HUNGER STRIKES AND FORCE-FEEDING IN PRISONS

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Abstract

This study will try to give an overview and assess the international and European standards regarding the management of hunger strikes.

We will analyse the international and European standards regarding the force-feeding a prisoner on a hunger strike.

The paper will focus on the study of the ECtHR judgements regarding the force-feeding of hunger strikers.

Also, we will address the U.S. case and the force-feeding of prisoners which is considered to be, in certain cases, an act of torture based on the international human rights standards.

To close with, the study will attempt to go through the recent developments in the Romanian legislation, analysing the legislation and its conformity with the European principles and recommendations, bearing in mind the prohibition, in absolute terms, of torture or inhuman or degrading treatment or punishment.

Keywords: *hunger strike; force-feeding; prison; ECHR; Declaration of Malta; Romanian legislation.*

1. Introduction

Hunger strike is a severe form of protest of convicted persons with possible negative consequences mainly on their health or life, but also in general on the enforcement of custodial sentences and on the safety of detention facilities.

Perseverance in hunger striking can have irreversible effects on the person's health. Given that during detention convicted persons are in the custody of the state, the state has a very important role: to ensure enforcement conditions which can guarantee the protection of life, health and physical integrity of detainees. Against this background, perseverance in hunger striking can pose serious problems to the state agents as soon as the status of the hunger striker degrades to the extent that the person's force feeding becomes necessary.

As a consequence, the tension between the duty to secure the right of a prisoner to life and the duty to respect the autonomy of the individual needs to be addressed, in accordance with medical ethics and also with the legislation of the particular country.[1]

The controversial and emotive issue of forcible feeding of prisoners who are on hunger-strike raises the difficult question weather, and if so when, the infliction of painful but potentially life-saving treatment may constitute prohibited ill-treatment, despite a refusal of consent. In essence the argument is between two principles: respect for the moral autonomy of the prisoner, against the responsibility of the state for the fate of those it has deprived of liberty.[2]

2. Content

2.1. World Medical Association (WMA) standards

It was said that one of the most spectacular violations in recent history that were brought before the public and widely discussed involved force-feeding of hunger strikers by health care professionals.[3]

The WMA Declaration of Tokyo[4] provides some general principles regarding the clinical independence of the physician and the force-feeding of the prisoners: *A physician must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible.*

Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to

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[1] A. Lehtmets, J. Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being* (Strasbourg, Council of Europe, 2014), 40-41, accessed March 25, 2016, http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/Publications_HealthCare_manual_Web_A5_E.pdf.

[2] N. S. Rodley, M. Pollard, *The treatment of prisoners under international law*, 3rd edition (Oxford: Oxford University Press, 2011), 419.

[3] G.J. Annas, *Hunger strikes at Guantanamo - medical ethics and human rights in a "legal black hole"*, N Engl J Med. 2006; 355(13):1377–1382 [PubMed]; M. Müller, *Zwangsernährung in der Haft [Forced feeding in detention]*, Neue Zürcher Zeitung [New Zurich newspaper], September 9, 2010, in J. Pont, H. Stöver, and H. Wolff, *Dual Loyalty in Prison Health Care*, American Journal of Public Health, Vol. 102, No. 3 (March 2012), 10.2105/AJPH.2011.300374, accessed March 25, 2016, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3487660/.

[4] *World Medical Association (WMA) Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment*, adopted by the 29th World Medical Assembly, Tokyo, Japan, October 1975 and editorially revised by the 170th WMA Council Session, Divonne-les-Bains, France, May 2005 and the 173rd WMA Council Session, Divonne-les-Bains, France, May 2006, rules no. 5 and 6, accessed March 25, 2016, http://www.wma.net/en/30publications/10policies/c18/index.html.

form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner.

The development of medical standards and ethics in case of force-feeding a prisoner during his/her hunger strike was realised through a special declaration of the WMA, dealing with hunger strikers.

According to the WMA Declaration of Malta on Hunger Strikers[5], an ethical dilemma arises when hunger strikers who have apparently issued clear instructions not to be resuscitated reach a stage of cognitive impairment. The principle of beneficence urges physicians to resuscitate them but respect for individual autonomy restrains physicians from intervening when a valid and informed refusal has been made. An added difficulty arises in custodial settings because it is not always clear whether the hunger striker's advance instructions were made voluntarily and with appropriate information about the consequences.

Physicians should respect individuals' autonomy. This can involve difficult assessments as hunger strikers' true wishes may not be as clear as they appear. Any decisions lack moral force if made involuntarily by use of threats, peer pressure or coercion. Hunger strikers should not be forcibly given treatment they refuse. Forced feeding contrary to an informed and voluntary refusal is unjustifiable. Artificial feeding with the hunger striker's explicit or implied consent is ethically acceptable (Declaration of Malta, principle no.2).

Physicians attending hunger strikers can experience a conflict between their loyalty to the employing authority (such as prison management) and their loyalty to patients. Physicians with dual loyalties are bound by the same ethical principles as other physicians, that is to say that their primary obligation is to the individual patient (Declaration of Malta, principle no. 4).

In this respect, it was stressed out that health care professionals employed as civil servants of the prison authority [as it is the case in Romania – *A/N, R.F.G.*] and subject to civil service rules also may encounter demands for dual loyalty and limitations of medical independence and confidentiality. This is particularly the case whenever nonmedical superiors in the administrative prison hierarchy abuse their responsibility of supervision by interfering in medical issues.[6]

On the contrary, private health care professionals, subject to no other command than their professional code, are less likely to defer to prison authorities who pressure them to compromise exclusive loyalty to their patients. Full-time prison health care professionals are more likely to succumb to institutional cultures that subordinate patient interest to agendas of the prison than are part-time professionals who also work outside of prison walls and maintain continuous contact with health care in the community. Dual loyalty is least likely to arise where health care services are organized independently of the prison authorities. Prison authorities then take responsibility only for medical tasks deemed necessary for safety and security or for forensic purposes.[7]

Of particular importance are the guidelines for the management of hunger strikers set out by the Declaration of Malta (no. 10, 12, 13):

If no discussion with the individual is possible and no advance instructions exist, physicians have to act in what they judge to be the person's best interests. This means considering the hunger strikers' previously expressed wishes, their personal and cultural values as well as their physical health. In the absence of any evidence of hunger strikers' former wishes, physicians should decide whether or not to provide feeding, without interference from third parties.

Artificial feeding can be ethically appropriate if competent hunger strikers agree to it. It can also be acceptable if incompetent individuals have left no unpressured advance instructions refusing it.

Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.

