not be obliged to administer nourishment against the prisoner's will and thereby effectively revive him for more torture."); see also Welsh, *supra* note 7, at n.27 (noting that the Tokyo Declaration calls for doctors to respect prisoner's decision to strike, rather than to expose him or her to further torture).

Management of Hunger Strikes,⁸⁸ which also provides guidance and a practical interpretation of the ethical rules on the subject.

Generally, physicians are ethically bound by the basic principles and guidelines listed in the Malta declaration, regardless of any other obligations and loyalties they have. According to the declaration, physicians who work in custodial settings and have dual loyalties (to both patients and the employing authority) are bound primarily to their individual patient, just as any other physician.⁸⁹ Among the main ethical obligations physicians have are: (a) the duty to act ethically and to prevent coercion or maltreatment and to protest if it occurs;⁹⁰ (b) to respect the individual autonomy of the striker (including the duty to verify the striker's voluntary participation in the strike, and to respect that he or she should not to be forcibly given treatment he or she refuses);⁹¹ (c) to benefit patients and to avoid harm, including not forcing treatment upon competent people nor coercing them to stop fasting;⁹² (d) to preserve clinical independence and not to be pressured by third parties to act against ethical principles (such as intervening medically for non-clinical reasons);⁹³ and (e) to respect hunger strikers' confidentiality unless they agree to disclosure or unless information sharing is necessary to prevent serious harm.⁹⁴ The Malta Declaration further details specific guidelines regarding physicians' duties to assess the strikers' mental capacity and voluntary choice,⁹⁵ monitor their health, and provide them with medical care and necessary medical information.⁹⁶

Similarly to the Tokyo Declaration, the Malta Declaration clearly denounces any forcible treatment⁹⁷ and states that force-feeding is "never ethically acceptable."⁹⁸ Such "forcible feeding," according to the Declaration, is feeding accompanied by "threats, coercion, force or use of physical restraints" and there-

⁸⁸ See Declaration of Malta Background Paper, *supra* note 12.

⁸⁹ *Id.*, principle No. 4.

⁹⁰ Declaration of Malta, *supra* note 12, principle No.1.

⁹¹ *Id.*, principle No. 2. (as opposed to artificial feeding administered with the striker's implicit or explicit consent).

⁹² *Id.*, principle No. 3. (It is further noted that "beneficence does not necessarily involve prolonging life at all costs, irrespective of other values.").

⁹³ *Id.*, principle No. 5.

⁹⁴ *Id.*, principle No. 6.

⁹⁵ *Id.*, guidelines 1 and 6.

⁹⁶ *Id.*, guidelines 2-4, 8.

⁹⁷ Declaration of Malta, *supra* note 12, principle No. 2.

⁹⁸ *Id.*, guideline 13.

fore would be considered a form of inhuman and degrading treatment, even if intended to benefit the prisoner.⁹⁹

Yet, the Malta Declaration and its background paper make a clear distinction between “forcible feeding” and “artificial feeding” that gives some leeway to the treating physician to use his or her discretion as to the appropriate treatment needed, with due consideration to the prisoner’s best interest and all other relevant factors.¹⁰⁰

With restriction to certain circumstances as detailed in the guidelines, the Malta Declaration allows the use of “artificial feeding,” which does not involve any coercive measure.¹⁰¹ According to the background paper, it is crucial that doctors understand the moral and practical difference between these two situations: as opposed to force-feeding, “artificial feeding” is typically prescribed by a physician or judicial authority and “usually occurs at a stage when the hunger striker is no longer fully conscious and too weak to express a view.”¹⁰² More practically, such “artificial feeding” includes administering nutrients and liquids parenterally (i.e. in a manner other than through the digestive tract) or through a naso-gastric tube.¹⁰³

The Malta Declaration outlines three specific circumstances in which artificial feeding or resuscitation is ethically acceptable. Notwithstanding these circumstances, if the striker persists to refuse treatment after resuscitation, “the physician should allow the person to die in dignity.”¹⁰⁴ The first circumstance in which artificial feeding or resuscitation is ethical is (1) when a competent hunger striker expressed his or her explicit or implied consent to the feeding.¹⁰⁵ As clarified in the background paper, hunger strikers may make known their agreement to artificial feeding “by any means.”¹⁰⁶ The second circumstance is (2) when an incompetent individual has left no unpressured advance instructions refusing it.¹⁰⁷ Guidelines 9 and 10 of the

⁹⁹ *Id.*

¹⁰⁰ Declaration of Malta Background Paper, *supra* note 12, at 40.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Declaration of Malta Background Paper, *supra* note 12, at 40.

¹⁰⁵ Declaration of Malta, *supra* note 12, principle 2, guideline 12. The background paper further adds that advance instructions can be written or verbal but have no value if made under duress. See Declaration of Malta Background Paper, *supra* note 12, at 41.

¹⁰⁶ Declaration of Malta Background Paper, *supra* note 12, at 41.

¹⁰⁷ Declaration of Malta, *supra* note 12, guideline 12.

Declaration describe the situation in which a physician takes over the case when the hunger striker has already lost mental capacity, such that there was no opportunity to discuss the individual's wishes regarding medical intervention to preserve life or to receive his or her advance instructions. Physicians then need to consider the person's best interest and decide whether to provide feeding, without interference from third parties.¹⁰⁸ The third circumstance is (3) when the situation has changed radically since the individual lost competence (for instance, if the prisoner's conditions to end the strike were suddenly accepted).¹⁰⁹ In this scenario, advance instructions become invalid and can be generally overridden.¹¹⁰ These three cases are the only ones acknowledged by the WMA as ethical and legal instances when medical practitioners can resort to artificial feeding or resuscitation.

Arguably, the Declarations do not fully take into account domestic laws and obligations that require physicians to protect the well-being and health of the prisoners and prevent the death of a hunger striker. In fact, it is more than likely that governments would seek, at some point, to provide medical treatment that involves involuntary feeding or treatment in order to save the life of a prisoner refusing nutrition (even at odds with advance instructions), which may thus require doctors to act against medical ethics.¹¹¹

More concerning is the WMA ethical obligation, made without any reservation, to "let the prisoner die in dignity"¹¹² once he or she persists with their refusal to get nutrition or to be resuscitated. Such a demand is currently widely unrecognized in most Western countries.¹¹³

¹⁰⁸ *Id.*, guidelines 9–10.

¹⁰⁹ *Id.*, guideline 9.

¹¹⁰ *Id.* This rule as it appears in the background paper does not require a radical change, but only that the situation has undergone a significant change since the striker lost competence, so it is no longer what he or she expected it to be. *See* Declaration of Malta Background Paper, at *supra* note 12, at 41.

¹¹¹ For instance, states that may regulate policies allowing artificial feeding at earlier stages, when the prisoner have not yet fully lost his or her mental capacity but is still considered in a life threatening situation, would require doctors to constantly violate medical ethics.

