Applying International Human Rights Laws to Force-Feeding Prisoners: Effort to Create Domestic Standards in the United States

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Heidi G. Kim*

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"I will never forget the first time they passed the feeding tube up my nose. I can’t describe how painful it is to be force-fed this way. As it was thrust in, it made me feel like throwing up. I wanted to vomit, but I couldn’t. There was agony in my chest, throat and stomach. I had never experienced such pain before."

—Samir Naji al Hasan Moqbel
—Guantanamo Bay hunger-striker

I. INTRODUCTION

A prisoner is taken into a cold room where he is strapped onto a restraint chair. His hands, legs, and head are tied down with belts, and there is no way to break loose. The doctor approaches the conscious prisoner and applies lubricant into one of his nostrils. Slowly, the doctor inserts a two-foot long clear plastic tube into the lubricated nostril in attempt to get the tube down his throat and into the stomach. The prisoner cringes in pain and refuses to take the tube. He screams and tears start to drip down his face uncontrollably. After many attempts and difficulties, the tube finally passes the esophagus, and into the stomach. A liquid diet is then delivered through the tube.

The aforementioned procedure is commonly known as force-feeding, specifically nasogastric feeding, and is one of two ways force-feeding is conducted, the other being intravenous treatment. Force-feeding is routinely employed when a prisoner goes on a hunger strike; however, the force-feeding

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3. See id.
4. Id.
5. See id.
6. See generally id.
7. See id.
8. Sepkowitz, supra note 2.
9. Id.
11. Id. at 349.
procedure has been described as “barbaric.” The procedure is disturbing and stressful, and can cause physical and mental discomfort to prisoners for weeks, even months. Although prisoners have the right to refuse medical treatment, including nasogastric feeding, they are still being force-fed. The international community has labeled this practice a violation of international human rights laws, specifically the ban on torture, cruel, inhuman and degrading punishment. Despite this label, the United States continues to sanction force-feeding regardless of whether international law actually allows force-feeding. Domestic standards and procedures to implement these standards are needed to ensure the United States is complying with international human rights laws.

This Comment will discuss the issue of force-feeding in the United States, and is specifically prompted by the recent federal court order that authorized the force-feeding of California prisoners. It will examine the applicable international law and provide an overview of the domestic standards that should be implemented to ensure U.S. compliance with international law pertaining to the force-feeding of prisoners.

Part II begins with background information on major hunger strikes that have occurred around the world and the circumstances that preceded them. It describes how force-feeding was and still is one of the main mechanisms in ending hunger strikes and examines how this mechanism has created an international outcry against the United States. Part III addresses the relevant international human rights treaties to which the United States is a party, specifically the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). This section also examines how the torture or cruel, inhuman, or degrading treatment or punishment (“CIDT”) provisions in both treaties apply to force-feeding prisoners. In addition, Part III discusses a case from the European Court of Human Rights (“ECHR”) that created a test

14. Id.
17. Sepkowitz, supra note 2.
19. See Cowley, supra note 16.
20. See infra Part II.C.
21. See infra Part III.D.
22. See infra Part II.A.
23. See infra Part II.B.
24. See infra Part III.A.
25. See infra Part III.A.
II. BACKGROUND

A. History of Hunger Strikes

A hunger strike occurs when “a mentally competent person...has refused to take food and/or fluids for a significant interval.” The Code of Federal Regulations explains that a prisoner is on a hunger strike when he or she abstains from eating in excess of seventy-two hours. When a prisoner’s hunger strike advances to a certain stage, normally when a prisoner is near death, both state and federal prison officials are faced with the issue of whether to intervene.

Hunger strikes in prisons have occurred throughout history and differ from other types of protest because it is the protesters who directly suffer rather than the intended target. The protesters depend on the “moral force of their actions” to accomplish their objective. Hunger strikes can occur anywhere and for any political or social reason, but they are prevalent in prisons throughout the world because they are often perceived as the only way prisoners can protest the harsh conditions to which they are subjected to in solitary confinement.

26. See infra Part III.C.
27. See infra Part III.D.
28. See infra Part IV.
29. See infra Part IV.
30. See infra Part V.
32. 28 C.F.R. § 549.61 (2006); Id. at 350.
33. See Gordon, supra note 10, at 356 (describing the government’s interest in preserving life).
34. Id. at 350.
37. Id.
38. Nocera, supra note 18.
Beginning in the twentieth century, a women’s suffrage movement arose in the United Kingdom. The women, known as the Suffragettes, partook in protest. While in prison, the Suffragettes went on a hunger strike and government officials became extremely concerned with the women’s health. The prison officials decided to force-feed the Suffragettes, which led to a public outcry because force-feeding was traditionally used to feed mentally unstable people.

Partly influenced by the British Suffragettes, a similar hunger strike occurred among suffragists in the United States in 1917. Many women were sent to prison where they deployed hunger strikes to protest their confinement. Prison officials force-fed the suffragists hoping to end the hunger strikes.

Other major hunger strikes occurred later in the twentieth century, including the Irish Republican Army hunger strike led by Bobby Sands. While confined in a British prison, Sands and nine other prisoners went on a hunger strike because the government refused to recognize them as “special category status” prisoners. However, the authorities failed to intervene, resulting in death for all ten prisoners.

