

Hunger and torture. Assessing the adequacy of prison food under international law

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Abstract

Background: Deprivation of prisoner food, in terms of its quality and quantity, has generally been accepted as violating the prohibition of torture and related ill-treatment, particularly when combined with other factors (i.e., harmful conditions and practices). Aspects relevant to assessing when and how food provision is considered inadequate, however, remain complex and confusing. This article presents a doctrinal review which consolidates normative understandings of adequate prisoner food.

Method: A systematic full-text search was made of international and regional normative standards, case-law and commentary in relevant databases. These were then selected based on their relevance for regulatory and explanatory specificity and pertinence to detention contexts.

Findings: International and regional bodies directly connect the adequacy of food to respect for dignity, freedom from torture and ill-treatment as well as the right to health – and particularly as depending on duration, quality, quantity and variety. What constitutes inadequate food remains complex as it is contingent on both material and non-material considerations, including its quality (content, nutritiousness, edibility, variety, wholesomeness),

its quantity (calorie, substantiveness, balance), its preparation (hygiene, respect to the individual and community), its provision and consumption (when, how and where it is to be eaten, regularity, accessibility, warmth/cold), its socio-cultural suitability (to religious and cultural values) and its developmental suitability (for pregnant or breast-feeding mothers and children).

Keywords: denial, deprivation, manipulation, food, nutrition, hunger

Apart from sleep, the only time a prisoner lives for himself is ten minutes in the morning at breakfast, five minutes over dinner, and five at supper [...] You got an extra six ounces of bread for your supper. A couple of ounces ruled your life.

Solzhenitsyn, 'One Day in the Life of Ivan Denisovich'

Introduction

Food (or more broadly “nutrition”)¹ is accepted as a basic human need next to water,

1 According to the International Committee for the Red Cross (hereafter: “ICRC”) (2021: 31), “[f]ood” refers to edible items, and the term ‘nutrition’ to the metabolic impact on individuals of what they eat”.

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sleep, health care, sanitation and accommodation under international law (Rule 42 of the UN *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules) (2015)). Put simply, the power to detain “comes with a corresponding responsibility to provide for basic needs, including food, adequate shelter and medical care, and to protect detainees from serious threats of harm” (UN Office of the High Commissioner for Human Rights (UNOHCHR) 2020: §18). Unsurprisingly, according to the World Health Organisation (WHO 2021), the “quality and quantity of food available in a prison has a major influence on the quality of a prisoner’s life”. The ICRC (2021:31) underscores it to be “an important and complex issue in prisons”.

In practice, however, quality food and water are scarce in prisons around the world and usually have to be supplemented by prisoner families (Amnesty International 2016: 215–216). The UN Office of Drugs and Crime (UNODC 2016: 57) observes that “complaints about quality and/or quantity of food are among the most common” received (see e.g., UN Subcommittee for Prevention of Torture (SPT) Portugal 2019: §69: where complaints “ranged from food smelling rotten or being too greasy to reports of foreign bodies such as cockroaches and other insects in the food served”). As such, it is a standard aspect of life in detention that is attended to by monitoring bodies as a general rule. The ICRC (2018: 150) points out that “[s]carcity or perceived scarcity of food is a threat to detainee and staff safety, making reliable and fair access to food critical to the effective management of prisons”. Therefore, the lack of food (whether intentional, incidental or structural) is generally taken to affect prison(er) life and health in a multitude of ways.

More directly, food has also long been a medium of “physiological influence during in-

terrogation and detention” (DIGNITY 2018: 1). Deprivation (or withholding) and manipulation (or contamination) of prisoner food, therefore, in terms of its quality and quantity, and due to systemic and specific reasons, has generally been interpreted as amounting to ill-treatment, particularly when combined with other factors (conditions and methods). Mindful of the differences here, the UN *Istanbul Protocol* (UNOHCHR 1999/2004) refers to techniques involving food *as part of conditions of detention* (as “irregular or contaminated food”) and *as deprivation of a basic need* (restriction of food) (§§145, (m)-(n)).

Additionally, this article adopts the conceptual approach outlined by Pérez-Sales (2020: 3), defining food deprivation as “food intake below the dietary required minimum energy level” and food manipulation as “the quality, aspect, taste or contamination of the food provided to an individual”. These are understood by Pérez-Sales (2020: 6) to be “[s]hort-term or partial restrictions in food quantity, including food insecurity, or food of low quality or which is provided in a denigrating manner” compared to starvation and famine which are taken as “[p]rolonged and sustained restriction in the access to food that causes undernutrition and, ultimately, compromises life”. As borne out by the literature, manipulation can amount to *de facto* deprivation due to the prisoner’s inability and unwillingness to consume the inedible food on offer.