¹¹² Declaration of Malta, *supra* note 12, guideline 11; Declaration of Malta Background Paper, *supra* note 79, at 40.

¹¹³ The United Kingdom in 1974 became one of the few countries to officially adopt a policy of non-intervention in prisoners' hunger strikes recognizing a legal right to starve and refuse medical treatment, as long as the prisoner can demonstrate sanity. *See* Welsh, *supra* note 7, at 147; *see also* British Medical Association, *Medicine Betrayed: The Participation of Doctors in Human Rights Abuses* 123–24 (1992)

Unfortunately, this clash between ethical obligations and state laws received little attention from the WMA. The gap between what is dictated by the Declaration and what may be required under domestic laws is addressed only briefly and generally in the Malta Declaration's Background Paper. The Background Paper explains that a physician, in the case that he or she may be prosecuted for not resuscitating, is broadly expected to act in accordance with his or her country's laws if they require the physician to intervene to save the hunger striker's life.¹¹⁴

In practice, however, this general rule oversimplifies the expectations from physicians and the complex ethical dilemmas that they face. In countries where the local laws do not allow prisoners to strike to death, it creates an inevitable situation where physicians are required to violate medical ethics and state actions almost always oppose these principles.

E. *Hunger Strikes at Guantanamo Bay and the Right to Health*

To complete the picture of what constitute international norms during prisoners' hunger strikes, it is important to discuss the protests held at Guantanamo Bay. Since 2005, many detainees held by the U.S. military have initiated prolonged hunger strikes to protest the harsh conditions of their imprisonment.¹¹⁵ Their protest has provoked vast reaction by the international human rights community condemning the U.S. authorities' response to the strikes¹¹⁶ and has influenced most of the recent medical and legal literature on hunger strikes.¹¹⁷

(citing the Jul. 17, 1974 speech of the British Home Secretary in the House of Commons).

¹¹⁴ See Declaration of Malta Background Paper, *supra* note 12, at 40 ("In some countries, patients' known wishes dictate what the physician does after consciousness is lost. In others, this is not an option and physicians may be prosecuted if they fail to intervene to save the hunger striker's life. Physicians need to know clearly what attitude to adopt and also make this clear to the hunger striker, so that they can reach a decision in common.").

¹¹⁵ See, e.g., *Situation of Detainees at Guantanamo Bay*, *supra* note 53, ¶ 71 ("These conditions have led in some instances to serious mental illness, over 350 acts of self-harm in 2003 alone, individual and mass suicide attempts and widespread, prolonged hunger strikes."); see generally Amnesty International, *USA: Cruel and Inhuman: Conditions of Isolation for Detainees at Guantanamo Bay*, AMR 51/051/2007 (Apr. 5, 2007).

¹¹⁶ See, e.g., *id.*; see also *supra* note 11 and accompanying text.

¹¹⁷ See, e.g., *supra* note 11 and accompanying text.

Though the current scholarship is driven by the grave violations of prisoners' rights at Guantanamo, the challenge is to go beyond the human rights scandals and articulate human rights norms in order to respond to hunger strikes even when no such extreme circumstances exist. Interestingly, as a result of Guantanamo strikes, a new norm that has emerged offers a new interpretation of the right to health to be applied in situations of hunger strikes.

Prompted by the prisoners' protests and the numerous reports of their conditions, five Special Rapporteurs of the U.N. Human Rights Commission have released a detailed report on the human rights violations at Guantanamo. A significant part of their report examined the practice of hunger strikers' force-feeding. They indicated abusive methods used to force-feed detainees, including the use of a thick tube that was repeatedly inserted through the strikers' nose until it caused severe bleeding.¹¹⁸ Other academic sources reported at the time on the use of a new punishment technique of using an "emergency restraint chair," which immobilizes the prisoner to facilitate the force-feeding.¹¹⁹

Subsequently, Paul Hunt, the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, commonly known as the Special Rapporteur on the Right to Health, extensively reviewed all the relevant human rights law sources and medical ethics principles.¹²⁰ Hunt concluded that the practice of force-feeding in general, regardless of how it is undertaken, is a violation of prisoners' right to health as the right to health also includes the right to refuse medical treatment, holding that:

¹¹⁸ See *Situation of Detainees at Guantanamo Bay*, *supra* note 53, n.73 ("The force-feeding happens in an abusive fashion as the tubes are rammed up their noses, then taken out again and rammed in again until they bleed. For a while tubes were used that were thicker than a finger because the smaller tubes did not provide the detainees with enough food. The tubes caused the detainees to gag and often they would vomit blood. The force-feeding happens twice daily with the tubes inserted and removed every time. Not all of the detainees on hunger strike are in hospital but a number of them are in their cells, where a nurse comes and inserts the tubes there.").

¹¹⁹ See Annas, *Human Rights Outlaws*, *supra* note 48, at 445–46.

¹²⁰ See *Situation of Detainees at Guantanamo Bay*, *supra* note 53, ¶¶ 72–82. Part V(B) is titled "Ethical Obligations of Health Professionals, Including In Relation To Force-Feeding."

From the perspective of the right to health, informed consent to medical treatment is essential, as is its “logical corollary” the right to refuse treatment. A competent detainee, no less than any other individual, has the right to refuse treatment. In summary, treating a competent detainee without his or her consent - including force-feeding - is a violation of the right to health, as well as international ethics for health professionals.¹²¹

The Rapporteur based this conclusion on General Comment No.14 of the ICESCR Committee,¹²² which provides that the right to health includes “the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation,” and applies to all persons, including prisoners or detainees.¹²³

Notably, the Rapporteur explicitly rejected the United States policy that allows health professionals to force-feed a detainee when the strike threatens his life or health and concluded that it is inconsistent with the policy of the WMA and the American Medical Association.¹²⁴

This analysis is important and relevant beyond the experience of Guantanamo. Though this opinion is not binding international law, it helps international tribunals and countries interpret international treaties and norms that may apply to hunger strikes. Nevertheless, it remains uncertain whether this unique interpretation of the right to health as prohibiting force-feeding will be widely accepted and recognized as an international norm.¹²⁵

II. INTERNATIONAL CASE LAW: STATE INTERESTS VS. PRISONERS’ RIGHTS

While international human rights treaties and mechanisms have dedicated little discussion to human rights analysis of hunger strikes, international tribunals have considered the phenomenon of prisoners’ food refusal in a handful of cases. These

¹²¹ *Id.*, ¶ 82.

¹²² *Id.*, n.133 and accompanying text ¶ 82.

¹²³ Committee on Economic, Social and Cultural Rights, *supra* note 48, ¶¶ 8, 34.

¹²⁴ See *Situation of Detainees at Guantanamo Bay*, *supra* note 53, ¶ 81.