Currently, well into the twenty-first century, hunger strikes remain prevalent in prisons. In 2002, the U.S. Naval Base located at Guantanamo Bay, Cuba, opened as a detention center. Shortly after the opening, detainees began protesting their confinement through hunger strikes, which resulted in force-feeding. The Guantanamo Bay hunger strikes caused a huge public outcry due to the U.S. government’s long-term use of force-feeding these detainees. Such outcry is depicted in descriptions of the force-feeding process as “disgusting.”

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40. Id.
41. Id.
42. Id.
43. Ohm, supra note 35, at 154.
44. Id.
45. Id.
47. The British government gave prisoners “special category status,” which was a status similar to prisoner of war for carrying out “scheduled terrorist-type” crimes. Ohm, supra note 35, at 154–55 n.17.
49. Ohm, supra note 35, at 155.
50. See generally Gordon, supra note 10, at 351.
51. Id.
52. Id.
54. THE TIMES EDITORIAL BD., *A Force-feeding Disgrace at Guantánamo*, LOS ANGELES TIMES (July 14, 2013), http://articles.latimes.com/2013/jul/14/opinion/la-ed-force-feeding-guantanamo-bay-prisoners-20130714 (“Food is forced through a 2-foot-long nasal tube down the throat and into the stomach while the prisoner is
Another recent hunger strike occurred in response to the guards’ abusive
treatment toward the detainees as well as detainees being held indefinitely and
without any indication of when they would be released. Notably, force-feeding
has caused public scrutiny from international human rights groups who have
demanded that justice be served and for the government to stop the force-
feeding because forcing people to eat raises many issues and is seen as cruel
punishment.

B. The Issue of Force-Feeding

Force-feeding is used when a prison official needs to intervene in a hunger
strike because the strike becomes life threatening. Prisoners who refuse such
treatment are forcefully restrained. Force-feeding may be conducted either
through nasogastric feeding or intravenous treatment. Nasogastric feeding
involves forcing liquid nutrients down a nasal tube, which runs down the
esophagus and into the stomach. Intravenous feeding, on the other hand,
provides nutrients through a catheter that is injected into the bloodstream. In
either case, the process of force-feeding is invasive, painful, and dangerous.
There have also been claims about medically unsafe force-feeding by untrained
guards who “force[e] greased tubes down the throat into the stomach. . . [and] have
forced ‘finger-thick’ tubes into prisoner’s noses without anesthetic.” The
physiological methods of force-feeding prisoners has resulted in strong
opposition among the international community who regard such methods as a
severe physical infringement of an individual’s right to bodily integrity.

immobilized. It requires an enormous commitment of medical personnel: 140 Navy doctors, nurses and
corpsmen, including 37 reinforcements dispatched in April to accommodate the spreading hunger strike.

55. Gaist, supra note 53.
56. Dennis Sadowski, Guantanamo Bay Prison Poses Moral Dilemma For White House, NATIONAL
CATHOLIC REPORTER (June 29, 2013), http://ncronline.org/news/peace-justice/guantanamo-bay-prison-poses-
moral-dilemma-white-house.
57. Id.
59. Id.
60. Id.
61. Id.
62. Id. at 353-54.
63. Id. (discussing the medical risks of force-feeding through nasogastric feeding, such as suffocation and aspiration).
64. Gordon, supra note 10, at 354.
65. Id. at 353.
C. California Prison Hunger Strike and Looking to the Future of Force-Feeding

On July 8, 2013, over 30,000 inmates\(^{66}\) imprisoned in two-thirds of California’s penitentiaries went on a hunger strike.\(^{67}\) The prisoners were protesting the state’s use of maximum-security prisons and solitary confinement.\(^{68}\) This was California’s largest prison protest.\(^{69}\) As the prisoners’ health deteriorated, prison officials obtained a federal court order to allow them to force-feed the prisoners, despite the fact that some prisoners previously signed a “do-not-resuscitate” order.\(^{70}\) The court order permitted physicians to make the determination of whether a prisoner should be force-fed, regardless of the “do-not-resuscitate” orders.\(^{71}\) Medical experts on prison hunger strikes claim that force-feeding prisoners against their will and ignoring the “do-not-resuscitate” order are medically inappropriate.\(^{72}\) The World Medical Association (“WMA”) underscores that the prisoner’s conscious decision to refuse food and medical treatment must be considered before any intervention occurs by the physician.\(^{73}\)

The hunger strike ended two months after it started and before any force-feeding was conducted;\(^{74}\) however, there is still the looming question of whether certain force-feeding methods in the United States violate international law, specifically the ICCPR and CAT. Prisoners have the right to refuse medical treatment under international law,\(^{75}\) yet the California federal court order ignored this fundamental right and allowed prison officials to proceed with force-feeding.\(^{76}\) This historical event raises the issue of what standards are appropriate for determining whether the force-feeding order violated international law.

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\(^{68}\) St. John, supra note 66.

\(^{69}\) Id.


\(^{72}\) Id.