Despite such wide recognition of its significance to prisoner well-being, the normative understanding of adequacy remains to be consolidated in the literature. The following presents a comprehensive doctrinal review of the existing norms and commentary related to the regulation of food, primarily in detention settings. The use of food to harm in non-custodial contexts, such as mass starvation and famine, as well as force-feeding and

hunger strikes will not be covered here due to lack of space.

A systematic full-text search of international and regional normative standards, case-law and commentary was conducted using the UN Official Documentation System (UNODS), European Court of Human Rights' HUDOC and CEJIL's database on the Inter-American human rights system. with the keywords 'food', 'nutri*', 'diet*', 'calorie*', 'meal*', 'ration', 'eat*' and 'starv*'. These were then selected based on their relevance for regulatory and explanatory specificity and pertinence to detention contexts. Based on this search, part II compiles the international and regional hard and soft-law standards. Part III surveys the international and regional case-law. Part IV draws on the leading commentary towards offering a practically oriented discussion qualifying deprivation of food as torture or ill-treatment.

Standards

This section provides an overview of the relevant international and regional standards which relate to the provision of food to prisoners. It draws heavily on international human rights law but also to some degree on international humanitarian law and historical developments wherever useful. At the most fundamental level, food is intrinsically linked to the right to health (and thus the right to life, though this has been under-argued). Article 25 of the *Universal Declaration of Human Rights* states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself [...] including food”. This is embodied in article 11 of the *International Covenant on Economic, Social and Cultural Rights*. UN Committee on Economic, Social and Cultural Rights' General Comment 12 on the right to adequate food (1999: §14) clarifies “minimum

essential food” as “sufficient, nutritionally adequate and safe, to ensure their freedom from hunger”.

The detention-specific point of departure here is Rule 22 (1) of the UN *Nelson Mandela Rules* which requires that “[e]very prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served”. The “quantity, quality, preparation and service of food” is also made subject to the inspection and advice of a physician or a competent public health body (Rule 35 (1)(a); see also *European Prison Rules*, Rule 44 (1)). These formulations have been maintained verbatim since the Rules were originally drafted in 1955 (as simply the *Standard Minimum Rules*). An important change has been that the “reduction of a prisoner’s diet or drinking water” is now prohibited as a disciplinary sanction (Rule 43 (1)(d); see also Principle XI of the *Principles on Persons Deprived of Liberty in the Americas*). Additionally, whilst the prison administration remains the principal provider of food, the *Mandela Rules* also foresee that food can be obtained by prisoners from outside the prison at their own expense or through their family or friends (Rule 114; see also *European Prison Rules*, Rule 31.5 – although this cannot be said to absolve state of their obligations). The recently finalised *Principles on Effective Interviewing for Investigations and Information Gathering* (“the Mendez Principles”, Association for the Prevention of Torture et al. 2021: Principles 70 and 111) also render “adequate food” as a necessary condition for an interviewee’s mental and physical state throughout a police interview.

Particular attention is also drawn to dietary requirements according to developmental considerations (i.e., pregnant or breast-feeding women, children: Rule 48 of the UN *Bangkok*

Rules (“adequate and timely food”); Principle X (“nutritional services”); UN *Havana Rules*, Rule 37 requires that “every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health”). Regional frameworks offer similar but more expansive formulations in these respects. The recently revised *European Prison Rules* require that prisoners be “provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work” (Council of Europe (CoE) 2020: Rule 22.1), with “its minimum energy and protein content” to be prescribed in national law (Rule 22.3) and that there must be “three meals a day with reasonable intervals between them” (Rule 22.4). Principle XI (1) of *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* for instance requires that food be “in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition, with due consideration to their cultural and religious concerns as well as to any special needs or diet determined by medical criteria”.

International humanitarian law has also long been concerned with the provision of food to those deprived of liberty (See e.g., *Convention relative to the Treatment of Prisoners of War* 1929, article 11; *Geneva Convention IV*, article 89 (“Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs”); *Geneva Convention II*, article 5 (1)). Article 26 of *Geneva Convention III*, of particular note, requires that:

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the

habitual diet of the prisoners. The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed. [...] Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession. Adequate premises shall be provided for messing. Collective disciplinary measures affecting food are prohibited.