As we can see, the WMA considers force-feeding ethically unacceptable. There is a confict of values between the duty of care to safeguard life and the right to physical integrity. Physicians should, however, prevent any act that could amount to torture or inhuman and degrading treatment. If a decision is nevertheless taken to force-feed a prisoner on hunger strike, such a decision should be based upon medical necessity and should be carried out under suitable conditions that refect the medical nature of the measure. The decision-making process should follow an established procedure, which contains sufficient safeguards, including independent medical decision-making. The methods used to execute force-feeding should not be unnecessarily painful and should be applied with skill and minimum force. Force-feeding should

[5] *WMA Declaration of Malta on Hunger Strikers*, adopted by the 43rd World Medical Assembly, St. Julians, Malta, November 1991 and editorially revised by the 44th World Medical Assembly, Marbella, Spain, September 1992 and revised by the 57th WMA General Assembly, Pilanesberg, South Africa, October 2006, accessed March 25, 2016, http://www.wma.net/en/30publications/10policies/h31/index.html.

[6] Pont, Stöver, and Wolff, *Dual Loyalty in Prison Health Care*.

[7] Pont, Stöver, and Wolff, *Dual Loyalty in Prison Health Care*.

infringe the physical integrity of the hunger striker as little as possible.[8]

But, as it was stressed out, the Malta Declaration does not resolve the dilemma. It provides only that the ultimate decision on whether to intervene or not should be left to the medical doctor.[9]

Once the prisoner's judgement is no longer rational or unimpaired, then he or she is no longer in a position to withhold consent, thus entering a condition wherein a concept of presumed consent can be held to operate. At least, such an approach is more easily reconciled with respect for the inherent dignity of the human person than is forcibly feeding a conscious and rational prisoner against his or her will.[10]

Rodley's above mentioned approach may be true if there is no prior consent of the prisoner, but the dilemma (whether medical practitioners should intervene) is at its most extreme where a hunger-striking prisoner loses consciousness and with it the ability to make a rational decision about whether to continue the hunger strike, but has left instructions that, even if this were to happen, he is not to be force-fed. There is an obvious tension in all these instances between the recognition of prisoner's right to choose, which is closely related to their right to physical integrity and human dignity, and the positive obligation on the state under Article 2 of the ECHR to protect human life.[11]

The respect for individuals' autonomy should be present in the case of hunger strikers. In this respect, it is mandatory that both the prison administration and the medical staff can communicate with the prisoner in order to know the reasons and the problems that need to be addressed in order to cease the hunger strike.

In any case, the force-feeding of a prisoner is not an ethical medical standard. To this end, the medical ethics only allow for artificial feeding in certain cases, with the compliance of certain conditions, but in the same time observing that the patient's autonomy is not infringed.

Finally, it should be stressed out that these minimum medical rules of ethics and guidelines are of the most importance, as the ECtHR examines and considers hunger strike from medical perspective, so the analyse of the cases is made in principle on the basis of the therapeutic necessity to artificially feed a prisoner.

2.2. European Convention of Human Rights and the case-law set out by the European Court of Human Rights

a.) Nobody should die in detention and Member States should ensure that every detainee is afforded the basic human dignity of dying outside of prison. Member States should ensure that all persons in detention receive the same level of medical care obtainable by other members of society.[12]

The shaping up of this future golden rule (*nobody should die in detention*) regarding the execution of prison penalties can be analysed in relation with the hunger strikes and the need to suspend the execution of the prison penalty on medical grounds.

Moreover, the equality of the quality of medical services recieved by prisoners (as other members of society) means, *inter alia*, that the prisoners should be subject to the same ethical and medical standards in case of hunger strike.

Although at international level the **United Nations Standard Minimum Rules for the Treatment of Prisoners**[13] are silent about the hunger strikes and force-feeding, at the European level, the **Recommendation no. R (98) 7 of the Committee of Ministers concerning the ethical and organisational aspects of health care in prison**[14] establishes a series of principles and recommendations which medical healthcare in prisons has to meet, including in relation with the hunger strike procedure (nos. 61-63 of the Recommendation):

The clinical assessment of a hunger striker should be carried out only with the express permission of the patient, unless he or she suffers from serious mental disorders which require the transfer to a psychiatric service.

Hunger strikers should be given an objective explanation of the harmful effects of their action upon their physical well-being, so that they

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[8] Lehtmets and Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being*, 44-45.

[9] D. van Zyl Smit, S. Snacken, *Principles of European prison law and policy. Penology and human rights* (Oxford: Oxford University Press, 2011), 167.

[10] Rodley and Pollard, *The treatment of prisoners under international law*, 419.

[11] van Zyl Smit and Snacken, *Principles of European prison law and policy. Penology and human rights*, 166.

[12] A. Gross, *The fate of critically ill detainees in Europe. Report* (Committee on Legal Affairs and Human Rights, 13 November 2015), 1, accessed March 25, 2016, http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjI0NCZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIyMjQ0

[13] *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, accessed March 25, 2016, http://www.penalreform.org/wp-content/uploads/1957/06/PRI-Marked-version-of-Nelson-Mandela-Rules-3rd-Cmmttee-Resolution.pdf.

[14] *Recommendation no. R (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison* (adopted by the Committee of Ministers on 8 April 1998, at the 627th meeting of the Ministers' Deputies), accessed March 25, 2016, http://www.legislationline.org/documents/action/popup/id/8069.

understand the dangers of prolonged hunger striking.

If, in the opinion of the doctor, the hunger striker's condition is becoming significantly worse, it is essential that the doctor report this fact to the appropriate authority and take action in accordance with national legislation (including professional standards).

As it can be noted, the Recommendation includes the issues of refusal of nourishment in the generic term of right to health of the detainees, whereas the focus is on the medical act.

b.) Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) enshrines one of the basic values of the democratic societies whose core purpose is to protect a person's dignity and physical integrity – prohibition, in absolute and unqualified terms, of torture or inhuman or degrading treatment or punishment[15], thus protecting, *inter alia*, the persons deprived of their liberty against the abuses of the prison administration.

Given the exposed position of the persons deprived of their liberty, member states need to give special attention upon fulfilling their obligation to taking all necessary measures in order to ensure the protection of those persons against torture or inhuman or degrading treatment or punishment. At this stage, mention should be made that a large proportion of the cases before the Commission and European Court of Human Rights (ECtHR) case-law have been introduced by prisoners, who are perhaps in a particularly vulnerable position, almost, if not all, aspects of their lives being subject to regulation by authorithy. The potential for interference and restriction in fundamental rights and freedoms is considerable.[16]

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor.[17]

c.) ECtHR case-law on article 3 of the Convention. The force feeding of the detainee within the hunger strike procedure can lead, as it can be easily noted further below, to the violation of the provisions of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.[18]

Forced feeding of prisoners staging a hunger strike. In its previous case-law, the Commission stated that in its opinion forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by art. 3 of the Convention.[19]

In the ***Herczegfalvy v. Austria*** case, the Court considered that the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. The established principles of medicine are admittedly in principle decisive in such cases (patients who are entirely incapable of deciding for themselves); as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.[20]

In other words, involuntary therapeutic treatment is unlikely to give rise to any Article 3 issue provided always that this is administered in accordance with contemporary medical standards.[21]

In this particular case it is above all the length of time during which the handcuffs and security bed were used which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. Moreover, certain of the applicant's allegations are not supported by the evidence.