\(^{75}\) Gordon, supra note 10, at 368.

\(^{76}\) \textit{See supra} Part II.C.
III. THE APPLICABLE INTERNATIONAL HUMAN RIGHTS LAWS ON FORCE-FEEDING

A. The ICCPR and CAT Applied to Force-Feeding

World War II proved the necessity of international protection for individual human beings. The barbarity committed against certain racial/ethnic groups demonstrated that national governments failed to provide their citizens with the basic minimum of liberty and life. Since national governments could not provide the necessary safeguards for their citizens, it became evident that there was a need for international principles to guarantee human rights protection.

The ICCPR encompasses many crucial human rights, and the Human Rights Committee (“Committee”) enforces these rights. Article 7 of the ICCPR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The purpose of this provision is “to protect both the dignity and the physical and mental integrity of the individual.” Article 7 is also complemented with Article 10, which states, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

Article 7 is absolute, meaning there can be “no derogation from the provision.” Article 7’s prohibition of torture or, cruel, inhuman or degrading treatment or punishment applies to both physical pain and acts that lead to mental suffering. State parties should notify the Committee of their efforts to prevent and punish acts prohibited by Article 7 and which are within their jurisdiction. The Committee also emphasizes the importance of training and instructing all personnel who participate in the custody or treatment of arrested or detained individuals. State parties must also notify the Committee on these trainings and identify how Article 7 is an important part of the rules and ethical guidelines

78. Id.
79. Id.
80. Id.
82. Human Rights Comm., General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 44th Sess., HR/GEN/1/Rev.9 (Vol. I) (Mar. 10, 1992) [hereinafter Human Rights Comm., General Comment No. 20, Article 7].
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
these personnel follow. The Committee imposes additional stringent standards on safeguards for the protection of detained persons. The Committee further requires State parties to give detailed information on interrogation practices, conditions of detentions, and the treatment to which detainees are subjected. It is clear that the protection of the detainees is extremely important and the Committee strives to ensure the detainees will receive the fairest treatment.

Another source of international human rights law is the CAT. The CAT is similar to the ICCPR in that it bans torture. However, the CAT is distinguishable from the ICCPR in that it specifically defines “torture.” The CAT also differs from the ICCPR in regard to how “other cruel, inhuman, or degrading treatment or punishment” is defined and treated. Unfortunately, the provision lacks any definition of what constitutes cruel, inhuman, or degrading treatment or punishment, and it does not clearly prohibit such treatment. The CAT only states that State parties “shall undertake to prevent” such acts and continues to define cruel, inhuman, or degrading treatment or punishment as something that does “not amount to torture.” Nonetheless, force-feeding has been established as degrading treatment amounting to torture. Specifically, it amounts to torture under Article 1 of the CAT because the prisoner undergoes extreme pain and suffering.

88. Human Rights Comm., General Comment No. 20, Article 7, supra note 82.
89. Id.
90. Id.
91. See id.
93. Id. at art. 2.
94. “Torture” is defined 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, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Id. at art. 1.
95. “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Id. at art. 16 para., 1.
97. Id.
B. Medical Ethics of Health Professionals in the Context of Force-Feeding

Health professionals play a vital role in the force-feeding process.\textsuperscript{100} The World Medical Association (“WMA”) strongly condemns force-feeding and views it as unethical and unjustifiable.\textsuperscript{101} The WMA has adopted two documents that delineate the medical ethics of treating prisoners who partake in hunger strikes.\textsuperscript{102} The 1975 Declaration of Tokyo provides guidelines for physicians regarding treatment of prisoners and practices amounting to torture and other cruel, inhuman or degrading treatment or punishment.\textsuperscript{103} It states “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 voluntary refusal of nourishment, he or she shall not be fed artificially.”\textsuperscript{104} In addition to this document, the 1991 Declaration of Malta on Hunger Strikers emphasizes that “[f]orcefeeding is never ethically acceptable.”\textsuperscript{105} And although the feeding is done to prevent death, if it is done either by threat or force, or with physical restraints, the feeding constitutes inhuman and degrading treatment.\textsuperscript{106}

C. The European Court of Human Rights Judgment on Force-Feeding

\textit{Nevmerzhitsky v. Ukraine} is a case from the European Court of Human Rights (“ECHR”).\textsuperscript{107} Although the ECHR has its own convention (European Convention on Human Rights), some of the provisions are similar to the ICCPR.\textsuperscript{108} Article 3 of the Convention states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”\textsuperscript{109} This is analogous

\begin{flushright}
100. \textit{Id.} at ¶ 32.
101. \textit{World Med. Ass’n, supra note 73.}
103. \textit{Id.}
104. \textit{Id.}
105. \textit{Id.}
106. \textit{Id.}
108. \textit{See id.}
\end{flushright}
to Article 7 of the ICCPR, in that both prohibit torture, and inhuman or degrading
treatment or punishment.\textsuperscript{110}