This jurisprudence adds to the discussion in three important respects: work-related and socio-cultural individuation as well as general notions of calorie consumption. To take calorie consumption first, “basic daily rations”, according to the ICRC Commentary (2020: §2112), must be sufficient as to prevent weight loss or nutritional deficiencies. The Commentary (§2113) goes on to outline that a balanced diet considers climactic conditions as well as age and health needs and to consist of:

ingredients from each of the main food groups: staples (such as grains, cereals, roots or tubers), protein sources (such as pulses, beans, dairy products, meat, fish, etc.); fats and oils (such as butter, vegetable oils, oily seeds, etc.); and vegetables and fruit (such as spinach, tomatoes, carrots, broccoli, oranges, mangoes, berries, etc.). These food groups provide the required energy, protein, fibre and micronutrients for optimum health.

Beyond its material importance for physical health, food is laden with values and beliefs. The ICRC Commentary (§2106) states that, instead of thinking strictly in terms of equality, the detaining power should take into account the “habitual diet” of prisoners of war. The term “habitual diet” is taken to mean food

that is consistent with prisoners of war's usual diet given that, although the food provided by detention authorities may ostensibly be adequate, it may reasonably be refused by detainees due to "cultural or religious practices" (ICRC 2020: §2121). This entails detaining authorities consulting on and understanding what the prisoners usually eat and how they eat (including acceptable mealtimes particularly when associated with religious values) (ICRC 2020: §§2121-2123). Such requirements to adequate food are also part of customary international humanitarian law (ICRC 2005: Rule 118). Such non-material considerations will be returned to.

By way of illustration, the requirement around rations and consideration of work tasks came into play in the *Duch Case* (ECCC 2010: §§268-269, 278, 457), where the Extraordinary Chambers in the Courts of Cambodia (ECCC) linked the inadequacy of food to expectations which arose from "arduous physical work involved in digging dykes and canals, and transplanting rice" (§229) as

Food rations were extremely scarce and usually consisted of rice gruel, rice soup or banana stalk served twice a day. Guards would scoop the food from a bowl into mugs or plates and order the detainees in the common rooms to distribute it among themselves. Due to the scarcity of food, detainees resorted to eating insects that fell on the floor, for which they could be beaten if a guard saw them. [One witness] described being so hungry that if he had been offered human flesh, he would have eaten it. [...] Consequently, detainees suffered severe weight loss and became extremely weak. The Accused acknowledged that the deprivation of adequate and sufficient food was deliberate and meant to debilitate the detainees in order to maintain control over the

prison population, prevent riots and facilitate the generation of confessions.

Moreover, the European Committee for the Prevention of Torture (CPT) has been a distinctly close and consistent observer of food in places of detention. Its recommendations have added a degree of clarity to what is meant by adequacy, including that: it means "at least one full meal (i.e. something more substantial than a sandwich) every day" (CPT 2015: §§42 and 47); that pregnant "women prisoners [...] should be offered a high protein diet, rich in fresh fruit and vegetables" (CPT 2002, §26); that inadequacy relates to "lack of variety and low protein content" (CPT Italy 2020: §1); that where detainees are restrained they should be "enabled to eat and drink autonomously" (CPT Bulgaria 2020, §40); that "food is served to inmates using appropriate equipment (such as food containers and trolleys" and that "residents are provided with proper cutlery to eat their meals and are encouraged and, if necessary, assisted by staff to use it" (CPT Moldova 2020, §§69 and 166); and that "meals should be eaten communally" and not so early in the afternoon that prisoners have "to wait almost 16 hours before their next meal" (CPT Ireland 2020, §67; see also CPT England 2020: §173).

Whilst this all seems context-specific, qualified and considerate enough, there is still a clear lack of operational clarity. How are we to assess adequate quality, quantity, substantial, nutritional value, especially that which avoids the violating the prohibition of torture and ill-treatment? Do we for instance take it as meaning *optimum* for well-being or as the *minimal* for survival? From a legal perspective, there are two complications. One complication is that violations of these prison rules, whilst indicative (as soft-law standards), are not automatically constitutive of torture or another

form of ill-treatment. The CPT, it should be acknowledged, does not hold its standards as being absolute and rejects any assessment, given the possibility of alleviating factors, that a “minor deviation from its minimum standards may in itself be considered as amounting to inhuman and degrading treatment of the prisoner(s) concerned” (CPT 2015: §21). The second is that deprivation of food is often associated with prison conditions or as part of a combination of other techniques (nowhere so clearly witnessed as in the European Court case of *Ireland v. UK* where the so-called “five techniques” consisted subjecting “detainees to a reduced diet during their stay at the centre and pending interrogations” (§96) (specifically “a diet of one round of bread and one pint of water at six-hourly intervals”: Separate Opinion of Judge Zekia). With these qualifications, what more can be said (if anything)? This will be asked of the reviewed case-law.