[15] *Article 3 – Prohibition of torture*
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[16] K. Reid, *A practitioner's guide to the European Convention on Human Rights*, 3rd edition (London: Thomson Sweet & Maxwell, 2008), 464.

[17] A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights* (Strasbourg: Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002), 19, accessed March 25, 2016, http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-06%282003%29.pdf.

[18] ECtHR, *Kudla v. Poland*, no. 30210/96, §91, 26 October 2000. ECtHR judgement from, in the case of. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR - http://hudoc.echr.coe.int and were accesed in March 19, 2016.

[19] European Commission of Human Rights, *X. v. Germany* (dec.), no. 10565/83, 9 May 1984.

[20] ECtHR, *Herczegfalvy v. Austria*, no. 10533/83, §82, 24 September 1992.

[21] J. Murdoch, *The treatment of prisoners. European standards* (Strasbourg: Council of Europe Publishing, 2006, reprinted 2008), 295.

Hence, no violation of Article 3 (art. 3) has been shown.[22]

In the ***Nevmerzhitsky v. Ukraine*** case[23], the applicant complained that he had been held in detention and in particular in the isolation cell despite the fact that he had been suffering from a number of chronic diseases. The applicant also maintained that he had been deprived of adequate medical treatment while remanded in custody. The applicant alleged that he had been force-fed while on hunger strike, without any medical necessity being established by the domestic authorities, which had caused him substantial mental and physical suffering. In particular, he alleged that he had been handcuffed to a heating appliance in the presence of guards and a guard dog (in his further complaints he did not mention the guard dog), and had been held down by the guards while a special medical tube was used to feed him.

On the force-feeding of the applicant: The Court reiterates that a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, § 83, cited above). Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the Convention. The Court will examine these elements in turn.

At the outset, the Court notes that the applicant did not claim that he should have been left without any food or medicine regardless of the possible lethal consequences. However, he claimed that there had been no medical necessity to force-feed him, as there had been no medical examinations, relevant tests or other documents that sufficiently proved that necessity. He claimed that the decision to subject him to force-feeding had been based on the analysis of the acetone level in his urine. He further maintained that the force-feeding had been aimed at his humiliation and punishment, as its purpose had been to make him stop the hunger strike and, in the event of his refusal, to subject him to severe physical suffering.

As to the manner in which the applicant was fed, the Court assumes, in view of the submissions of the parties, that the authorities complied with the manner of force-feeding prescribed by decree. However, in themselves the restraints applied – handcuffs, a mouth-widener, a special rubber tube inserted into the food channel – in the event of resistance, with the use of force, could amount to torture within the meaning of Article 3 of the Convention, if there is no medical necessity.

In the instant case, the Court finds that the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture. In the light of the above, the Court considers that there has been a violation of Article 3 of the Convention.

Medical assistance and treatment provided for the applicant: The applicant suspended his hunger strike on 14 July 1998, resuming in October 1998. However, from the records submitted by the Government it is clear that the applicant was not examined or attended by a doctor from 5 August 1998 to 10 January 2000. In the Court's view, this cannot be deemed to be adequate and reasonable medical attention, given the hunger strike and the diseases from which the applicant was suffering. Furthermore, the Government have provided no written records as to the force-feeding throughout the hunger strike, the kind of nutrition used or the medical assistance provided to him in this respect.

In these circumstances, the Court considers that there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained, amounting to degrading treatment.

In ***Ciorap v. Moldova***[24], Strasbourg Court held that there is a violation of article 3 of the ECHR, as repeated force-feeding of the applicant performed in a manner which unnecessarily exposed him to great physical pain and humiliation, was considered torture. As it can be observed from the judgement, the Court held a violation of article 3 not only because of the force-feeding, but also because of an intervention of several factors, especially the unnecessary use of force, namely handcuffing and the fact that the forced-feeding was not supported by valid medical reasons.

[22] ECtHR, *Herczegfalvy v. Austria*, §83-84.

[23] ECtHR, *Nevmerzhitsky v. Ukraine*, no. 54825/00, §78, 93-99 and §102-106, 5 April 2005.

[24] ECtHR, *Ciorap v. Moldova*, no. 12066/02, §84-85 and §88-89, 19 June 2007. The Court was struck by the manner of the force-feeding, including the unchallenged facts of his mandatory handcuffing regardless of any resistance, the causing of severe pain in order to force him to open his mouth and the pulling of his tongue outside of his mouth with metal tongs.

In ***Pandjikidzé and Others v. Georgia***[25], relying on article 3 (prohibition of inhuman or degrading treatment) of the Convention, the first applicant complained in particular about the lack of reaction on the part of the competent authorities to his 115-day hunger strike (to show disagreement with the criminal proceedings against him), while he was held in pre-trial detention.

The Court observed that he had never been force-fed and had not complained to the Court that the authorities should have taken such action. Even though his state of health must have declined, it did not appear from the case file that his life had been exposed to an obvious danger as a result of the authorities' attitude, and therefore that force-feeding would have been justified by any "medical imperative", or that he had been deprived of medical treatment appropriate to his state of health, or that he had been medically unfit to remain in prison. The Court therefore declared the complaint **inadmissible** (manifestly ill-founded) pursuant to article 35 (admissibility criteria) of the Convention.

In ***Özgül v. Turkey***[26], the applicant went on hunger strike while he was in prison. A few months later he was admitted to a hospital ward reserved for prisoners, but he refused treatment. The Institute of Forensic Medicine examined him and diagnosed him with Wernicke-Korsakoff syndrome[27], recommending that his sentence be suspended for six months. His request for release having subsequently been denied. One month after he had been sentenced to life imprisonment, when his health deteriorated, the doctors decided to impose treatment on him. The applicant complained in particular about the authorities' medical intervention against his will.

As to the medical intervention complained of by the applicant, the Court observed that article 3 (prohibition of inhuman or degrading treatment) of the Convention imposed an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remained under the protection of article 3, whose requirements permitted of no derogation. In the present case, the Court noted that the applicant had been under permanent medical supervision in a hospital since late December 2001. Until 15 March 2002 the doctors had not imposed treatment, but on that date they noted a deterioration of his state of health and found medical intervention and force-feeding to be necessary. Thus, for as long as the applicant's medical condition had been satisfactory the doctors had respected his wishes and they had only intervened when a medical necessity had been established. They had then acted in the applicant's interest, with the aim of preventing irreversible damage. Moreover, it had not been established that the aim of the medical intervention was to humiliate or punish him. It could be seen from the file that there had never been any question of using means of restraint. The Court thus found the complaint **inadmissible** (manifestly ill-founded) under article 35 (admissibility criteria) of the Convention.