In \textit{Nevmerzhitsky}, the applicant, a Ukrainian national, was detained in a
temporary isolation unit to await his conviction.\textsuperscript{111} Nevmerzhitsky’s detention
was extended five times and during his detention, he was treated inhumanely.\textsuperscript{112}
At times, he was placed in extremely small cells with twelve other detainees with
no access to drinking water.\textsuperscript{113} He contracted microscopic eczema and scabies due to
the bug-infested cells.\textsuperscript{114} Nevmerzhitsky went on a hunger strike and was
eventually force-fed.\textsuperscript{115} He was handcuffed, his mouth was forcibly opened, and a
rubber tube was inserted into his body, all of which he resisted.\textsuperscript{116} Approximately
three years later, he was finally convicted of forgery and was sentenced to over
five years in prison.\textsuperscript{117} Due to this temporary detention before his conviction, he
was exempted from serving the five years and was immediately admitted to the
City Hospital where he received medical treatment.\textsuperscript{118}

Nevmerzhitsky claimed the Ukrainian Government violated Article 3 and
complained of the inhumane conditions in the isolation units and the force-
feeding conducted during his hunger strike.\textsuperscript{119} The Court emphasized the medical
necessity of force-feeding to save a human being’s life, and the burden is on the
State to prove that such measure is a medical necessity.\textsuperscript{120} The Court developed a
test to determine whether the force-feeding at issue was necessary, and thus not a
violation of Article 3.\textsuperscript{121} The test requires that the State prove force-feeding is a
medical necessity, meaning it must be essential to save the prisoner’s life;\textsuperscript{122}
however, if there is no medical necessity, the procedural safeguards set in place
for the prisoner should be respected, including the right to refuse such treatment
and having the State act in the prisoner’s best interest.\textsuperscript{123} In addition, the manner
in which the prisoner is force-fed cannot be cruel, inhuman, or degrading.\textsuperscript{124}

\begin{thebibliography}{99}
\bibitem{110} See \textit{id.}; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. \textit{TREATY DOC. NO.}
95-20, 999 U.N.T.S. 171; Elizabeth Wicks, \textit{The Right to Refuse Medical Treatment Under the European}
\bibitem{112} See \textit{id.}
\bibitem{113} \textit{id.}
\bibitem{114} \textit{id.}
\bibitem{115} \textit{id.}
\bibitem{116} \textit{id.} at 4.
\bibitem{118} \textit{id.}
\bibitem{119} \textit{id.}
\bibitem{120} \textit{id.} at 4.
\bibitem{121} \textit{id.}
\bibitem{122} \textit{id.}
\bibitem{124} \textit{id.}
\end{thebibliography}
However, the Court will give prison officials more discretion in the manner of the force-feeding when the force-feeding is a medical necessity.\textsuperscript{125} The Ukrainian government failed to meet this burden.\textsuperscript{126} No evidence existed of any medical necessity in force-feeding Nevmerzhitsky.\textsuperscript{127} The government was obligated to provide a medical report or a report from the head of the detention center, which described the necessity of the force-feeding as well as the procedure of how the force-feeding was to be conducted.\textsuperscript{128} The government failed to prove that force-feeding was medically necessary, and it disregarded the procedural safeguards guaranteed to Nevmerzhitsky by force-feeding him after his deliberate refusal to eat food.\textsuperscript{129} The Ukrainian authorities did not act in Nevmerzhitsky’s best interest when they decided to force-feed him.\textsuperscript{130} With regard to the manner in which he was force-fed, the Court determined that handcuffing Nevmerzhitsky and forcing a tube into his stomach with his forceful resistance was torture and a violation of Article 3 of the European Convention of Human Rights.\textsuperscript{131}

\textbf{D. Analyzing the California Prison Hunger Strike under the Nevmerzhitsky Standards}

The standard the Court developed in \textit{Nevmerzhitsky} can be useful in determining whether certain instances of force-feeding violate international law and constitute torture or cruel, inhuman, or degrading treatment or punishment. In regard to the California prison hunger strike, the federal court order that authorized the force-feeding of the California state prisoners would likely have constituted cruel, inhuman, or degrading treatment or punishment.\textsuperscript{132} Since the hunger strike was terminated before any force-feeding was implemented,\textsuperscript{133} medical experts can only speculate what the procedures of the force-feeding would have been.\textsuperscript{134}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{125} \textit{Id.} (explaining that the manner of the force-feeding must not breach the minimum level of severity set by case law under Article 3).
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} See \textit{BLACK’S LAW DICTIONARY} 1429 (10\textsuperscript{th} ed. 2014) (Cruel and unusual punishment); \textit{infra} Part II.C.
\item \textsuperscript{133} Thompson & Elias, supra note 74.
\end{itemize}
\end{footnotesize}
1. Medical Necessity and Procedural Safeguards

The California federal court order authorized the force-feeding for prisoners who were near death, which would seemingly meet the medical necessity requirement. However, Dr. Steven Tharratt, director of medical services who oversees medical care for California’s prisons, claimed that no prisoner was near death at the time the court order was obtained. State authorities requested the court order as a blanket permission to allow prison doctors to make the judgment of whether a prisoner should be force-fed without requesting orders case-by-case. To prove medical necessity, Nevmerzhitsky made it clear that a written report either by the physician or head of the detention center must adequately indicate why the force-feeding is necessary. The court order was obtained prior to any evidence of such medical necessity, and it was obtained as a general order to allow force-feeding of any prisoners under the prison doctor’s discretion. Thus, there was no medical necessity when the state authorities obtained the federal court order.