Case-law

This section presents the most representative case-law illustrations where deprivation or manipulation of food amounted to torture or ill-treatment. Systematic full-text searches were conducted in electronic official databases of the UN Human Rights Committee (HRC), UN Committee Against Torture (CAT), European Court of Human Rights (ECtHR), the International Tribunal for the Former Yugoslavia (ICTY) and the Inter-American Court of Human Rights (IACtHR).²

As with the standards compiled above, there is no shortage of case-law alluding to

food deprivation, starvation and hunger as torture or ill-treatment. Such instances are almost always remarked upon in combination with other factors. They are mentioned briefly as the “lack of food” (HRC, *Sendic v. Uruguay*, §§2.3, 2.4, 20), that “the food [provided was] deficient” (HRC, *Polay Campos v. Peru*, §§2.1, 8.7), that the prisoner was “denied food and water” (CAT, *Danilo Dimitrijevic v. Serbia and Montenegro*, §§2.2, 7.1, CAT, *Abdulrahman Kabura v. Burundi*, §7.8; HRC, *Franck Kütenge Baruani v. Democratic Republic of Congo*, §2.4), or that the food was “sparse and spoiled” (ICTY, *Nikolic*, §57). There are numerous cases in which adjudicatory bodies describe the content of the food a bit more sparsely. In *Cariboni v. Uruguay* (HRC, 1987: §10), the victim was provided with “usually a very hot clear soup with hardly anything in it [...] and nothing else”. In *Déogratias Niyonzima v. Burundi* (CAT, 2014: §9), the victim was “served disgusting food consisting of beans and rice crawling with insects”. In *Juvenile Reeducation Institute v. Paraguay*, the IACtHR found that the food was: “not fit for human consumption because it was prepared on the bathroom floor”, “horrible”, “almost always beans with stew”, “pig’s slop” causing illness (see §§16, 18, 25, 147). In another widely cited case from the IACtHR of *Miguel Castro Castro Prison v. Peru*, “kerosene, camphor and rat skin”, “small rocks” and “grounded glass, urine... rat parts [were in the food, which was not provided] warm or at adequate hours” (§§37, 51, 105). The way detainees were forced to eat attracted similar levels of judicial attention: that the prisoner had to eat “by kneeling on the floor and using the same chair as a table [and using their] fingers to eat soup” (HRC, *Cariboni v. Uruguay*, §4); with “three minutes to eat, then one minute to return to their quarters (ICTY, *Kvočka*, §§15, 64, see also ICTY, *Prlic*); “all detainees had to eat standing up”

2 The IACtHR does not provide detailed guidance (as compared to other regimes) beyond recognising (in *Pacheco Teruel v. Honduras*, para. 67 (d)) that “the food provided in prisons must be of good quality and sufficient nutritional value”.

(ECtHR, *Istratii and Others v. Moldova*, §62); or blind-folded (HRC, *Giri v. Nepal*, §2.4). The HRC has also considered on occasion the deprivation of food to violate article 10 (respect for dignity of detained persons) of the *International Covenant on Civil and Political Rights* (see HRC, *Basnet v. Nepal* 2014: §8.6; HRC, *Aber v. Algeria* 2007: §3.4).

The ECtHR has also handed down a number of judgments concerning food and article 3 (prohibition of torture and ill-treatment). In the case of *Kadiķis v. Lithuania* (no 2), the ECtHR explicated the connection between the right to health and the right to food stating that the obligation of national authorities to ensure the health and well-being of a general detainee implies, among others, the obligation to provide adequate nutrition (wherein the Court also called into question the frequency of meals, §55; see also *Stepuleac v. Moldova*, § 55). In the case of *Moisejevs v. Latvia*, which concerned a pre-trial detainee who was denied adequate food on days he was transported to court hearings (being offered only a slice of bread, onion and a piece of fish or meatball or simply a bread roll), the ECtHR found this to be insufficient to meet the body's functional needs and having increased his psychological tension, holding it to amount to inhuman and degrading treatment under article 3 (see also *Starokadomskiy v. Russia*, § 58). In *Ebedin Abi v. Turkey*, the diabetic applicant was not provided with meals compatible with the diet that doctors had prescribed for him and experienced a deterioration in his health as a result. Rejecting the state's argument on economic grounds, this was held to amount to inhuman or degrading treatment (see §§31-54).