Re-imprisonment of convicted persons suffering from the Wernicke-Korsakoff syndrome. The Court has established that article 3 may go as far as requiring the conditional liberation of a prisoner who is seriously ill or disabled, notably where the detainee either can no longer receive adequate treatment while in detention, or his or her condition is so poor that it would be inhuman and degrading to keep him or her in detention. Exemplary cases in which a detainee's condition was no longer deemed compatible with detention, necessitating either temporary or permanent release, include *inter alia*, the conditional liberation due to the continued detention of a detainee suffering complications of a hunger strike.[28]

For example, in ***Tekin Yıldız v. Turkey***[29], the applicant was diagnosed with Wernicke-Korsakoff Syndrome in July 2001. His sentence was suspended for six months on the ground that he was medically unfit, and the measure was extended on the strength of a medical report which found that his symptoms had persisted. A warrant was issued for his arrest in October 2003 after he was suspected of having resumed his activities with the terrorist organisation. On 21 November 2003 he was arrested and sent back to prison. Despite an early ruling that he had no case to answer, he remained in prison for eight months and it was not until 27 July 2004 that he was finally released.

The Court held that there had been a **violation of article 3** (prohibition of inhuman or degrading treatment) of the Convention on account of the applicant's re-imprisonment from 21 November 2003 to 27 July 2004. It observed in particular that the fact that an applicant had inflicted harm upon himself by going on a prolonged hunger strike did not release a State from any of its obligations towards such persons under article 3. Considering, in the instant case, that the applicant's state of health had been consistently found to be incompatible with detention and that there was no evidence to cast doubt on those findings, it found that the domestic

[25] ECtHR, *Pandjikidzé and Others v. Georgia* (dec.), no. 30323/02, 20 June 2009. See European Court of Human Rights. Press Unit. *Factsheet – Hunger strikes in detention* (2015), 2, accessed March 25, 2016, http://www.echr.coe.int/Documents/FS_Hunger_strikes_detention_ENG.pdf.

[26] ECtHR, *Özgül v. Turkey* (dec.), no. 7715/02, 6 March 2007. See *Factsheet – Hunger strikes in detention,* 2.

[27] Encephalopathy consisting in the loss of certain cerebral functions, resulting from a deficiency of vitamin B1 (thiamine).

[28] Gross, *The fate of critically ill detainees in Europe*, 10.

[29] ECtHR, *Tekin Yıldız v. Turkey,* no. 22913/04, 10 November 2005. See *Factsheet – Hunger strikes in detention,* 6.

authorities who had decided to return the applicant to prison and detain him for approximately eight months, despite the lack of change in his condition, could not be considered to have acted in accordance with the requirements of Article 3. The Court further held that **there would be a violation of article 3** of the Convention if the applicant was re-imprisoned without there being a marked improvement in his medical fitness to withstand such a measure.

In ***Sinan Eren v. Turkey***[30], the applicant was diagnosed as suffering from Wernicke-Korsakoff syndrome in October 2002 and his sentence was suspended as a result. In January 2004 a medical report concluded that the suspension of his prison sentence was no longer justified on medical grounds and a warrant was issued for his arrest. The applicant absconded. Alleging that the stay of execution of his sentence had been lifted based on a medical report of no scientific value and which clearly contradicted the previous medical reports, the applicant submitted in particular that he was suffering from Wernicke-Korsakoff Syndrome and that his possible return to prison would constitute a violation of article 3 (prohibition of inhuman or degrading treatment) of the Convention.

The Court held that there had been **no violation of article 3** (prohibition of inhuman or degrading treatment) of the Convention. It observed in particular that, having examined him on 11 September 2004, the panel of experts appointed by the Court had unanimously concluded that the applicant was not suffering from any neurological or neuropsychological disorders that made him unfit to live in prison conditions. The Court could only share its own experts' opinion and it therefore considered that the applicant's return to prison would not in itself constitute a violation of article 3 of the Convention.

d.) ECtHR case-law on article 2 of the Convention. Exceptionally, the issue of refusal of nutrition and force feeding can pose a problem also in the light of article 2 of the Convention. When a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's obligation under art. 2 of the Convention – a conflict which is not solved by the Convention itself.[31]

In ***Horoz v. Turkey***[32], the applicant's son died in 2001 while in prison after going on hunger strike to protest against the introduction of "F-type" prisons, designed to provide living spaces for two to three persons instead of dormitories. Before the Court, the applicant complained in particular that the judicial authorities' refusal to release her son, contrary to the opinion of the Institute of Forensic Medicine, had led to his death.

The ECtHR held that there had been no violation of article 2 (right to life) of the ECHR with regard to the death of the applicant's son, since it had been impossible to establish a causal link between the refusal to release him and his death. It observed that the death in this case had clearly been the result of the hunger strike. The applicant had not complained either about her son's conditions of detention or of an absence of appropriate treatment. The Court found that the authorities had amply satisfied their obligation to protect the applicant's son's physical integrity, specifically through the administration of appropriate medical treatment, and that they could not be criticised for having accepted his clear refusal to allow any intervention, even though his state of health had been life-threatening.

Also, when analysing the findings of the ECtHR in the *Nevmerzhitsky v. Ukraine* case, one can observe that the judgment does not settle the significant question of when, if at all, a medical doctor may recommend that a prisoner be fed without his consent. However, it can be argued, in the light of the Court's full and uncritical referral to the declarations of the WMA, that is now recognized at a European level that established principles of medicine require a doctor not to intervene in the case of a prisoner who wishes to continue with a hunger strike and who is capable of making an informed decision in that regard. At the very least, a state that follows a doctor's advice to respect such a decision should not find itself subject to a complaint on the ground of having failed in its duties under article 2 to protect life. The provision in respect of the prisoner who whishes not to be treated even after he has lapsed into unconsciousness as a result of a hunger strike, is less clear, but the same argument may succeed here.[33]

e.) From the **procedural point**, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic

[30] ECtHR, *Sinan Eren v. Turkey*, no. 8062/04, 10 November 2005. See *Factsheet – Hunger strikes in detention,* 6-7.
[31] European Commission of Human Rights, *X. v. Germany* (dec.).
[32] ECtHR, *Horoz v. Turkey*, no. 1639/03, 31 May 2009. See *Factsheet – Hunger strikes in detention,* 1.
[33] van Zyl Smit and Snacken, *Principles of European prison law and policy. Penology and human rights,* 170-171.

evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identity the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent. Thus, the investigation lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation. The independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.[34]

For example, in ***Leyla Alp and Others v. Turkey***[35], the Court held that there had been a **procedural violation of Article 2** (right to life) of the Convention in respect of one of the applicants, and a **procedural violation of Article 3** (prohibition of inhuman or degrading treatment) of the Convention in respect of five other applicants, finding that the investigation and proceedings conducted by the national authorities had failed to satisfy the requirements of promptness and reasonable expedition implicit in the context of the positive obligations at issue.