In addition, the California prison officials initially sought the federal court order to disregard the prisoners’ “do-not-resuscitate” order, which is a procedural safeguard that should be respected according to Nevmerzhitsky. Before the federal court order, California policy banned force-feeding of prisoners if they had signed a “do-not-resuscitate” order. The California prison officials claimed they were concerned with prisoners being coerced into signing these orders by gang leaders; however, there are claims that the officials were “exaggerating” and that the state should not ignore these “do-not-resuscitate” orders.

Although there is a possibility that some of the do-not-resuscitate orders were obtained through coercion, the invalidation of the orders that were voluntarily signed violates the prisoners’ right to refuse such medical treatment. The federal court order also gives prison officials discretion in determining whether the prisoners were coerced into signing the “do-not-resuscitate” orders.

135. Id.
136. Id.
139. See Thompson & Elias, supra note 74.
140. California Hunger Strike, supra note 70.
142. California Hunger Strike, supra note 70.
143. Id.
144. Id.
146. Thompson, supra note 134.
Nonetheless, it is possible that the prison officials will be likely to claim the signed orders were coerced when they were actually signed voluntarily because they have a strong interest in preserving life and preventing suicide. Given the circumstances, it is difficult to conclude that the California federal court order did respect the procedural safeguards necessary for the prisoners.

2. The Manner of the Force-Feeding

There are conflicting statements on how the force-feeding procedure would have been implemented if the prisoners in California had not ended their hunger strike. One source states the force-feeding could have been performed either through intravenous treatment or nasogastric feeding. Another source contends the force-feeding method would have been less invasive than methods used on detainees at Guantanamo Bay. The Director of Medical Services of California prisons stated the force-feeding would have most likely been implemented through intravenous feeding, and that prisoners would have been unconscious, and therefore unable to feel any pain. Nevertheless, for the prisoner to be in an unconscious state, the medical personnel would need to restrain the resisting prisoner by strapping him onto a restraint chair, and forcibly inserting the needle into his blood vessel. Although the prisoner would be unconscious, this would be a synthetically unconscious state, which doctors view as medically and morally unethical. Intravenous treatment, compared to nasogastric feeding, is less intrusive; but introduces problems including infections and complications from line placement. Intravenous treatment must also be monitored closely and carefully.

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147. See California Hunger Strike, supra note 70; Thompson, supra note 134.
148. See California Hunger Strike, supra note 70; Thompson, supra note 134; Thompson & Elias, supra note 74.
150. See Thompson, supra note 134 (explaining that the “U.S. military officials . . . snaked feeding tubes through the noses and into the stomachs of terror suspects who refused to eat”).
151. Id.
152. Id.
153. See id.
154. See Ansbacher, supra note 149, at 124.
155. Id.
156. See id.
159. Id.
Although Nevmerzhitsky was force-fed through nasogastric feeding, conducting force-feeding intravenously to an unconscious prisoner is inherently invasive because it is conducted against the prisoner’s will.\textsuperscript{160} In addition, since the federal court order was obtained without evidence of a specific medical necessity, the manner of the force-feeding could amount to cruel, inhuman, or degrading actions.\textsuperscript{161} The burden should be on California to prove that there was a medical necessity when obtaining the federal court order, the procedural safeguard of the prisoners were fully respected, and the manner in which the force-feeding would have been conducted would not have been cruel, inhuman, or degrading. However, there was no medical necessity at the time the federal court order authorized the force-feeding;\textsuperscript{162} but even if there was such necessity, forcing the prisoners to undergo intravenous treatment by inducing unconsciousness would have heightened the level of severity of the intrusion into the prisoner’s right to refuse food. Therefore, under the Nevmerzhitsky standards, the California federal court order authorizing the force-feeding of the hunger-striking prisoners would likely constitute cruel, inhuman, or degrading treatment or punishment and possibly amounting to torture depending on the severity of the method of force-feeding.\textsuperscript{163}

IV. THE U.S. FEDERALISM RESTRAINTS IN EXECUTING THE ICCPR AND CAT

Before a similar standard to Nevmerzhitsky can be adopted in the United States to examine whether a specific force-feeding situation violates the ICCPR and CAT, the United States must implement the treaties domestically through legislation.\textsuperscript{164} The United States has ratified both the ICCPR and CAT.\textsuperscript{165} The Senate approved the treaties with the understanding that U.S. law already conformed with the treaties.\textsuperscript{166} The ICCPR and CAT have had very little effect in domestic American courts.\textsuperscript{167}

The United States included reservations, understandings, and declarations (“RUDs”) into both the ICCPR and CAT, thus making the treaties non-self-executing.\textsuperscript{168} A non-self-executing treaty requires Congress to pass legislation