¹²⁵ See Welsh, *supra* note 7, at 159.

rulings provide legal analysis that takes into account the role and obligations of state authorities in hunger strikes, as well as the complex questions surrounding medical ethics, state interests and prisoners' rights. The decisions provide a legal framework and practical guidance for the management of hunger strikes and the accountability framework on states' conduct in response to prisoners' food refusal.¹²⁶

*A. The ECtHR Assessment On Prisoners' Force-Feeding:
Establishing a Groundbreaking Rule*

Among the cases brought before the ECtHR, two landmark decisions provide important guidance for developing a human rights-based domestic policy on hunger strike management and the practice of force-feeding—*Nevmerzhitsky v. Ukraine*¹²⁷ and *Ciorap v. Moldova*.¹²⁸

At the outset, it should be noted that though the term used by the ECtHR for the feeding of a prisoner under some circumstances is “force-feeding,” it is not completely clear that the interpretation of this practice by the Court is significantly different from the “artificial feeding” allowed and considered ethical by the WMA, as discussed in the previous chapter. In both cases brought before it, the Court prohibited the manners of feeding applied by the states, rejected coercive measures that were used by prison authorities and medical staff, and limited the use of the feeding to life threatening situations.

In the above precedential cases, the Court found it necessary to balance between the prohibition on torture (under Article 3 of the European Convention on Human Rights)¹²⁹ and the right to life (Article 2).¹³⁰ It considered a basic conflict between a prisoner's right to physical integrity (which is directly related to his or her freedom from torture, inhumane or degrading

¹²⁶ See also Welsh, *supra* note 7, at 156 (“Court ruling can provide a legal framework for the conduct of the authorities in response to hunger strike.”). For a comprehensive description and analysis of European and international case law, see also Pauline Jacobs, *supra* note 8, at 148–165, 176–205.

¹²⁷ *Nevmerzhitsky v. Ukraine*, *supra* note 60.

¹²⁸ *Ciorap v. Moldova*, no. 12066/02, Eur. Ct. H.R. (Jun. 19, 2007). For European case law and other cases of the ECtHR see Pauline Jacobs, *supra* note 8, at 180–200.

¹²⁹ European Convention, *supra* note 57, art. 3.

¹³⁰ *Id.*, art. 2.

treatment or punishment)¹³¹ and the positive obligation of a state to secure the right to life of persons under its custody.¹³²

To balance these conflicting interests and to ensure that the authorities act in the prisoner's best interests when subjecting him to force-feeding,¹³³ the Court in the *Nevmerzhitsky* and *Ciorap* cases established a five-factor test to assess when and in what manner "force-feeding" is permissible. The test requires that all of the following requirements be met:

1. Existence of *medical necessity*. Force-feeding should be prompted only by well-grounded medical reasons. According to the Court, a measure, which is of therapeutic necessity based on established principles of medicine, cannot be considered in principle as inhuman or degrading.¹³⁴ In addition, a state must satisfy itself that the medical necessity has been demonstrated to a convincing degree.¹³⁵
2. *A life-threatening state of health* of the prisoner requiring force-feeding. The medical justification should not only indicate a serious medical condition but also attest that the force-feeding is aimed at saving the life of a particular detainee who has consciously refused food.¹³⁶
3. *Compliance with procedural guarantees*. States should also establish procedural guarantees for the decision to force-feed a prisoner, such that the feeding would not be considered arbitrary but rather based on serious considerations and performed in a manner that does not amount to torture, inhuman, or degrading treatment or punishment.¹³⁷ Such guarantees include, for instance, constant medical assessment and supervision of the situation, administration of force-feeding only by a doctor

¹³¹ *Id.*, art. 3.

¹³² *Id.*, art. 2.

¹³³ The requirement to act in the best interest of the prisoner is a central aspect that is emphasized by the WMA Declaration of Malta applied here by the Court. *See* Declaration of Malta, *supra* note 12, at guideline 10; *see also* *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶ 96; *Ciorap v. Moldova*, *supra* note 128, ¶ 83.

¹³⁴ *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶ 94; *Ciorap v. Moldova*, *supra* note 128, ¶¶ 76–77, 82.

¹³⁵ *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶ 94; ("the Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist"); *see also* *Ciorap v. Moldova*, *supra* note 128, ¶ 77.

¹³⁶ *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶ 94; *see also* *Ciorap v. Moldova*, *supra* note 128, ¶¶ 77, 81.

¹³⁷ *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶¶ 94–99.

or a medical staff; judicial review and permission of the decision to force-feed¹³⁸ and regulations in domestic laws requiring written reports on the prisoner's medical condition; and record-keeping on the decision to force-feed a person, clarifying the reasons for starting and ending the force-feeding, and/or noting the composition and quantity of food administered.¹³⁹

4. The manner of force-feeding *should not trespass the threshold of a minimum level of severity* envisaged by the Court's case law under Article 3 of the Convention.¹⁴⁰ This element is more general and is left for the Court to assess the circumstances on a case-by-case basis. In general, it could be said that states should aim to choose the less harmful and intrusive alternative to force-feeding and that the manner in which the prisoner is force-fed is not inhuman or degrading.
5. Force-feeding and any related regulations *should never be aimed at punishing, discouraging or stopping* a prisoner from his protest.¹⁴¹

In the *Nevmerzhitsky* case, involving a prisoner who went on several hunger strikes and was subsequently force-fed, the Court found that the Ukrainian authorities' actions failed to comply with the above requirements and thus violated Article 3 of the European Convention on Human Rights by amounting to torture. The Court ruled that the force-feeding of the prisoner was conducted without any medical justification and therefore was arbitrary.¹⁴² In addition, although the Court assumed that the Ukrainian authorities had complied with the decree from the domestic government regarding the manner of force-feeding, the Court concluded that "in themselves the restraints applied—handcuffs, a mouth-widener, a special rubber tube

¹³⁸ See e.g. *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶ 93 (referring to safeguards posed in German law in hunger strikes situations); see also *Ciorap v. Moldova*, *supra* note 128, ¶¶ 81, 82.

¹³⁹ *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶¶ 94–99; *Ciorap v. Moldova*, *supra* note 128, ¶¶ 82–86.

¹⁴⁰ See *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶ 80; see also *Ciorap v. Moldova*, *supra* note 128, ¶ 63 ("To fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.").

¹⁴¹ See *Ciorap v. Moldova*, *supra* note 128, ¶¶ 78–83, 89.

¹⁴² *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶¶ 96, 98.

inserted into the food channel—in the event of resistance, with the use of force, could amount to torture.”¹⁴³ The Court further held that the Ukrainian government did not respect procedural safeguards as the government failed to produce any written medical report or any record of the decision of the head of the detention institution, both of which were obligatory under the decree that set forth the procedure for force-feeding detainees.¹⁴⁴ Moreover, the Court found that, although the authorities were using the equipment authorized in the decree, the force-feeding, in light of the prisoner’s conscious refusal, could not be in his best interest.¹⁴⁵ Accordingly, the authorities’ actions constituted torture.¹⁴⁶

Two years later, in *Ciorap v. Moldova*,¹⁴⁷ which involved similar arguments and factual background, the Court based its assessment on the rules and guiding principles adopted in *Nevnerzhitsky*. However, compared to *Nevnerzhitsky*, *Ciorap* provided a much more extensive analysis of the circumstances and the manner of force-feeding, and contained detailed and decisive criticism of the government’s conduct. Such scrutiny of the facts and measures taken is crucial in providing states with better guidance on how to form domestic policy that is consistent with international human right standards.¹⁴⁸

Accordingly, the Court applied a two-pronged approach to consider the above elements, reviewing: (a) the existence of medical necessity to force-feed the prisoner and (b) the manner of force-feeding of the prisoner.