Outside the detention setting, in *MSS v. Belgium and Greece*, the ECtHR confirmed that the scope of article 3 (prohibition of torture and ill-treatment) also extended to a state's

failure to act in “a situation of extreme material poverty” or “serious deprivation of [most] basic human needs” including food, hygiene and shelter (§254). In *Modârca v. Moldova*, which concerned an application where numerous basic necessities such as heating, ventilation, bedding and space were not adequate as well as daily expenses for food limited to 28 Euro cents for each prisoner, referring to a CPT report which described food at the same prison as “repulsive and virtually inedible” (§67), the ECtHR ruled that the treatment amounted to a violation of article 3 (unspecified). In *Ciorap v. the Republic of Moldova* (§36), the ECtHR interestingly ruled that:

while the absence of specific [meat and dairy] products from the menu does not, of itself, amount to treatment contrary to Article 3 of the Convention, it is to be noted that the nutritional tables and menus in prisons already represent the minimum of food as determined by the domestic authorities. Failure to provide even that minimum, and doing so for prolonged periods of time as in the present case, puts at risk the health of detainees [...] and is incompatible with the State's obligations under Article 3 of the Convention. [inhuman treatment]

The danger of food allergies have also been argued to raise significant issues (albeit unsuccessfully before the European Commission of Human Rights (ECommHR) in *Nevaro v. Finland* (see also the death of Michael Saffioti due to food allergies in prison, Washington Post (2014)). Nutrition needs of breastfeeding mother in prison have also been recognised (*Korneykova and Korneykov v. Ukraine*, § 141). Prisoner requests for a special diet based on religions considerations and motivations were accepted as reasonable in *Ĵakóbski v. Poland* (see § 45-55) (where it was linked to

the freedom of religion under article 9) and *Vartic v. Romania* (no. 2) (see §35). In the case of a Jewish prisoner requesting kosher meals, in *Erlich and Kastro v. Romania*, however, the Court assessed the demands that kosher food preparation entailed as onerous to the state and found no violation of article 9. In sum, special dietary and nutritional needs due to religion, health or contextual circumstances (transportation as discussed) have been attended to by the ECtHR at some length.

Yet, in most other cases where the quality, quantity and variety of the food is fleetingly remarked upon (e.g. *Mozer v. Moldova and Russia*: “the food was scarce and inedible [...] full of worms and made from rotten produce”, see §§29–31) or the manner in which it is served is noted (*Todorov v. Bulgaria*: “without cutlery” and that prisoners were forced to eat with their fingers: §52) a useful elaboration of how these were weighed in the overall finding does not exactly follow. How similar factual scenarios diverge in being found to either violate the prohibition of torture and ill-treatment or the respect to dignity is also unclear. Such opaque reasoning is not particular to food violations. We are left to deduce the implicit reasoning, as is attempted in the following discussion.

Commentary and discussion

There are tens of additional cases involving comparable factual scenarios ending with similar vague reasoning as to how significantly the deprivation of food weighed in the overall decision-making. Hunger is a complex matter and contingent on numerous factors beyond a simple calorific intake. How does one therefore quantify ‘adequate’, ‘appropriate’, ‘usual’, ‘timely’, ‘sufficient’ and ‘edible’? Legal prescriptions are often detached from practical realities and experiences of prisoners. Laws and standards have “largely been drafted without considering their meaning

in terms of architecture and design” (ICRC 2018: 9), or implementation for that matter. Needless to say, this is not restricted to food but also applies to conceivably any issue relating to prison regime. By one prominent take, generality in legal language performs the function of bringing in “principles or policies lying beyond the rule” (Dworkin 1977: 28). As the research here suggests, prescriptions of “adequate” operate in a similar manner. Legal practitioners are left with homework in explicating specifics. Harm inflicted through food, whether in terms of its deprivation or manipulation, in the context of an assessment of torture and ill-treatment runs through two main elements of the international definition of torture in article 1 of the UN *Convention Against Torture*: namely, *severity* and *intentionality*. In other words, deprivation of food in prison will clearly satisfy other elements of the definition (namely, official involvement and purpose) but be challenged on these two. In the following, a critical discussion is offered in better appreciating these interpretative terrains.

Severity (and duration)

Mindful to avoid an iron-clad causality, we can safely say that deprivation is indicative of harm, especially when what is deprived is as basic as the nutrients to physically and cognitively function as a human. Harm is also contingent on prevailing societal expectations of dignity. Harms inflicted through the deprivation or manipulation of food, therefore, centre on both physiological and non-physiological aspects. Physiological harms entail considerations of content, calories, quality, quantity, variety and regularity, whilst non-physiological harms entail emotional reactions borne out of socio-cultural-political-religious disregard and discrimination in how food is prepared, served and consumed, and its symbolic

(and psychic) impact on prisoner autonomy and identity.