2.3. The standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

According to article 1 from the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.

When analyzing the activity of the CPT, Leidekker argues that perhaps the most striking development since 2001 is the altered attitude of the CPT as regards examining medical interventions; until fairly recently, the CPT preferred not to assess the content of a medical intervention carried out on a person deprived of his/her liberty.[36]

For some reason this approach changed: in the last few years, the CPT assessed a medical intervention, as it considered the situation of a prisoner who had been repeatedly forcibly fed by the Spanish authorities[37] in the course of his hunger strikes.[38]

Still, so far, the CPT has taken a cautious approach vis-à-vis medical interventions, which is rather similar to the manner in which the European Court of Human Rights tends to address such matters. The Court's approach is based on the concept of 'therapeutic necessity'.[39]

As a general principle, the CPT does not believe that it is the Committee's role to pronounce on the question whether it is right to force-feed a detained person on hunger strike.[40]

However, the CPT emphasized certain standards which should be met in the event that a decision is taken to force-feed a prisoner.

The minimum standards set out by the CPT are provided in the *Report to the Spanish Government on the visit to Spain (2007)*[41]:

If a decision is taken to force-feed a prisoner on hunger strike, in the CPT's view, such a decision should be based upon medical necessity and should be carried out under suitable conditions that reflect the medical nature of the measure. Further, the decision-making process should follow an established procedure, which contains sufficient safeguards, including independent medical decision-making. Also, legal recourse should be available and all aspects of the implementation of the decision should be adequately monitored.

The methods used to execute force-feeding should not be unnecessarily painful and should be applied with skill and minimum force. More generally, force-feeding should infringe the physical integrity of the hunger striker as little as possible. Any resort to physical constraint should be strictly limited to that which is necessary to ensure the execution of the force-feeding. Such constraint should be handled as a medical matter.

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[34] ECtHR, *Mikhenyev v. Russia*, no. 77617/01, §107-108 and 110, 26 January 2006.

[35] ECtHR, *Leyla Alp and Others v. Turkey*, no. 29675/02, 10 December 2013. See *Factsheet – Hunger strikes in detention*, 5.

[36] *CPT, Report to the Turkish Government on the visits to Turkey*, carried out by the CPT from 10 to 16 December 2000 and 10 to 15 January 2001 and from 18 to 21 April and 21 to 24 May 2001, CPT Doc. CPT/Inf (2001) 31, §33. "*(…) the issue of the artificial feeding of a hunger striker against his/her wishes is a delicate matter about which different views are held. (…) The CPT understands that the World Medical Association is currently reviewing its policy on this subject. To date, the CPT has refrained from adopting a stance on this matter. However, it does believe firmly that the management of hunger strikers should be based on a doctor/patient relationship. Consequently, the Committee has considerable reservations as regards attempts to impinge upon that relationship by imposing on doctors managing hunger strikers a particular method of treatment".* See, M. Leidekker, *Evolution of the CPT's Standards Since 2001,* Essex Human Rights Review, Volume 6 (2009), 103, accessed March 25, 2016, http://projects.essex.ac.uk/ehrr/V6N1/Leidekker.pdf.

[37] *CPT, Report to the Spanish Government on the visit to Spain*, carried out by the CPT from 14 to 15 January 2007 (Strasbourg, 2009), accessed March 25, 2016, http://www.cpt.coe.int/documents/esp/2009-10-inf-eng.htm.

[38] Leidekker, *Evolution of the CPT's Standards Since 2001*, 103-104.

[39] Leidekker, *Evolution of the CPT's Standards Since 2001*, 104.

[40] News Flash - Council of Europe anti-torture Committee publishes report on Spain, accessed March 25, 2016, http://www.cpt.coe.int/documents/esp/2009-02-03-eng.htm.

[41] *CPT, Report to the Spanish Government on the visit to Spain*, no. 14.

Force-feeding a prisoner without meeting the standards set out above could very well amount to inhuman or degrading treatment.

According to the CPT standards, regarding the patient's consent, in the event of a hunger strike, public authorities or professional organisations in some countries will require the doctor to intervene to prevent death as soon as the patient's consciousness becomes seriously impaired. In other countries, the rule is to leave clinical decisions to the doctor in charge, after he has sought advice and weighed up all the relevant facts.[42]

For the CPT, when examining a medical intervention, article 3 of the ECHR remains the reference point; in other words, it is not under the CPT's mandate to decide on primacy among conflicting fundamental rights, such as the right to life versus the right to physical integrity, which is at the core of the ongoing discussion about forced feeding of hunger strikers.[43]

Concluding, it was stressed out that the landscape in which the CPT operates is altering rapidly. It took years of intensive lobbying before the CPT could be established; now, international monitoring of detention conditions appears to be fully accepted.[44]

2.4. The U.S. case

If at European level there is, as noted above, a minimum of standards and regulations in place concerning hunger strikers and force feeding of detainees, within the North-American legislation the prison administration has rather permissive margin of action, whereas the case-law under certain conditions validates the intentional deprivation or reduction of food rationing for detainees.

Against this background, a prisoner's allegations in his conditions-of-confinement claim that he was deprived of food, drink, and sleep for four days were insufficient to state a claim for physical injury.[45]

The prison's feeding rule required a prisoner to stand in the middle of his cell, with the lights on, when the meal was delivered and that he wear trousers or gym shorts. If the prisoner did not comply with the rule, the meal was not served. The prisoner wanted to eat in his underwear, so on a number of occasions over a two-and-a-half-year period, he refused to put on the pants or shorts and, as a result, was not served. Because he skipped so many meals, he lost 45 pounds. The prison also refused to serve the prisoner when he had a sock on his head because this could be used to hide a weapon. The prisoner's cell walls were smeared with blood and feces that he refused to clean. Under these circumstances, the prisoner's food deprivation was self-inflicted. The prisoner failed to show how many of his missed meals were missed for reasons that could not be related to his refusal to comply with a reasonable condition on the receipt of food. The prisoner experienced no real suffering, extreme discomfort or any lasting detrimental health consequences.[46]

On the other hand, denying food for a 50-hour period was held to go beyond what was necessary to achieve a legitimate correctional aim.[47]

Also, a trial court's order that prison officials place a defendant in solitary confinement and feed him only bread and water on the anniversary of his offense was impermissible.[48]

Special issues have been reported concerning **the situation of detainees at Guantánamo Bay**, as excessive use of force and force feeding of prisoners have been established to be documented and usual practices whereas such practices at the level of the Council of Europe, as noted above, have been considered inhuman and degrading treatment or even torture[49].