\footnotesize{\textsuperscript{160} See Ansbacher, supra note 149, at 124. \textsuperscript{161} See id. \textsuperscript{162} Thompson, supra note 134. \textsuperscript{163} See Nevmerzhitsky, 2005-II Eur. Ct. H.R. at 4. \textsuperscript{164} See infra Part V. \textsuperscript{165} David Kaye, \textit{State Execution of the International Covenant on Civil and Political Rights}, 3 U.C. IRVINE L. REV. 95, 95 (2013); Amnesty Int’l, \textit{USA: The Edge of Endurance, Prison Conditions in California’s Security Housing Units}, at 9, AI Index AMR 51/060/2012 (Sept. 2012). \textsuperscript{166} Kaye, supra note 165, at 111. \textsuperscript{167} Id. at 96; see Parry, supra note 96, at 1043. \textsuperscript{168} Kaye, supra note 165, at 96; see Convention Against Torture, supra note 92; U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).}
before the treaty can be binding in domestic courts. The treaties are ratified and are considered the “supreme law[s] of the land,” but they cannot be invoked in American domestic courts. Therefore, there is no way for a victim to petition for relief from a violation of the treaties since there is no legal mechanism to ascertain whether the United States is fulfilling its obligations under the ICCPR or CAT.

The RUDs are criticized because they restrict the United States’ obligation under the treaties and prohibit any expansion upon the established substantive rights and protections presented in the Constitution and statutes. The United States has limited the definition of “torture” under the CAT to require a specific intent element, denoting there must be an express purpose to cause pain. This would make it more difficult to bring a claim against state officials since they can claim their purpose was to maintain prison order, and not cause pain. Both the ICCPR and CAT contain reservations that state, “[T]he United States considers itself bound by Article 7 [of the ICCPR and Article 16 of the CAT] to the extent that CIDT means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.” By adding this reservation, the United States restricts the definition of the term CIDT to its own constitutional interpretation of it from under the U.S. Constitution. CIDT under the treaties differs from “cruel and unusual punishment” under the Eighth Amendment because it is interpreted much more broadly than “cruel and unusual punishment.” Thus the RUDs prevent Article 7 of the ICCPR and Article 16 of the CAT from being applied domestically.

Since the United States has limited the domestic applicability of the ICCPR and CAT, prisoners may only bring a claim under U.S. constitutional standards. The Eighth Amendment of the U.S. Constitution bans cruel and unusual

169. Kaye, supra note 165, at 96.
170. Id.
171. Id.
173. “In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.” Parry, supra note 96, at 1043–44 (2008-2009) (explaining one of the understandings that limit the definition of torture applied in the United States).
174. Id. at 1044.
175. See generally id.
177. Parry, supra note 96, at 1044–45.
178. Id. at 1047.
179. Id.
180. See id.
punishment.\textsuperscript{181} However, it will be difficult for a prisoner to bring a claim against force-feeding under this amendment because the U.S. Supreme Court declared that force-feeding would not prevail as a medical mistreatment to prisoners unless prison officials were deliberately indifferent to the nature of the force-feeding.\textsuperscript{182} Conversely, under the Fifth and Fourteenth Amendment, federal case precedents have established that prisoners have the right to refuse medical treatment, which expands from the fundamental right to privacy under the Fifth and Fourteenth Amendment Due Process Clause.\textsuperscript{183} However, this right can be overridden when the state has a strong interest in preventing suicide.\textsuperscript{184} Therefore, the U.S. Constitution does not have the same effect as the ICCPR and CAT would have in the context of force-feeding due to the many limitations the U.S. Supreme Court has set forth regarding prisoners’ right to reject medical treatment.\textsuperscript{185} Although the U.S. Supreme Court has limited prisoners’ ability to prevail on their claim against force-feeding, a few state courts have ruled against the state intervening in prison hunger strikes, favoring the prisoner’s right to bodily integrity under state law.\textsuperscript{186} Having U.S. state courts interpret the cruel and unusual punishment provision of their own constitution to comply with international human rights laws could prove to be more successful than trying to circumvent the U.S. Supreme Court decisions that have already limited prisoners’ rights to not be force-fed.\textsuperscript{187}

In \textit{Hamdan v. Rumsfeld}, the U.S. Supreme Court stated that international human rights treaties can be a source of law, but the issue of whether the treaties will be interpreted to constitute individual rights in U.S. courts still remains unclear.\textsuperscript{188} Although the United States has acknowledged international law standards on torture and cruel, inhuman, or degrading treatment, it eludes the standards’ full implications.\textsuperscript{189}

In its General Comment No. 20, the Human Rights Committee addressed the goal of Article 7 of the ICCPR and interpreted the provision in furtherance of that goal, including what the States’ duties are regarding this provision.\textsuperscript{190} But the