In *Ciorap*, the applicant claimed that he had repeatedly been force-fed in the absence of any medical necessity, that the force-feeding had been punitive in character and aimed at stopping his hunger strike, and that the manner in which it was performed subjected him to severe unnecessary pain and humiliation.¹⁴⁹ In its ruling, the Court affirmed these allegations, finding that the prisoner had been held many times in solitary confinement for staging hunger strikes, which purportedly violated

¹⁴³ *Id.*, ¶ 97.

¹⁴⁴ *Id.*, ¶¶ 96.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*, ¶ 98.

¹⁴⁷ *Ciorap v. Moldova*, *supra* note 128.

¹⁴⁸ Also note that unlike *Nevmerzhitsky*, the Court in *Ciorap* did not mention or refer to the two WMA declarations revised only one year before the case was brought to the Court.

¹⁴⁹ *Ciorap v. Moldova*, *supra* note 128, ¶ 72.

prison order under the Moldovan law, and that such measures were aimed at discouraging the prisoner from his protests.¹⁵⁰

Thereafter, the Court found no evidence to the existence of medical necessity. The Court found that there was no test or any other investigation serving as the basis for the decision to initiate the force-feeding, nor did the Moldovan government produce any report supporting its decision to start the force-feeding procedure, thereby failing to provide a “basic procedural safeguard.”¹⁵¹ The Court therefore concluded that the authorities had not acted in the best interests of the prisoner.

With respect to the manner of the force-feeding, the Court was “struck by the manner of the force-feeding,” which included mandatory handcuffing, regardless of whether the prisoner put up any resistance, and severe pain inflicted with a mouth-widener used to open the prisoner’s mouth and metal tongs to pull his tongue outside his mouth. The Moldovan government disputed none of these methods.¹⁵² Notably, the Court stressed that, regardless of whether the prisoner proved any tangible physical harm inflicted by these actions, the manner of force-feeding was “unnecessarily painful and humiliating.”¹⁵³

Lastly, the Court observed that the authorities had not complied with the procedural safeguards set forth in domestic laws, including the requirements to specify the reasons for starting and ending the force-feeding and to record the nutrition given to the force-fed prisoner.¹⁵⁴

The Court therefore concluded that the prisoner’s “repeated force-feeding, not prompted by valid medical reasons but rather with the aim of forcing the prisoner to stop his protest, and performed in a manner which unnecessarily exposed him to great physical pain and humiliation, can only be considered as torture.”¹⁵⁵

To conclude, the cases shed light on the practice of hunger strikes. They provide a careful legal consideration of the conflict between state duties and prisoners’ rights, as well as of ethical obligations, putting a great burden on state parties to prove compliance with human rights norms. Nevertheless, the

¹⁵⁰ *Id.*, ¶¶ 78–79, 83.

¹⁵¹ *Id.*, ¶¶ 81–82. The Court further noted that the prisoner’s health condition had been assessed as “relatively satisfactory,” which is “hardly compatible with a life-threatening condition requiring force-feeding.” *Id.*

¹⁵² *Id.*, ¶ 85.

¹⁵³ *Id.*, ¶ 88.

¹⁵⁴ *Id.*, ¶ 86.

¹⁵⁵ *Id.*, ¶ 89.

ECtHR does not recognize a prisoner's right to refuse life-saving treatment. It allows force-feeding and intervention, under certain conditions, even when a competent prisoner or detainee makes an informed refusal to medical treatment. Regrettably, an important question is left unanswered. Considering all the conditions for such treatment are sufficiently established, what is specifically the permissible and humane manner by which involuntary medical treatment or feeding can be administered? The Court's ambiguous threshold of a minimum level of severity leaves a considerable gap in practice.¹⁵⁶ As of now, it is for the states to determine the answer under the scrutiny of national and international tribunals and mechanisms.

B. *The International Criminal Tribunal for the Former Yugoslavia and struggle to implement international norms*

The issue of prisoners' hunger strikes has also reached the International Criminal Tribunal for the former Yugoslavia (ICTY). This U.N. tribunal was specifically established in 1993 to try cases against alleged war criminals and is different in form and structure from the ECtHR. Yet, its rulings apply international law standards and are thus relevant to this discussion on hunger strikes. The ICTY's review gives consideration to both the ECtHR jurisprudence and the two revised WMA declarations. Its ruling demonstrates the serious difficulty of applying these principles in practice.

In a surprising comment in *Prosecutor v. Vojislav Seselj*,¹⁵⁷ the ICTY found that the domestic and international legal standards applied to detainees on hunger strikes "reveal[ed] a lack of uniformity" and that medical ethics created

¹⁵⁶ See also Pauline Jacobs, *supra* note 8, at 199, 325 (Jacobs mentions that it is difficult to predict what kind of treatment will be regarded as transgressing the threshold of minimum severity. In this regard, Jacobs notes that the ECtHR "has repeatedly held that this threshold limit is in the nature of things, relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim." Moreover, she concludes that the ECtHR has left a "wide degree of interpretation to Member States to decide on the issue of force-feeding of prisoners on hunger strikes, and is in principle not opposed to force-feeding in competent hunger strikers.").

¹⁵⁷ *Prosecutor v. Seselj* (Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused), Case no. IT-03-67-T (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 6, 2006), *available at* <http://www.icty.org/x/cases/seselj/tord/en/061206.pdf> (last visited Jun. 25, 2014).

an “absolute obstacle” for implementation.¹⁵⁸ In this case, a suspect before the ICTY, charged with war crimes committed in Bosnia and Herzegovina, had initiated a hunger strike in protest to his detention conditions and criminal proceedings and consciously refused any kind of medical treatment, even to the point of loss of consciousness and eventually life. Among many demands the detainee made, he asked to be provided with all prosecution case documents, translated to his language, to have additional family visits, to receive an approval to nominate his own legal advisers, and to disqualify the judges currently composing the bench.¹⁵⁹

Unlike the hunger strikes discussed in the ECtHR cases, the detainee in *Prosecutor v. Vojislav Seselj* explicitly rejected “any form of medical treatment while on hunger strike” and “any attempts at forced artificial nourishment,” both when conscious and unconscious.¹⁶⁰ At the same time, he declared that he “consciously entered upon a hunger strike in pursuit of his requests” and that he had “neither the motivation nor the intention to commit suicide.”¹⁶¹

In response, approximately one month after the detainee began his hunger strike, the ICTY’s Trial Chamber decided to issue an “Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused.” In its order, the ICTY emphasized the government’s responsibility to protect the welfare and health of any accused under its custody,¹⁶² in tension with the prisoner’s right to physical integrity.¹⁶³ The ICTY also expressed other interests involved in this situation, such as the impact of the hunger strike on the exercise of the government’s judicial function,¹⁶⁴ the potential effect of the non-legal processes demanded by the detainee on trial condition, and the goal of a trial “to serve the end of justice.”¹⁶⁵

The ICTY thus concluded that the trial “should not be undermined by the Accused’s manipulative behavior. In order to resume the trial proceeding and fulfill the Tribunal’s duty to

¹⁵⁸ *Id.*, ¶¶ 12–13.