In this sense, there are recurrent reports of contexts in which excessive force was routinely used, including the context regarding the force-feeding during hunger strikes. According to reports by the defence counsels, some of the methods used to force-feed definitely amounted to torture[50].

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[42] *CPT standards*, "Substantive" sections of the CPT's General Reports (CPT/Inf/E(2002)1-Rev.2015), no. 46, accessed March 25, 2016, http://www.cpt.coe.int/en/docsstandards.htm.

[43] Leidekker, *Evolution of the CPT's Standards Since 2001*, 103-104.

[44] Leidekker, *Evolution of the CPT's Standards Since 2001*, 105.

[45] Mitchell v. Horn, 318 F.3d 523 (3d Cir. 2003) in J. W. Palmer, *Constitutional Rights of Prisoners*, 9th Edition (New Providence, New Jersey: Lexis Nexis Anderson, 2010), 429.

[46] Freeman v. Berge, 441 F.3d 543 (7th Cir. 2006) in Palmer, *Constitutional Rights of Prisoners*, 285-286.

[47] Dearman v. Woods, 429 F.2d 1288 (10th Cir. 1970) in Palmer, *Constitutional Rights of Prisoners*, 107.

[48] People v. Joseph, 434 N.E.2d 453 (I11. Ct. App. 1982) in Palmer, *Constitutional Rights of Prisoners*, 107.

[49] See, for example, ECtHR, *Nevmerzhitsky v. Ukraine*; ECtHR, *Ciorap v. Moldova*.

[50] *"They are being force-fed through the nose. 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."* Accounts given by Attorney Julia Tarver (28 October 2005) *in Situation of detainees at Guantánamo Bay*. Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul

[*Concluding the Special Rapporteur considered that*] such treatment amounts to torture, as it inflicts severe pain or suffering on the victims for the purpose of intimidation and/or punishment.[51]

In the *Situation of detainees at Guantánamo Bay* Report[52] the authors underlined that, as we showed above, both the *Declarations of Tokyo and Malta* prohibit doctors from participating in force-feeding a detainee, provided the detainee is capable of understanding the consequences of refusing food. This position is informed by the fundamental principle, which recurs throughout human rights law, of individual autonomy. (…) Further, some domestic courts have decided, based on an individual's right to refuse medical treatment, that a State may not force-feed a prisoner[53]. While some other domestic courts have taken a different position, it is not clear that they have all given due consideration to the relevant international standards[54].

At national level, according to the United States Government, Department of Defense policy allows health professionals to force-feed a detainee in Guantánamo Bay when the hunger strike threatens his life or health.[55]

From the perspective of the right to health, informed consent to medical treatment is essential[56], as is its "logical corollary" the right to refuse treatment[57]. A competent detainee, no less than any other individual, has the right to refuse treatment[58]. 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.[59]

Concluding, it was stressed out that the Government of the United States should ensure that the authorities in Guantánamo Bay do not force-feed any detainee who is capable of forming a rational judgement and is aware of the consequences of refusing food. The United States Government should invite independent health professionals to monitor hunger strikers, in a manner consistent with international ethical standards, throughout the hunger strike.[60]

2.5. National legislation regarding the hunger strike

The majority of national legislations in Europe, as well as relevant international medical ethical codes, today consider that a competent adult may choose to refuse medical treatment even if it could save his life. Consequently, the authorities involved in the management of a hunger strike by a prisoner may often be faced with two potentially conficting values: their duty of care to safeguard a life and the prisoner's right to physical integrity (including the right not to have a treatment imposed on him).[61]

a.) Having regard to the difficulties posed by a detainee's refusal to feed himself/herself, the legal regulations created a detailed procedure for hunger strikers which establishes some clear tasks for the prison staff, but also with the intervention of the judge in charge of the supervision of deprivation of liberty in order to guarantee the respect of the hunger striker's rights.

The hunger strike procedure is detailed in art. 54 from the Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings[62] and art. 119-122 from the Government Decision no. 157/2016 for the approval of the Regulation of application of the Law No. 254/2013[63]. Against this

Hunt (United Nations, Economic and Social Council, Commission on Human Rights, Sixty-second session, E/CN.4/2006/120, 27 February 2006), 36, accessed March 25, 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement.

[51] *Situation of detainees at Guantánamo Bay,* 17-18.

[52] *Situation of detainees at Guantánamo Bay*, no. 80, 23.

[53] See, e.g., *Secretary of State for the Home Department v. Robb* [1995] Fam 127 (United Kingdom); *Thor v. Superior Court*, 21 California Reporter 2d 357, Supreme Court of California (1993); *Singletary v. Costello*, 665 So.2d 1099, District Court of Appeal of Florida (1996) in *Situation of detainees at Guantánamo Bay,* 41.

[54] See, generally, Mara Silver, "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation", 58 Stanford Law Review 631 (2005) (collecting US jurisprudence on force-feeding of detainees) in *Situation of detainees at Guantánamo Bay,* 42.

[55] Committee on Economic, Social and Cultural Rights, general comment no. 14 (2000), E/C.12/2000/4, §8, 34 in*Situation of detainees at Guantánamo Bay,* no. 81, 23.

[56] Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), §8, 34 in *Situation of detainees at Guantánamo Bay*, 42.

[57] See *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 269-70 (1990) (recognizing the right to refuse treatment as the logical corollary to the doctrine of informed consent) in *Situation of detainees at Guantánamo Bay,* 42.

[58] See *Secretary of State for the Home Department v. Robb* [1995] Fam 127 (United Kingdom); see also Chair of the Board of Trustees of the American Medical Association (AMA), Duane M. Cady, M.D., *AMA to the Nation, AMA unconditionally condemns physician participation in torture*, (20 December 2005) accessed at http://www.ama-assn.org/ama/pub/category/15937.html (10 February 2006) (clarifying that "every patient deserves to be treated according to the same standard of care whether the patient is a civilian, a US soldier, or a detainee" and acknowledging that the AMA position on forced feeding of detainees is set forth in the Declaration of Tokyo in *Situation of detainees at Guantánamo Bay,* 42.

[59] *Situation of detainees at Guantánamo Bay*, no. 82, 24.

[60] *Situation of detainees at Guantánamo Bay,* no. 103, 26.

[61] Lehtmets and Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being*, 41.

[62] Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, published in the *Official Journal of Romania*, Part I, no. 514 of August 14, 2013.

[63] Government Decision no. 157/2016 for the approval of the Regulation of application of the Law No. 254/2013, published in the *Official Journal of Romania*, Part I, no. 271 of April 11, 2016.

background, person who refuses food is monitored by the prison administration.