The physiological considerations focus on the material nourishment a human body requires to function physically and cognitively. From a physiological perspective, a recent systematic review of medical literature (DIGNITY, 2018: 1, *references omitted*) on food deprivation clearly links adequate nutrition and health consequences as follows:

A diet that repeatedly lacks adequate nutrition intake leads to malnutrition which can weaken the immune system, delay wound healing, cause pain, and disorientation. Symptoms of malnutrition include dry and scaly skin, swollen gums, weight loss, thinned hair, and decaying teeth. Consistent food deprivation results in starvation which can lead to profound weakness, the inability to sustain even the smallest physical efforts, frailty, depression, apathy, increased urination, brady- cardia (slowed heart rate), hypertension, constant chills, fatigue, reduction in circulation and cardiac function, and increased risk of infections e.g., pneumonia, tuberculosis and gastrointestinal infections. Ongoing food deprivation may lead to death in 8-12 weeks. Studies examining the effects of food deprivation have found that food restrictions under circumstances of stress causes deficits in cognitive functions, impairs short-term memory and can lead to depression. Furthermore, poor diet coupled with lack of hygiene can lead to vitamin deficiency syndromes, a host of malnutrition diseases and death due to dysentery.

Caloric intake has been one lens through which adequacy (and severity) has been approached. This discussion remains unsettled. Pérez-Sales (2020: 15) proposes that prolonged food deprivation, which he defines as “less than 2000 calories/day for more than

two weeks” that “produces severe suffering in almost all human beings and that should, in most if not all cases, at least from a medical point of view, amount to torture”. More recently, the ICRC (2021: 43) has promoted the understanding that the

human body needs a diet of adequate quantity (sufficient amount of kilocalories, or kcal) and quality (balance among the various food groups) in order to maintain health. [...] Because all the nutritional requirements cannot be met by only one meal, a minimum of two meals should be served each day. The energy content of detainees ration should be 2,400Kcal at least.

The ICRC *Commentary to Geneva Convention IV*, relatedly, notes that the 1947 Government Experts assembled to debate the possibility “to refer to the calorific value of the food [...] rejected [such a solution] because of the difficulty of fixing a value which would be suitable in all latitudes and also because of the difficulty of giving sufficient details regarding the distribution of the calories to meet all cases”. Furthermore, according to the *Commentary to the Model Detention Act* (van Zyl Smit 2011), a detaining authority:

... should take appropriate advice from international agencies (such as the ICRC and United Nations bodies) on what constitutes a nutritious diet. The UN Food and Agriculture Organisation (FAO) recommends 1800 kcal per person per day as a minimum energy intake. A diet which drops below this minimum requirement cannot be justified by lack of resources.

The standards and caselaw above also consider the non-material aspects of food which, though related to material physical needs, un-

underscore the potent harms which can arise from the disregard of a prisoner's social, cultural, religious values and beliefs. This can be experienced "as a form of dehumanisation, humiliation and denigration" thus constituting "a powerful method to produce severe suffering and break identity" (Pérez-Sales 2020: 14). Non-physiological harms focus on the non-material meaning attributed to food, in terms of prisoner perceptions of fairness and experiences of punishment. As such, food becomes central to punishment, underscoring a prisoner's powerlessness, which can easily amount to degradation at the very least.

Related to the discussion here is the use of "minimum level of severity" test to assess whether the alleged conduct falls in the scope of the prohibition against torture and inhuman and degrading treatment. What role does this actually involve or serve? This serves as a lower threshold that encompasses a broader assessment than that simply of pain, though that too is included. It draws in considerations of "duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim" (*Ireland v. UK*: §162). For the ECtHR, it also serves a role analogous to article 1 of UNCAT's "lawful sanctions clause" – in that it seeks to exclude altogether forms of treatment that are viewed by adjudicators as being lawfully inherent to criminal justice practice. The Court has interpreted this in various ways as something other than difficult or "undoubtedly unpleasant or even irksome" (*Guzzardi v. Italy*, §107) requiring the conduct in question to be "discreditable and reprehensible", "distressing and humiliating" or "interfering with human dignity" (*Raninen v. Finland*: §50). When determining degrading acts, the Court has looked for treatment which "grossly humiliates [the victim] before others or drives to act against his will or conscience" (*Greek Case*

1969: §186) or "showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance" (*Strelets v. Russia*: §54).