¹⁵⁹ *Id.*, n.1.

¹⁶⁰ *Id.*, ¶ 7.

¹⁶¹ *Id.*

¹⁶² *Id.*, ¶¶ 2, 8–9.

¹⁶³ *Id.*, ¶ 9.

¹⁶⁴ *Id.*, ¶¶ 2, 8–9.

¹⁶⁵ *Id.*, ¶¶ 10–11.

protect the Accused's health and welfare, it is necessary for the Host State to take decisive measures."¹⁶⁶

Yet, in terms of what would qualify as such "decisive measures," the ICTY decision was extremely vague and unworkable. On its surface, the ICTY decision reiterated the ECtHR jurisprudence allowing force-feeding to some extent and affirmed that the international standards of medical ethics create "an absolute obstacle" for medical intervention in the event of persistent refusal to nourishment.¹⁶⁷

However, the ICTY refrained from resolving this conflict: in this nebulously-phrased decision, the Tribunal eventually ordered the Dutch authorities to provide the accused some medical services "which may, in the case of medical necessity, include intervention such as drip-feeding," to be administered "with the aim of protecting the health and welfare of the accused and avoiding loss of life," to the extent that such services comply with "compelling internationally accepted standards of medical ethics or binding rules of international law."¹⁶⁸ At the same time, the disposition also required Dutch authorities to ensure that the medical professionals seek professional advice, "both in terms of specialized medical expertise and ethics, domestically and internationally," when considering whether to initiate or continue medical interventions.¹⁶⁹

In effect, the ICTY ended with the very questions it was asked to decide, i.e. which international medical standards and international law norms should apply in these circumstances and what rules should govern in practice when this "absolute obstacle" of medical ethics is reached.

Though the ICTY's ruling seems like an attempt to circumvent the international standards of medical ethics, the ruling remains ambiguous. Certainly, this decision highlights the difficulty of adjudicating and making actual decisions based on international law standards and medical ethics principles, especially when it comes to cases that involve serious risks to human life and a persistent refusal of treatment.

¹⁶⁶ *Id.*, ¶ 11.

¹⁶⁷ *Id.*, ¶¶ 12–13.

¹⁶⁸ *Id.*, ¶ 15.

¹⁶⁹ *Id.* The ICTY further ordered the Dutch authorities to review the domestic protocol on prisoners' hunger strike such that it would reflect the latest international medical and ethical standards. *Id.*

III. THINKING DOMESTICALLY: OUTSTANDING ISSUES IN THE MANAGEMENT OF HUNGER STRIKES

A. *The Role of State Officials*

Moving forward from the international human rights regime to the realm of domestic policy, it is important to recognize that state officials at all levels—from prison administration to legislators and state ministerial officials¹⁷⁰—play a crucial role in decision-making regarding hunger strikers in custodial settings. Yet, surprisingly, the existing international standards and human rights scholarship focus mainly on the role of physicians and the clinical management of strikes, as well as the doctor-prisoner relationship at the micro level, rather than on the processes at the macro level.¹⁷¹ However, even applying the WMA principles of medical ethics to the largest extent, physicians have very limited resources for dealing with hunger strike situations, let alone for effectively leading to its resolution: it is simply insufficient to only discuss the medical aspect of addressing hunger strikes.

While not all hunger strikes receive the same amount of attention from the government and the public, many do become widely known nationally and internationally¹⁷² and involve the participation and leadership of high-level officials who attempt to resolve the strikes (including legislators, legal advisors and policymakers belonging to different government departments and ministries (e.g. the ministries of health services, justice, public security and the national prison and police forces). These

¹⁷⁰ Such officials may include representatives from the ministries of health services, public security and justice, depending on the jurisdiction.

¹⁷¹ See *supra* note 8. As an additional example, one of the few comments that could be found on the subject of hunger strikes by the Committee for the Prevention of Torture (CPT), established under the European Convention against Torture of the Council of Europe, notes that though it refrained to date from adopting a stance on this matter, "it does believe firmly that the management of hunger strikers should be based on a doctor/patient relationship." European Convention for the Prevention of Torture and Inhuman or degrading Treatment or Punishment (CPT), Report to the Turkish Government on the visits to Turkey from 10 to 16 December 2000, CPT/Inf (2001), available at <http://www.cpt.coe.int/documents/tur/2001-31-inf-eng-1.htm> (last visited Jun. 26, 2015).

¹⁷² Most widely known are the Irish inmates of the Maze prison who starved themselves to death in 1981. See Reyes, *Medical and Ethical Aspects of Hunger Strikes*, *supra* note 10. Also, the hunger strikes of prisoners at Guantanamo Bay sparked vast international response and human rights scholarship as a result of the harsh condition and treatment of prisoners that according to the U.N. Human Rights Commission amounted to torture. See *supra* note 11.

officials have an enormous influence on state policies and on the prisoners' rights on a basic day-to-day level during the course of a strike.

On a more general level, state officials are responsible for shaping and regulating a nation's policy on prisoners' food refusal, for setting procedural safeguards and guidelines for the treatment of such prisoners, for establishing guarantees to protect prisoners' rights, and for making decisions on the kinds and manner of medical interventions that would be allowed. Similarly, prison administration has a leading role in any negotiation held to resolve the strike and in the management of hunger strikes.

To conclude, state officials' decisions, while subject to judicial review, constantly require an assessment of the proper balance between state obligations and prisoners' rights. Officials involved in the management of hunger strikes are instrumental for the implementation of international standards at the domestic level. It is therefore crucial to give due consideration to their role and provide them with practical guidelines for managing hunger strikes in their capacity.¹⁷³

B. *State Obligations v. Prisoners' Rights*

Another outstanding issue is the gap described throughout this article between human rights law on hunger strikes in theory and in practice. This article advances the argument that an important step to implement the relevant international standards in prisoner hunger strike situations is to give due consideration to state obligations and domestic concerns. This is true especially when domestic circumstances or other justifications require medical intervention to preserve the life of a prisoner.