According to the above mentioned provisions, in case a sentenced person intends to refuse food, he/she notifies the supervisory agent verbally or in writing and submits to such agent any possible applications concerning the grounds for food refusal.

The supervisory agent shall notify immediately the head of the detention section about the matter, who shall hear the sentenced person and shall take appropriate measures, if the matters invoked fall under its jurisdiction. In case the sentenced person remains determined to refuse food, the head of the section shall inform the director and the doctor of the penitentiary.

The prison director hears the detainee and records in the standardized form the issues indicated by the detainee, the reasons which led to that form of protest, the measures ordered, as well as the detainee's option to further refuse food or to accept it. If the detainee upholds the hunger strike, the director has to inform the judge in charge of the supervision of deprivation of liberty and send him in writing a standardized form with indication of the date and hour when he was informed, accompanied, as case may be, by the detainee's grounds for food refusal [Regulation of application of the Law No. 254/2013, art. 120 para.(1)-(2)]. From the time of notifying the judge in charge of the supervision of deprivation of liberty, *it shall be considered that the sentenced person is in a situation of food refusal*.

Starting from the moment when a person is considered to be in food refusal, the legal provisions establish in detail the role of the judge in charge of the supervision of deprivation of liberty and the tasks he has to fulfill.

If the aspects noted by the detainee refer to aspects pertaining to the jurisdiction of the judge in charge of the supervision of deprivation of liberty (establishing or change of the regime in which custodial sentences are enforced, exercise of the detainees' rights or complaint against the decision of the discipline commission), the judge in charge of the supervision of deprivation of liberty is obliged to hear the detainee and will decide on the aspects raised by the detainee[64].

Having regard to the radicality of this form of protest, as well as the possible negative effects on the state of health or even life of the detainee, we think that the hearing of the detainee on hunger strike has to be performed by the judge in charge of the supervision of deprivation of liberty immediately.

According with the legal provisions, if the announcement occured during the working hours of the Office of judge in charge of the supervision of deprivation of liberty, the convicted person is heard on the same day. If the announcement occured after the working hours the hearing will pe performed the next day [Supreme Council of Magistracy Decision no. 89/2014 for the approval of the Regulation for organizing the activity of the judge in charge of the supervision of deprivation of liberty, art. 37 para.(2)[65]].

If the problems raised by the convicted person refer to other issues (not for the judge's competence), the judge in charge of the supervision of deprivation of liberty can hear the convicted person.

In such a situation the judge in charge of the supervision of deprivation of liberty can present to the prison director proposals concerning the measures which he consideres to be necessary [Regulation for organizing the activity of the judge in charge of the supervision of deprivation of liberty, art. 37 para.(2)].

Furthermore, if the detainee declares that he renounces the food refusal, the judge informs the prison director and notes this in the dedicated form. If the detainee declares that he does not renounce the food refusal, as well as in case the detainee was not heard, the dedicated form, containing the proposals of the judge in charge of the supervision of deprivation of liberty, is presented to the prison director [Regulation of application of the Law No. 254/2013, art. 120 para. (4)-(5)].

If the person refuses to make any declarations this has to be recorded in a protocol. For identity of judgment this last solution is also applicable where the convicted person says he is illiterate, when the matters stated have to be recorded in a protocol.

Following the hearing, if the person upholds its decision to refuse food, the judge can present to the prison director proposals in the dedicated form.

In must be observed the law-maker's approach consisting in the regulation of the administrative participation of the judge in charge of the supervision of deprivation of liberty in the hunger strike procedure as an individual task. The alternative solution – limitation of the judge's intervention strictly to giving court minutes in case the hunger striker complained about the exercise of his legal rights – we think would have very much restricted the judge's role. However, it is obvious that the judge's intervention within the food refusal

[64] It must be stressed out that, in the case-law developed under the previous legal framework, one can observe that in some cases there was an abuse of the regulation on food refusal, as the inmates adopted this form of protest only to gain access sooner to the judge, without respecting the audience program. See, *Report of the Judicial Inspection within the Supreme Council of Magistracy on the respect of legal provisions by the delegated judges, in accorance with the provisions of Law no. 275/2006 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings,* no. 1806/IJ/1179/DIJ/2013, 25, accessed March 25, 2016, www.csm1909.ro/csm/linkuri/20_09_2013__60704_ro.doc.

[65] Supreme Council of Magistracy Decision no. 89/2014 for the approval of the Regulation for organizing the activity of the judge in charge of the supervision of deprivation of liberty, published in the *Official Journal of Romania*, Part I, no. 77 of January 31, 2014.

procedure should not be limited to solving the complaints concerning the exercise of the rights of the hunger striker.

According with the applicable legal provisions, the intervention of the judge in charge of the supervision of deprivation of liberty within the food refusal procedure is aimed not only to giving a decision concerning the exercise of rights, but also the hearing and deciding in relation with the issues raised by the convicted person which refer to the establishment or change of the regime for the enforcement of custodial penalties or, as case may be, the complaint against the decision of the discipline commission. The judge can also hear the convicted person in case he has other requests which are not subject to his jurisdiction, acting as an element of mediation, balance and equidistance between the convicted person as a hunger striker and the prison administration. Against this background one should note the very important role which the judge in charge of the supervision of deprivation of liberty has to play, who has to identify and analyze the causes which made the convicted person go on hunger strike.

The prison administration shall be under the obligation to temporarily transfer the person that refuses food in a medical institution within the medical network of the Ministry of Health and to notify the family of the sentenced person or someone close to the sentenced person, in case the health or bodily integrity of the sentenced person is seriously affected by refusal to eat.

Renouncing food refusal can be made through written or verbal statement before the prison staff, announcing the judge in charge of the supervision of deprivation of liberty (by letter accompanied by the statement concerning the renounciation to food refusal) or before the judge in charge of the supervision of deprivation of liberty [Regulation of application of the Law No. 254/2013, art. 122 para.(1)].

A special problem arises when several convicted person **as a group or the totality of the inmates** refuse food. In this case a discussion has to take place with each convicted person and the action will become the more stringent issue to be solved so that the prison administration will channel all its efforts towards mitigation of the event which can easily degenerate in general revolt or serious disturbance of order. In such cases the prison administration has to immediately make use of energy and means of positive influence, satisfaction of legitimate requests of the prison population. The prison administration also has to prepare the intervention forces so as to be able to defend the institution in case of danger.[66]

In any case food refusal, despite the fact that it is not a structural issue regarding the prison regime, has to be carefully looked at and assessed for each case individually, given that it is possible that the convicted person's requests are legitimate. Exposion to such physical suffering, even if not for a long time, or even when the detainee could not resist physically and morally several days, has to trigger at the level of the prison administration a special investigation as to establish if the detainee's version is not the right one. It is a ground for honour and deontology to be able to repair, even after a longer time, a situation which seems to have no solution.[67]

b.) In what concerns the food refusal, the prison's obligation arises as soon as the convicted person declares that he refuses to eat. Starting here the prison staff have to immediately fulfill all tasks as provided in the applicable regulations. The obligation of the prison administration is to undergo the intermediate stages up to the hearing of the convicted person by the judge in charge of the supervision of deprivation of liberty within the shortest time possible. If the prison staff do not fulfill the legal tasks, the judge in charge of the supervision of deprivation of liberty can intervene only to the extent in which non-fulfillment of these tasks interpheres with the exercise of one of the detainee's rights.