From a legal perspective which holds fast to case-by-case analysis, there can of course be no hard and fast rules given the differences in individual needs based on age, sex, health etc. Given that a relative assessment is always needed, we can only take calorific numbers as guidance, albeit needed and useful for a practitioner. What can be confidently said is that the severity of pain arising from the deprivation of food can be based on duration (ICTY, *Prosecutor v. Krnojelac*, 2002: §183). The unclarity of the duration (also in terms of whether the deprivation was total or partial) has been commented on in a number of cases (including HRC, *Mika Miha v Equatorial Guinea*, 1994, §§6.4 and HRC, 1997, *Hill v Spain*, §13). The duration of deprivation is reasoned to therefore be associated with deterioration of well-being and, in turn, the accumulation of prisoner's pain. The case-law generally supports the reading that prolonged denial of an adequate quality or quantity of food enters the domain of at least ill-treatment. There is no requirement that there is total deprivation though that will likely move decision-makers towards a finding of torture – as severity and intentionality can be more strongly established in such a scenario. Complexity abounds.

Intentionality (and omission)

Standard discussions related to assessing food deprivation as torture also relate to intentionality and omission, as article 1 of the UN *Convention Against Torture* requires that severe pain must be inflicted intentionally for an act to constitute torture. An omission (a negative act) is likely to amount to torture as is a commission (a positive act), as it is

widely accepted that nothing in the drafting would indicate that “the drafters intended a narrow interpretation that would exclude conduct such as intentional deprivation of food, water, and medical treatment from the definition of torture” (Nowak 2006: 819; see also Nowak and McArthur 2008: 66). Boulesbaa (1999: 14) similarly finds that it would be “absurd to conclude that the prohibition of torture in the context of Article 1 does not extend to conduct by way of omission” (see also Rodley and Pollard 2006: 120). This was derived from the ECommHR’s finding in the *Greek Case* (1969: 461) that “the failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an ‘act’ of torture”.

Despite these understandings, the element of intent underscores action and commission in contrast to omission as that is in some ways associated with negligence. The ICTY has itself pointed this out where it stated that “the most characteristic cases of torture involve positive acts” (see *Prosecutor v. Delalić et al.*: §468; *Prosecutor v. Kunarac*: §483; *Prosecutor v. Brđanin*: §481). Following the *Greek Case*, it was only in 1998, in *Kurt v. Turkey*, where the Turkish state failed to investigate the applicant’s son’s disappearance that the ECtHR found that an omission amounted to an article 3 violation (and not torture at that).

The conventional understanding has it that intentionality can be easily discerned. The differentiation between intentionality (and towards torture) and negligence (and towards another form of ill-treatment) is often illustrated in the following scenario (UN Special Rapporteur on Torture (SRT) 2010: §34):

A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a

severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food for the purpose of extracting certain information, that ordeal, in accordance with article 1, would qualify as torture.

When referring to intentionality, Boulesbaa (1999: 20) argues:

The term, however, serves a very important function because it implies the exclusion of negligent conduct from the application of Article 1. The question then becomes: When does a particular conduct cease to be considered merely negligent. There is no reference to the particular conduct ceasing to be considered merely negligent. There is no reference to the question at any stage in the drafting of the Convention. In many systems of law, however, ‘intent’ is defined in terms of ‘specific’ and ‘general intent’, and negligence is determined by the reasonable standard under the circumstances. Thus, when a State fails to provide food and water to prisoners in its custody and is accused of torture by way of omission, such State would not be able to escape liability by claiming that its conduct was not intentional but was merely negligent outside the scope of Article 1.

This is further complicated from a macro perspective as there are clear systemic sources of the deprivation of food implicating resource limitations due to lack of funding, overcrowding and corruption (including where food is taken out of prison by staff and sold for profit (see, e.g., SPT Paraguay 2011: §60)). There is no question that “[s]ignificant financial resources are required in order to ensure its regular supply” (ICRC 2021: 31). Furthermore, the characterisation of the right to food

as a fundamental economic and social right also contributes to distorting the deprivation of food in detention contexts. This is due to the right to health being understood through a developmental prism and as less than justiciable and enforceable. When violations of such rights are pervasive, the law tends to attend to specific cases that are somehow aggravated and thus individuated. Otherwise, individual perpetrators and victims become difficult to identify. Whilst there is nothing in article 1 of the UNCAT that explicitly requires identifying an individual, this emerges as an implicit yet important processual requirement. More attention to the circumstantial and contextual is warranted.

A case-study on starvation in Haitian prisons, over a period where the prison population doubled without any increase in funding, directly implicates governmental decisions concerning prison food budgets in the ensuing harms (Schechter 2003: 1255-1256). Schechter thus argues that this can only be characterised as acquiescence, intentional and purposeful as it facilitates additional punishment and coerces prisoners to pay prison officials. She argues that intent is established as

the government knows that its budget is inadequate to meet the needs of the prison population. The prison administrators satisfy general intent either by tolerating the guards' thievery of the food with willful blindness or by stealing along with the prison guards. The guards fulfill the intent requirement by keeping the food from the prisoners, an act that clearly deprives the inmates of food and results in their suffering.