The ICTY case discussed above uncovers the challenge. The attempt to promote national human-rights based policies on the issue is complicated by the generality and ambiguous nature of the existing principles, the lack of coherence and uniformity on the international level, the absence of international consensus on the obligations of states during prisoners' hunger strikes, and finally, the principles of medical ethics operating as the

¹⁷³ See, e.g., Tracy M. Ohm, *What They Can Do About It: Prison Administrators' Authority to Force-Feed Hunger Striking Inmates*, 23 WASH. U. J.L. & POL'Y 151 (2007) (in a similar attempt aiming at guidelines for prison administrator at the U.S. legal system).

“absolute obstacle” (as was put by the ICTY—i.e. essentially requiring to acknowledge a right of a competent prisoner to die in dignity once he or she makes an informed and persistent refusal to get nutrition or to be resuscitated, without recognizing any justification to save the life of such a prisoner). More concerning is the risk to prisoners’ rights in practice in the absence of an accepted set of international human rights norms. Such complexity heightens the importance of a broader legal framework that carefully considers both state interests and the ground level implications.¹⁷⁴

Because different states take different approaches to the management of hunger strikes and implement different policies,¹⁷⁵ it is helpful to first analyze the conflicting interests, obligations, and rights of state authorities and prisoners.

The most significant rights recognized for the protection of hunger strikers in custodial settings are: (1) the right to be free from torture and other cruel, inhuman or degrading treatment, (2) the right to physical integrity,¹⁷⁶ (3) the right to the highest attainable standard of physical and mental health, (4) the right to refuse medical treatment,¹⁷⁷ (5) the right to self-determination and personal autonomy,¹⁷⁸ and (6) the right to protest.¹⁷⁹

So can states truly posit sufficiently substantial interests or obligations that would prevail over these prisoners’ rights?¹⁸⁰ Among the most recognized domestic and international legal obligations is the responsibility of states to protect the prisoners’ life and the obligation to ensure and preserve the prisoners’

¹⁷⁴ See generally Welsh, *supra* note 7, at 169–70 (concluding that “a general position on hunger strikes based on human rights must take into account the obligations of the state with regard to the well being of the prisoner(s) and rights-sensitive commentary by expert bodies and individuals”).

¹⁷⁵ For a comparative study on the policies on force-feeding in three jurisdictions, namely the Netherlands, Germany, and England/Wales, see Pauline Jacobs, *FORCE-FEEDING OF PRISONERS AND DETAINEES ON HUNGER STRIKE: RIGHT TO SELF-DETERMINATION VERSUS RIGHT TO INTERVENTION* (2012), at 219–306 (Jacobs notes that on the question of whether intervention may be performed on a prisoner who refuses food and treatment, opinions differ in these three jurisdictions, from absolute respect for the prisoner’s decision to refuse food in England and Wales to a legal right to intervention on competent hunger strikers in Germany..

¹⁷⁶ See generally *Nevmerzhiysky v. Ukraine*, *supra* note 60; *Ciorap v. Moldova*, *supra* note 128.

¹⁷⁷ *Situation of Detainees at Guantanamo Bay*, *supra* note 53, ¶ 82.

¹⁷⁸ Silver, *supra* note 10.

¹⁷⁹ See *supra* note 43.

¹⁸⁰ Silver, *supra* note 10, at 642 (assessing and questioning state interests in force-feeding of inmates).

health and welfare during any strike.¹⁸¹ Welsh adds other obligations of states, including the prevention of suicide, protection of innocent third parties, maintaining the ethical obligations of the health personnel, fulfillment of the duty of care, and enforcement of prison security and discipline.¹⁸²

In this regard, it is important to differentiate between legitimate and illegitimate interests and considerations that a state has. State interests aimed at satisfying its own objectives—such as promoting political agenda or immediately stopping the strike—should never triumph over prisoners' human rights. For example, force-feeding administered to discourage hunger strikes or punish hunger strikers for the sake of keeping order in prison clearly transgresses international norms.¹⁸³

Surely, prisoners' decision to hunger strike and put their health in danger poses considerable challenges to a state that seeks to fulfill its obligations. Yet, at the same time, state officials are required to balance these obligations with the set of human rights protecting hunger strikers. Prison authorities, physicians, legislators, policymakers, judges, legal advisors and state leaders are all required to provide a careful response to what is already a complex and unclear situation that is often perceived as illegal or as a political manipulation, within the context of these often-contradictory principles.

From a domestic perspective, a human rights-based approach that fails to meet state obligations, including justifications to provide medical treatment to prisoners in life threatening situations, may fundamentally violate prisoners' rights. In practice, when the majority of states do not recognize the right of a prisoner to resort to death and refuse life-saving treatment, the absence of an accepted human rights-based framework that deals with these hunger strikes may simply result in a legal vacuum where states act according to their own local standards. While it is important to set high standards for states to reach,

¹⁸¹ See *id.* at 642–43; see also Welsh, *supra* note 7, at 146 (offering a detailed table on the human rights of prisoners and state interests in responding to hunger strikes).

¹⁸² Welsh, *supra* note 7, at 146 (offering a detailed table on the human rights of prisoners and state interests in responding to hunger strikes).

¹⁸³ *Ciorap v. Moldova*, *supra* note 128, ¶ 89 (“the applicant’s repeated force-feeding, not prompted by valid medical reasons but rather with the aim of forcing the applicant to stop his protest, and performed in a manner which unnecessarily exposed him to great physical pain and humiliation, can only be considered as torture.”).

especially in such complex situations, it is detrimental to establish unfeasible standards or leave no applicable law.

International law should attend to states' concerns and intervene where medical ethical standards cease to be a source of law. An approach that acknowledges certain state circumstances and obligations that may necessitate the provision of involuntary medical treatment during hunger strikes may directly advance the protection of prisoners. While exceptions to prisoners' right to go on hunger strike should apply in a strict and limited manner, it may well assist the development of concrete state responsibilities as well as procedural safeguards during these situations. It would serve to not only hold states accountable for their conduct at the domestic level, but also advance the rights of the hunger strikers who in fact do not seek to die but to confront certain issues that give rise to their protest.¹⁸⁴

IV. FACING THE CHALLENGE: IMPLEMENTING INTERNATIONAL STANDARDS AT THE DOMESTIC LEVEL

A. *Striking an Appropriate Balance*

As discussed in Part II, the ECtHR jurisprudence provides a viable legal framework that is relevant for the majority of domestic legal settings and can strike the right balance between prisoners' rights and states' custodial obligations. It provides an adequate assessment that overcomes the judicial "dead-end" created when national laws conflict with medical ethics principles that do not allow intervention when a competent prisoner or detainee makes an informed and persistent refusal to medical treatment. Absent such an analysis that addresses circumstances in which it is neither justifiable nor legal to allow a prisoner to continue the hunger strike in life threatening situations, it is un-

¹⁸⁴ Declaration of Malta, *supra* note 12 ("Hunger strikers usually do not wish to die but some may be prepared to do so to achieve their aims"). Hunger strike is considered a practice that is one of the few ways for prisoners to protest the conditions of their incarceration or express political viewpoints. *See Silver, supra* note 10, at 632. Furthermore, some argue that a policy recognizing a prisoner's right to hunger strike to death reflects the absence of consideration to the right to protest and to be heard since it allows states not only to abandon its obligation to protect the health of inmates, but also to ignore their protesting voice for a change in the conditions of their detention. *See, e.g., Welsh, supra* note 7, at 147 (mentioning that a government's decision not to intervene in a hunger strike "could demonstrate a government's intransigence and refusal to engage with hunger strikers on the matter in dispute").

certain what would fill the gap, compromising prisoners and detainees' rights.