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\item \textsuperscript{181} Gordon, \textit{supra} note 10, at 359.
\item \textsuperscript{182} \textit{Id.} (discussing multiple U.S. cases concerning prison official’s duty to provide prisoners with medical care).
\item \textsuperscript{183} \textit{Id.} at 359–60.
\item \textsuperscript{184} \textit{Id.} at 360.
\item \textsuperscript{185} \textit{Id.} (discussing the prison officials’ ability to overrule a competent prisoners right to refuse medical treatment and food when they have a “legitimate penological interest,” which includes maintaining prison order).
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{See generally} Rachel A. Van Cleave, \textit{State Constitutional Interpretation and Methodology}, 28 N.M. L. REV. 199 (1998); \textit{see generally} Gordon, \textit{supra} note 10.
\item \textsuperscript{188} Parry, \textit{supra} note 96, at 1051.
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} Human Rights Comm., \textit{supra} note 82. (“The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures
Committee explicitly stated it was unnecessary for it to list all the acts prohibited by Article 7 and to differentiate between what constitutes cruel and inhuman treatment and what does not. The Committee gave the State parties discretion in deciding what constitutes torture and cruel, inhuman or degrading treatment, but the major issue revolves around whether the States are complying with their duties under this provision as well as what the legal consequences should be if they violate it.

This issue is difficult for the United States to resolve. The last understanding in the ICCPR attached by the United States recites:

That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

There are different perspectives on what this understanding means. One legal scholar stated there is no legal purpose for the understanding, meaning it does not restrict the United States’ legal responsibility under the treaty. Yet on the domestic front, some legal scholars view the understanding as a way for state and local governments to implement the treaty themselves. Others have rejected this theory and state that the understanding reiterates Congress’ power in implementing this treaty through legislation for it to become binding.

The first part of the understanding is interpreted to mean that the federal government may or may not implement the treaty. The second part emphasizes that issues that are already reserved to the state and local government will remain

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191. Id.
192. Id.
193. See generally id.
194. See infra Part V.
196. See Roth, supra note 172, at 903–05.
197. Id. at 903.
198. Id. at 905.
199. Id. (discussing the Understanding to mean the treaty is non-self-executing).
200. Id. at 905–06 (“That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein”).
within their jurisdiction.\textsuperscript{201} As such, state and local governments may take all necessary means to achieve the objectives of the ICCPR if they have jurisdiction over the related matters.\textsuperscript{202}

Although state and local governments are aware of the pressing need to adopt the principles from these human rights treaties, the federal constitution may prevent them from circumventing the federal government when doing so.\textsuperscript{203} Both the federal and state government are given a limited amount of authority in what they can actually govern.\textsuperscript{204} There are two theories regarding the distribution of authority between the two governments.\textsuperscript{205} The traditional theory expresses a more limited view on state power and believes only Congress can implement treaties.\textsuperscript{206} The revisionist theory states that there is more power reserved to the states based on the separation of powers principle.\textsuperscript{207} These two theories establish that either the federal or state has the sole authority in implementing human rights treaties into legislation.\textsuperscript{208} However, there is a way for both views to co-exist without creating a conflict.\textsuperscript{209}

V. RECOMMENDATIONS AND CONCLUSION

Although state execution of the human rights treaties would help the United States comply with the treaties,\textsuperscript{210} the U.S. reservation on Article 7 of the ICCPR and Article 16 of the CAT will remain an obstacle to overcome.\textsuperscript{211} It will be even more difficult to bring an injunction against torture due to the limiting definition the United States has set forth under the CAT.\textsuperscript{212} As prison hunger strikes continue to be prevalent in the United States, there needs to be a way to implement the norms of international human rights into domestic law. The reservations attached to Article 7 of the ICCPR and Article 16 of the CAT limited the definition of torture, cruel, inhuman, or degrading treatment or

\textsuperscript{201} Id. at 906 ("[A]nd otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant").

\textsuperscript{202} Roth, supra note 172, at 906.

\textsuperscript{203} Catherine Powell, Dialogic Federalism: Constitutional Possibilities For Incorporation of Human Rights Law in the United States, 150 U. PA. L. REV. 245, 245–46 (2001); see also Kaye, supra note 165, at 122–24 (discussing potential arguments against state execution).

\textsuperscript{204} Id. at 248–49.

\textsuperscript{205} Id. at 246.

\textsuperscript{206} Id.

\textsuperscript{207} Id. at 247.

\textsuperscript{208} Id. at 248.

\textsuperscript{209} Powell, supra note 201, at 249; see infra Part V.

\textsuperscript{210} Kaye, supra note 165, at 117.

\textsuperscript{211} See supra Part IV.

\textsuperscript{212} See supra Part IV; Parry, supra note 96, at 1044.
punishment to the language of the Eighth and Fifth/Fourteenth Amendment.\textsuperscript{213} However, the U.S. state courts have the power to interpret their own constitutions\textsuperscript{214} and decide whether, under state law, force-feeding should be conducted.\textsuperscript{215} The state courts should adopt standards, similar to the one from \textit{Nevmerzhitsky},\textsuperscript{216} to help determine whether the specific force-feeding at issue is so invasive as to constitute torture or cruel, inhuman, or degrading treatment or punishment under international human rights laws. State courts should interpret their own constitutions and laws to conform to international human rights laws. Having the courts adopt the \textit{Nevmerzhitsky} standard will help each state as well as the United States as a whole comply with the objectives of the human rights treaties, regardless of state or federal execution. This standard will also help emphasize the importance of human rights laws within the United States.