In other words, despite the fact that the judge's role within the food refusal procedure is limited acording with art. 54 para.(7)-(11) from the Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, only to the hearing and deciding on the issues raised by the hunger striker (if the issues raised by the convicted person refer to matters of his jurisdiction), the judge can intervene within this procedure, upon the detainee's request, if one right of the detainee is affected by the behaviour of the prison staff.

In such a situation the delegated judge [now - *judge in charge of the supervision of deprivation of liberty*] held[68] the violation of the right ot medical healthcare, treatment and care, despite the fact that the detainee M.C. submitted a written request concerning food refusal to the head of the departement, which the latter, however, did not register, did not transfer the detainee to a room without food and did not order a medical consultation to be performed. Consequently, the judge held that the violation of the legal procedure affected the right to medical consultation, taking into

[66] I. Chiș, *Drept execuțional penal [Execution of Criminal Penalties Law]* (Bucharest: Wolters Kluver, 2009), 359. As it was noted, such cases in which the detainees are refusing meals in a group can cause violations of the ECHR standards. See, for example, ECtHR, *Leyla Alp and Others v. Turkey.*

[67] Chiș, *Drept execuțional penal [Execution of Criminal Penalties Law]*, 360-361.

[68] The delegated judge, Codlea Prison, judgement no. 63/2012, unpublished.

consideration also the fact that the prison staff exercised their tasks concerning food refusal only 4 days after the food refusal was announced, that is when the detainee complained before the judge.

Looking at the actions performed by the prison staff, it cannot be checked if the detainee refused food or did consume food, as he had not been transfered to a room without food and he had not been consulted by a physician; the prison administration's arguments concerning the fact that the intention to refuse food was not carried out during the day cannot be accepted because, if the detainee had accepted food, this would have been registered in a special register, including the detainee's signature, which was not the case.

3. Conclusions

The management of hunger strikers in prison is a controversial issue. Both Recommendation No. R (1998) 7 on the ethical and organisational aspects of health care in prison and the WMA Declaration on Hunger Strikers leave to the physician the discretion to act in a situation where a hunger strike becomes life-threatening for the prisoner.[69]

Professionals caring for prisoners should strictly and exclusively adhere to their role as caregivers to their inmate patients, acting in complete and undivided loyalty to them, and should firmly refuse to take over any professional obligation that is outside the interest of their prisoner patients. Professionally, they should be supervised by an authority other than the prison authorities, for example, the public health service or their professional association. In addition, inspections should be performed by an agency or organization that is independent of the prison authority or ministry of justice.[70]

Of course, when analysing the ECtHR case-law, one can observe that forcible feeding can in some circumstances violate the prohibition of torture and other ill-treatment under international law, where it is administered so as to cause unnecessary suffering or where not medically necessary. Medical ethics require doctors to respect the will of the hunger striker as long as the latter's judgement is rational and unimpaired.[71]

The medicalization of dealing with hunger strikes, which can be easily observed in the international standards (WMA) or the ECtHR case-law means that the action, when dealing with prisoners on hunger-strike, should be adressed by medical professionals, observing the ethics and methodology of their profession.

So, it must be stressed out that the decisions regarding force-feeding a prisoner on hunger strike must be of a medical nature, as asessed by the professionals (medical staff), without the involvement of the prison administration (as is the case in the U.S. law).

There is no need to involve the prison administration, as force-feeding a person does not involve an administrative decision regarding the order or discipline in the prison, but rather consists in a medical issue, which must be dealt with by the medical staff. As *van Zyl Smit and Snacken* emphasized, such a [*therapeutic*] relationship is itself a more humane way of dealing with the issue than relying on instructions given directly to prison officials.[72]

No human being should perish in detention, but trends in Europe show that more people die behind bars now than have in past years.[73] The Council of Europe must ask of its member States that laws and policies be examined in order to make changes that will allow for every human being to die with dignity, not chained to a bed while in detention.[74]

This trending principle must be taken into consideration when dealing with severe cases on hunger strikes among the prison population. For example, it would be in accordance with the ECtHR case-law to temporary release a prisoner suffering from Wernicke-Korsakoff Syndrome, disease generated by the complications from a hunger strike.

Turning to the Romanian case, it is important to stress out the evolution of the Romanian legislation since the entering into force of Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, continuing with the adoption of the Government Decision no. 157/2016 for the approval of the Regulation of application of the Law No. 254/2013, emphasising the special attention given by the Romanian legislator in drafting and adopting legislation within the framework of international and European recommendations.

On the management of the hunger strikers, it should be stressed out the clear procedure provided for in the Romanian legislation, with the involvment of the judge in charge of the supervision of

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[69] Lehtmets and Pont, *Prison health care and medical ethics. A manual for health-care workers and other prison staf with responsibility for prisoners' well-being*, 40.

[70] Pont, Stöver, and Wolff, *Dual Loyalty in Prison Health Care*.

[71] Rodley and Pollard, *The treatment of prisoners under international law*, 419.

[72] van Zyl Smit and Snacken, *Principles of European prison law and policy. Penology and human rights*, 171.

[73] The most recent report of the Council of Europe Annual Penal Statistics indicates that from 2010 to 2012, the mortality rate in prisons rose from 25 deaths per 10 000 inmates to 28 deaths per 10 000 inmates. See M.F. Aebi, N. Delgrande, *SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2013* (Strasbourg: Council of Europe, 2015), accessed March 25, 2016, http://wp.unil.ch/space/files/2015/02/SPACE-I-2013-English.pdf.

[74] Gross, *The fate of critically ill detainees in Europe*, no. 132, 26.

deprivation of liberty, an independend body with competence on supervising and controlling that the legality of custodial sentences is ensured.

There are no special provisions on force-feeding a prisoner, the Romanian legislation acknowledging the medical nature of the measure, providing that a person with complications from a hunger strike must be admitted immediately into a hospital, the medical procedures and ethics being incident in such a situation.

Concluding, when dealing to a hunger strike and the need of force-feeding the person, it is important to observe only the medical standards and ethics, without the involvement of the prison staff, as force-feeding a person is generally acknowledged as a measure of medical nature.

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