While acknowledging states' positive obligation to protect the right to life of a prisoner or detainee, and with due consideration to the prohibition of torture as well as inhuman and degrading treatment, the Court established a precedential comprehensive test that considers the various factors and contexts involved in the hunger strike (i.e. the medical necessity for intervention; a life threatening situation; compliance with various procedural guarantees for the decision to force-feed a prisoner; a manner that shall not transgress the threshold of minimum level of severity and that is not inhumane or degrading; and a prohibition on punitive measures).

Accordingly, to find the proper balance of these rights on both sides, one needs to differentiate between different stages in the timeline of a hunger strike—from the very beginning of the strike until the stage in which a prisoner's health or life is clearly in danger. When the strike is at its initial stage, a prisoner's right to proceed with the strike without any medical treatment or other interference prevails over any state interest in interfering with the prisoner's decisions. In the course of the strike, no intervention is allowed when a competent prisoner or detainee makes an informed refusal to medical treatment. As the prisoner's health condition deteriorates to the point in which there is a danger of permanent injury or an obvious threat to life, the rationale for allowing the authorities to take measures to provide medical care, including involuntary feeding, becomes significantly more compelling under a human rights-based approach, provided that all conditions and safeguards for such treatment are complied with. In all stages, a state must carry its obligations to protect and preserve the health and welfare of the prisoner, provide daily care and supervise the striker's medical condition.

Indeed, the ECtHR jurisprudence suggests a certain shift from the legal human rights framework that appears in other international sources, which for the most part embrace the principles prescribed by the WMA, to a more pragmatic position. This approach can serve as a basis to develop a comprehensive domestic legal framework of safeguards and guarantees and can hold states accountable for protecting the human rights that governments have already recognized in international treaties.

B. *Operational Guidelines and Policy Recommendations for State Officials*

An important step for addressing the human rights-related challenges of prisoners' hunger strikes at the domestic level is the development of human rights policies, including procedural guarantees and mechanisms that give effect to state obligations during hunger strikes as well as to the set of rights protecting the prisoners. State authorities are obligated to incorporate such policies in order to ensure prisoners' rights, and further, states could significantly benefit from a greater standardization regarding the issue.¹⁸⁵ This section of the Article proposes several such mechanisms, which would serve to implement international human rights principles at the domestic level. Inevitably, these cover only a small part of the possible measures and are intended as a baseline framework to be further developed under different domestic contexts.

At the onset, it must be noted, that one of the most important issues to address at the state level is the relationship between the *clinical* and the *administrative* management of hunger strikes. A well-established system of cooperation and clear assignment of roles in this crucial intersection of powers may determine the success of domestic efforts to deal with hunger strikes. While it is difficult to pinpoint what would be an optimal solution to a hunger strike, it is safe to say that it is in both sides interest to avoid a prolonged strike and the need for any involuntary intervention. Certainly, the most heated debates occur around the possible conflict between the set of ethical obligations of physicians (especially those who work within custodial settings) and the custodial, governmental or judicial authorities, which may decree involuntary treatment. More often than not, it seems that the gap cannot be bridged. However, the result of ineffective collaboration may be devastating for the protection of prisoners' rights. A genuine attempt must be made. The following recommendations are an initial step in this endeavor.

As suggested in the previous sections, the ECtHR jurisprudence provides a preferable model for a domestic legal framework. It not only gives human rights-based legal tests for the review of state conduct in hunger strikes, but also is applicable in practice.

¹⁸⁵ See generally Ohm, *supra* note 158, at 153.

Based on the ECtHR model and various national models that have shown to be effective dealing with the issue, the following recommendations incorporate some of the most significant measures that states could take to face the complex problems involved in prisoners' hunger strikes:

1. *Standardization Through Legislation and Regulation*

Given the high volume of public attention and criticism hunger strikes tend to create at both the national and international levels, as well as the major risk to prisoners' rights when policies remain vague and unclear, it is in states' interest to articulate the policies and standards in as much details as possible. Public pressure on state authorities, in the absence of clear procedures and standards, often leads authorities to produce an arbitrary and inconsistent response to hunger strikes, which can lead to political repercussions and/or further escalation. Moreover, clear regulations can also improve transparency and reduce the risk of manipulation by either party.

Therefore, states should adopt national legislation and set specific regulations to be used within custodial institutions, addressing both the roles of health personnel and the authorities of prison administrators. This is the first step in the formation of a national policy. Such legislation must be rights-sensitive and use clear definitions, descriptions, and procedures for the evaluation and management of hunger strikes.

In addition, it is important to ensure that all relevant parties, including the national medical association and NGOs, are involved in the legislative process. Legislation that would earn the support of the latter would get broad legitimacy from the public and international community.

Any such legislation should set procedural guarantees for the management of hunger strikes, *inter alia*:

- *Specific provisions that guarantee the clinical autonomy of health professionals to direct medical care.*¹⁸⁶ Solely physicians and health personnel should perform any medical assessment of the patient's health condition and

¹⁸⁶ Allen & Reyes, *supra* note 8, at 192 (referring to actions that can be implemented by physicians working within the custodial institution, Allen and Reyes suggest a list of recommendations that some are also relevant and practical at the national level and can be implemented by policy makers and other officials).

administer medical treatment or intervention. Clear and detailed policies and procedures regarding the decision to administer involuntary medical treatment or feeding, including forbidden measures and instruments, should be in place. These policies should include the manner and conditions under which involuntary treatment would be conducted. A judicial review before any decision to conduct such medical intervention without the prisoner's consent is preferable (i.e. administering involuntary medical treatment only with a judicial order).

- *Clear protocol to ensure transparency and public scrutiny in the management of hunger strikes.* States should strive to make public and accessible any procedure and policy that guide officials in these situations. Reyes suggests that means of securing transparency should also include granting independent observers access to the hunger striker and their medical records.¹⁸⁷ When this is not possible for security reasons, another neutral and independent party should be allowed such access.¹⁸⁸
- *Guidance regulating and defining the role of physicians who work within custodial institutions or otherwise treat hunger strikers.* These should be based on the medical ethics principles and guidelines provided by the WMA (namely, the Malta Declaration)¹⁸⁹ for physicians who clinically manage hunger strikes.¹⁸⁹
- Instructions and regulations ensuring the *constant supervision of the prisoner's medical condition* by a physician or a medical committee.¹⁹⁰
- Guidelines on the *proper documentation of the prisoner's health*, as well as of the administrative decisions and their underlying reasoning made in the process.¹⁹¹

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Declaration of Malta, *supra* note 12.