If a similar standard to \textit{Nevmerzhitsky} is adopted, the courts should weigh the evidence and determine whether the state provided sufficient evidence in support of force-feeding the prisoners.\textsuperscript{217} As stated in \textit{Nevmerzhitsky}, the state must prove with sufficient evidence that force-feeding is medically necessary.\textsuperscript{218} This includes medical reports that will describe the condition the prisoner is in as well as evidence of the prisoner’s deteriorating state of health.\textsuperscript{219} If there is no medical necessity, the state must respect the procedural safeguards guaranteed to prisoners, such as the “do-not-resuscitate” orders California prisoners signed.\textsuperscript{220} Thus, without a medical necessity, force-feeding will likely almost never be allowed.

By its nature, force-feeding will almost always be extremely invasive.\textsuperscript{221} Nasogastric feeding is the most common method of force-feeding,\textsuperscript{222} and it is extremely intrusive.\textsuperscript{223} The ECHR condemned the procedure of nasogastric feeding as torture when conducted without a medical justification.\textsuperscript{224} Though intravenous treatment is a less intrusive method of force-feeding,\textsuperscript{225} it is still invasive and may still constitute torture or cruel, inhuman or degrading treatment or punishment when conducted without any medical necessity. However, when force-feeding is medically necessary and the prisoner is near death, the

\textsuperscript{213} See supra Part IV.
\textsuperscript{214} See \textit{Van Cleave}, supra note 187.
\textsuperscript{216} See supra Part III.C.
\textsuperscript{217} See supra Part III.C.
\textsuperscript{218} See supra Part III.C.
\textsuperscript{220} Staff and agencies in Sacramento, supra note 70.
\textsuperscript{221} \textit{Gordon}, supra note 10, at 353 (discussing the medical risks of force-feeding through nasogastric feeding, such as suffocation and aspiration).
\textsuperscript{222} \textit{Ansbacher}, supra note 149, at 125.
\textsuperscript{223} See supra Part II.B.
\textsuperscript{225} \textit{Ansbacher}, supra note 149, at 124.
government should be given more discretion as to how the force-feeding is conducted because of strong interests in preventing death, preserving life, and maintaining prison safety, that cannot be ignored. The government does not want to be scrutinized by the public for allowing a prisoner to die in its custody. Indeed, the methods of force-feeding currently employed by the United States will need to be modified to limit the pain and severity of the intrusion into the prisoner’s bodily integrity.

The issue of force-feeding becomes especially difficult to assess when the government has a strong interest in preventing death yet at the same time must respect the prisoner’s right to refuse unwanted medical treatment. Adopting a standard similar to Nevmerzhitsky will help the United States in achieving the human rights objectives of respecting the physical and mental integrity and dignity of the prisoners as well as ensuring safety for the prisoners when it is medically necessitated. State authorities can avoid force-feeding overall by targeting the specific issues the prisoners are protesting from the onset. The California prisoners were protesting the state’s use of maximum-security imprisonment and the conditions of solitary confinement. The California Department of Corrections and Rehabilitation issued a response during the hunger strike regarding the demands set forth by the prisoners. The California hunger strike was subsequently terminated by the prisoners due to the legislators’ willingness to hold public hearings on the conditions of the prisons. Nonetheless, the two-month hunger strike could have ended sooner or been completely avoided if the requests of the prisoners were taken into consideration from the beginning.

States and cities have already begun taking a proactive approach to incorporating the human rights treaties into their local law. Constituents are also raising their voices and insisting their local governments to enact laws pursuant to the human rights treaties. Having state courts develop standards that comply with international human rights laws will help the United States meet

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226. Id. at 102; Silver, supra note 157, at 642–43.
227. See Silver, supra note 157, at 643.
228. See supra Part II.B.
229. See supra Part II.
230. See supra Part III.A.
231. See generally USA: The Edge of Endurance, Prison Conditions in California’s Security Housing Units, Amnesty Int’l, supra note 165, at 52–54.
232. See supra Part II.C; Victoria Law, California Prison Hunger Strike Ends after 60 Days, TRUTHOUT (Sept. 6, 2013), http://www.truth-out.org/news/item/18649-california-prison-hunger-strike-ends-after-60-days (describing the five demands set out by the prisoners involved in the California hunger strike).
234. Victoria Law, supra note 230.
234. St. John, supra note 66.
235. See Powell, supra note 201, at 245–46 (San Francisco has included the Convention on the Elimination of All Forms of Discrimination against Women into their local law).
236. Id. at 246 (Cities have requested their states and the federal government to ratify and support the Second Option Protocol to the ICCPR, which abolishes the death penalty).
its obligation under the treaties, despite its reservations.\textsuperscript{237} Force-feeding is grotesque, disturbing, and painful,\textsuperscript{238} and imposing an invasive treatment on a competent prisoner can do more harm than good; thus the United States should highly consider the true necessity of the force-feeding before infringing into the prisoner’s bodily and physical integrity.

\textsuperscript{237} Kaye, \textit{ supra} note 165, at 117–19.

\textsuperscript{238} Gordon, \textit{ supra} note 10, at 353–54 (discussing the medical risks of force-feeding through nasogastric feeding, such as suffocation and aspiration).