This cannot be said to be limited to Haiti as the UNODC (2010: 13) has observed that the prison food budget

... will rarely increase sufficiently to meet the nutritional requirements of the growing number of prisoners. Indeed especially in low-resource countries there will be no change in the budget allocated for food, thus prisoners will need to rely on additional food from their families and/or suffer the consequences of inadequate and low quality food. This will severely compromise prisoners' health. In the worst cases it can lead to prison deaths due to malnutrition.

A notable international authority who has paid special attention to prison food has been the UN SRT whose reports, particularly those from Manfred Nowak's tenure, are dotted with remarks on inadequacy of food. Beyond individual complaints about inadequacy of food, one way of quantifying quality for the SRT has also been through examining the state budget allocated to prison food as well as possibility of agricultural initiatives to allow for prisons to grow their own food – following it up on a number of country visits (SRT 2012: 334; SRT 2014: 9-10; SRT 2015: 22; SRT 2008: §546; see also budgetary discussion around food in *Segheti v. the Republic of Moldova*, and *Ciorap v. the Republic of Moldova* (No. 3), where violations were found). Expenditure on prisoner food has also been a point of scrutiny by the CPT and SPT in certain contexts (eg. CPT Greece 2020: §117; CPT North Macedonia 2021; SPT Poland 2020: §§100-101).

Slow and systemic harm has long been an issue for decision-makers, who tend to look upon individual, intense and spectacular events as torture and those which are born out of the detention regime and environment as other forms of ill-treatment (on this point see Başoğlu 2017: 140-144 and see generally Berlant 2007). Under Article 20 of the UNCAT, the CAT is empowered to conduct a confidential inquiry of a member state (who

has opted into this provision) upon receipt of “reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party”. The CAT (1993: §39) has advanced a working definition of systematic torture as where:

Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.

We must bear in mind that this procedure does not look at individual cases per article 1 but at the systemic conditions prevailing in a state. The working definition, as it looks away from intent, has proven relatively expansive. Monina (in Nowak 2019: 554) finds that the ten inquiries to date on the whole (though not consistently) have not required an “explicit Government policy instructing intelligence or law enforcement bodies to use torture”. The perspective on offer here may be usefully reading intentionality into specific assessments of deprivation of food where it is also systematic.

According to conventional interpretive orientations, deprivation of food has been assessed by decision- and policy-makers alike as follows: i. planned and prolonged deprivation of food in an interrogation context to force a confession or as punishment of a prisoner resulting in severe health consequences (physical or psychological) would conceivably amount to torture (not that a single international or re-

gional case has conclusively decided so); ii. the provision of insufficient, inedible or non-nutritious food leading to severe pain (as elements of intention and purpose per article 1 remain questionable) adds or amounts to inhuman treatment or punishment; and, iii. deprivation of food due to systemic shortages, or being forced to eat in a humiliating manner (where intention, purpose, severity are questionable) may amount to degrading treatment.

Conclusion

International and regional bodies directly connect the adequacy of food to respect for dignity, freedom from torture and ill-treatment as well as the right to health – and particularly as depending on duration, quality, quantity and variety. What constitutes inadequate food remains complex as it is contingent on both material and non-material considerations, including its quality (content, nutritiousness, edibility, variety, wholesomeness), its quantity (calorie, substantiveness, balance), its preparation (hygiene, respect to the individual and community), its provision and consumption (when, how and where it is to be eaten, regularity, accessibility, warmth/cold), its socio-cultural suitability (to religious and cultural values) and its developmental suitability (for pregnant or breast-feeding mothers and children). Furthermore, its restriction is prohibited as a disciplinary punishment, and the adequacy of food is to be supervised by a competent professional. The assessment of food deprivation as torture or ill-treatment is further complicated by obscurity of severity and narrow readings of intentionality.

So, what are the implications here? The complexity of food provision is indeed complex – as it draws in a multitude of considerations. Yet, there is sufficient information and regulation to allow for a clear and criti-

cal reflection in practice (detection, documentation, adjudication) – perhaps even more so with the systematic review presented by this article. Whilst there is no question about how often food is complained about by prisoners, the paramount challenge here is to be more attentive to the suffering it can produce – that it is not simply a background factor because it is a basic need, that its inadequacy not only exacerbates other suffering but that it can produce real suffering in and of itself.

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