¹⁹⁰ See e.g. *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶ 93; *Ciorap v. Moldova*, *supra* note 128, ¶¶ 81–82 (both referring to safeguards posed in German law in hunger strikes situations).

¹⁹¹ *Nevmerzhitsky v. Ukraine*, *supra* note 60, ¶¶ 94–99; *Ciorap v. Moldova*, *supra* note 128, ¶¶ 82–86.

2. Review and Implementation Mechanisms

States should institute mechanisms for reviewing officials' decisions regarding the treatment of prisoners on hunger strikes and for implementing the standardized policies and procedures in each case.

- *Judicial review.*¹⁹² States should consider establishing a judicial review mechanism that applies before any decision to administer medical treatment without the prisoner's voluntary consent. Both the decision on involuntary treatment and the manner in which it is conducted would need an order from a national court.
- *Semi-judicial bodies for review and implementation.* Absent judicial review, states should consider granting to a national body or a permanent professional committee the semi-judicial authorities or administrative powers to provide guidance and make decisions during hunger strikes. Such a body would monitor the implementation of laws and ensure compliance. The body may comprise former judges, medical and legal experts, permanent representatives from different governmental ministries (including the national prison leadership), representatives from the national medical association, representatives from civil society, and any other relevant officials.
- *National Ombudsman on Prisoners' Rights and Complaints.* Nominating or broadening the authorities of a National Ombudsman on Prisoners' Rights and Complaints, who will be entrusted with representing prisoners' rights and interests before governmental bodies, may be effective and beneficial in resolving hunger strikes. A "National Ombudsman" can serve as a voice to the prisoners in internal governmental discussions and provide less controversial assessment of their demands.¹⁹³ It is also usually a person that enjoys a degree

¹⁹² In both cases, the ECtHR applied principles from German Law. See *Nevmerzhiitsky v. Ukraine*, *supra* note 58; *Ciorap v. Moldova*, *supra* note 116, at ¶¶ 81–82.

¹⁹³ The issue of representation of prisoners' interests during hunger strikes is very complicated. Often NGOs lack the possibility to conduct close and serious assessment of hunger strikes in custodial settings (including assessing the prisoners'

of trust from both the government and prisoners, while retaining independence.

- *Independent Observers.* A government able to establish a human rights-based policy should also be capable of allowing maximum transparency and access to prisoners and detainees.¹⁹⁴ Though some states refrain from allowing other parties to monitor their actions, cooperation with independent observers and involvement of NGOs in the process may increase the legitimacy of states' actions with regard to hunger strikes and thus prove to be beneficial. Such cooperation may also extend states' ability to manage hunger strikes effectively and lessen pressure and manipulation, assuming that all procedural guarantees were complied with.

3. *Training and Education*

States should also ensure consistent training for state officials at all levels, especially prison administration staff and physicians working in custodial institutions. Such training would serve to build their capacities to deal with hunger strikes effectively and act in accordance with national laws and international norms. Official trainings would also help to increase awareness around all of the complexities involved in these situations.

4. *Partnerships and Cooperation Mechanisms*

Perhaps the most important partnership to facilitate in the course of hunger strike is the one between the physicians and authorities responsible for managing hunger strikes. Establishing trust and maximum collaboration may be achieved through various measures including: (a) clear assignment of roles and responsibilities (for instance, only the authorities have the power to engage in negotiations regarding the conditions posed by

health, the nature of the hunger strike, the mental status of the food refuser, etc.) and their observations are very limited. See Welsh, *supra* note 7, at 170–71.

¹⁹⁴ Allen & Reyes, *supra* note 8, at 192 (stressing the importance of ensuring transparency of process in the management of hunger strikes. Allen and Reyes offer that independent observers be granted access to detainees and their medical records.).

the hunger striker, while physicians are the sole authority to determine the need for medical treatment); (b) meetings geared at facilitating mutual understanding of the set of obligations directing the actions of each sides and at managing conflicting duties; (c) joint bodies responsible for decision making during hunger strikes; (d) joint trainings; and (e) official procedures to ensure deliberation on a regular basis (and not only during strikes). Eventually, both sides should strive to facilitate and avoid the need for any involuntary intervention. Optimal cooperation can lead to avoid escalation that requires such intervention.

In addition, states should adopt cooperation mechanisms to develop best practices on three levels: (1) within the government, i.e. inter-ministerial cooperation, (2) with NGOs and civil society involvement, and (3) internationally, i.e. between states and other international institutions (for example the WMA). Especially important are the partnerships with civil society, which should be officially established. Having prominent NGOs with experience in situations of hunger strikes (such as the International Red Cross) officially involved in national efforts to establish policies on prisoners' hunger strikes can add tremendous value to the process. Governments can only benefit from the legitimacy granted to their actions.

The implementation of these suggested recommendations is far from simple. The challenges posed by hunger strikes of prisoners are complex, frequently politicized, and controversial, but no doubt states must aim at greater standardization, using in whole or in part the measures detailed above.

CONCLUSION

To conclude, it appears that international human rights law has not yet addressed all the various legal, ethical, and practical questions that surround prisoners' hunger strikes.

Opinions differ greatly in international sources: some call for an absolute respect for a prisoner's decision to refuse food and medical treatment, while others recognize the right to intervene to protect the life and health of competent hunger strikers under certain circumstances. The situation is further complicated by the generality and ambiguity of some of the existing

principles as well as the tendency to focus on the medical aspects of hunger strikes.

Absent coherent standards and consensus on the international level, many questions remain unanswered. Under the existing vague regime, national policies on the protection of the rights of prisoners on hunger strike are underdeveloped, and practical guidance is sorely lacking. States therefore face complicated challenges when responding to these situations.

This Article thus provides an overview of the human rights norms and case law that currently governs prisoners' hunger strikes while clarifying the professional terminology that is often used in these circumstances. It proposes a shift in the current scholarship from a focus on medical matters and the role of health professionals to a more thorough assessment of broader policy considerations and the role of state officials during hunger strikes. Domestic challenges, states' obligations, and state officials' duties in shaping national policies and managing such situations require a more developed understanding and should be evaluated along with possible implementation mechanisms. Specifically, an examination of the ECtHR jurisprudence and a set of policy recommendations demonstrate how states can and should respond to prisoners' hunger strikes in ways consistent with human rights norms.

Surely, the gate for states to humanly and legally manage hunger strikes has been opened. Inevitably, this baseline framework does not answer all the domestic dilemmas associated with hunger strikes. Nevertheless, it has the potential to generate policy work and encourage states to develop human rights-based policies, bridging international norms with lessons from the practice.

Ultimately, the ability of international human rights law to provide a normative position and effective, viable set of rules that can inform state practice is invaluable. Absent an applicable framework, human rights law risks becoming ineffectual and incapable of influencing the reality of the vulnerable groups it intends to protect.