

## **HIV Testing of Specific Populations: Recruits of the Armed Forces**

This paper was prepared by The Canadian HIV/AIDS Legal Network for UNAIDS in 2002 addressing HIV testing for peacekeeping forces. The issues raised are similar to those faced by recruits of the armed forces in general and can help frame the discussion in this area.

### **HIV Testing for Peacekeeping Forces: Legal and Human Rights Issues**

In 2001, the United Nations Security Council established an Expert Panel to study the issue of whether the UN should institute HIV testing of peacekeeping personnel. This article, based on a 9 July 2002 presentation to the 14<sup>th</sup> International AIDS Conference (abstract TuOrG1173), reports on the findings of a paper prepared for the Expert Panel by the Canadian HIV/AIDS Legal Network. The paper examined whether it is permissible for the UN to implement mandatory HIV testing of its peacekeeping personnel, and whether HIV-positive UN peacekeeping personnel should be excluded or restricted from service on the basis of their HIV status or HIV disease progression. The article describes some of the court cases in which these issues have been considered; discusses the importance of analyzing such issues in the context of a human rights-based approach to the pandemic; and formulates a series of key principles for guiding UN decision-making. The article concludes that a policy of mandatory HIV testing for all UN peacekeeping personnel cannot be justified on the basis that it is required in order to assess their physical and mental capacity for service; that HIV-positive peacekeeping personnel cannot be excluded from service based on their HIV status alone, but only on their ability to perform their duties; and that the UN cannot resort to mandatory HIV testing for all UN peacekeeping personnel to protect the health and safety of HIV-negative personnel unless it can demonstrate that alternatives to such a policy would not reduce the risk sufficiently. In the end, the Expert Panel unanimously rejected mandatory testing and instead endorsed voluntary HIV counselling and testing for UN peacekeeping personnel.

### **Introduction**

In Resolution 138, adopted on 17 July 2000, the Security Council expressed “concern at the potential damaging impact of HIV/AIDS on the health of international peacekeeping personnel, including support personnel.”<sup>i</sup> The Joint United Nations Programme on HIV/AIDS (UNAIDS) convened a strategy meeting in Sweden in December 2000 to address the broad array of issues concerning HIV/AIDS and peacekeeping. Subsequently, UNAIDS, in collaboration with the UN Department of Peacekeeping, established an Expert Panel on HIV Testing in UN Peacekeeping Operations to analyze and formulate a comprehensive position on the issue of HIV testing. The Expert Panel convened in Bangkok in late 2001.<sup>ii</sup>

A paper was commissioned to contribute to the deliberations of the UNAIDS Expert Panel.<sup>iii</sup> The main questions addressed by the paper are as follows:

- Is it permissible for the UN to implement mandatory HIV testing of its peacekeeping personnel?
- Can HIV-positive UN peacekeeping personnel be excluded or restricted from service on the basis of their HIV status or HIV disease progression?

These two questions are closely linked because, as an employer, the UN is only entitled to require information about the HIV status of its peacekeeping personnel or applicants for service (by mandatory testing or otherwise) if it can legitimately use that information to make employment-related decisions.

## Court Judgments

There are a few court cases in which these questions have been considered in a military context. The following is a brief description of the most important cases:

- *N v Minister of Defence* (Namibia):<sup>iv</sup> At issue was the ability of the Namibian Defence Force to refuse to enlist an applicant for service on the basis of his HIV-positive status alone. The applicant's challenge before the Labour Court of Namibia succeeded.
- *Hoffmann v South African Airways* (South Africa):<sup>v</sup> At issue was the ability of South African Airways (SAA) to refuse to employ an HIV-positive recruit as a cabin attendant solely on the basis of his HIV status. The applicant's challenge failed initially, but succeeded on appeal to the Constitutional Court of South Africa.<sup>vi</sup>
- *A. v Union of India* (India):<sup>vii</sup> At issue was the ability of the Indian Navy to refuse to re-engage a crew member in the Submarine Branch solely on the basis of his HIV status. The crew member's challenge failed before the High Court of Judicature at Bombay.
- *X v Commonwealth of Australia* (Australia):<sup>viii</sup> At issue was the ability of the Australian Defence Force to terminate the service of an enlisted soldier solely on the basis of his HIV status. The soldier's challenge succeeded before a human rights tribunal, was returned to the tribunal for a rehearing, and ultimately resulted in a settlement on undisclosed terms.
- *Thwaites v Canada (Canadian Armed Forces)* (Canada):<sup>ix</sup> At issue was the ability of the Canadian Armed Forces to terminate the service of an enlisted soldier on the basis of his HIV-positive status and related disease progression. The soldier's challenge succeeded before a human rights tribunal and was upheld on review by a court.

## The Importance of a Human Rights-Based Approach to HIV/AIDS

Global public health and other experts have long emphasized the need to protect, rather than limit, the human rights and fundamental freedoms of people with HIV/AIDS (and those vulnerable to HIV infection), and to integrate them into society to the fullest extent possible, as the most effective means of preventing the spread of HIV and mitigating the social and economic impact of the pandemic.

This is generally referred to as a “human rights–based approach” – ie, an approach that protects, respects, and fulfils (rather than restricts) human rights.<sup>x</sup> The International Guidelines on HIV/AIDS and Human Rights provide a framework for a

human rights–based approach by outlining in concrete and practical terms how human rights standards apply in the context of HIV/AIDS.<sup>xi</sup> A human rights–based approach is important because it is the most effective means of preventing the spread of HIV and of mitigating the social and economic impact of AIDS, and because it is morally right. The importance of adopting a human rights–based approach to HIV/AIDS has been affirmed by institutions such as the UN High Commissioner for Human Rights, UNAIDS, the World Health Organization, and the International Labour Organization.

The fundamental importance of human rights, and the preponderance of expert opinion that protection, rather than restriction, of human rights is the most effective means of protecting the public health from HIV transmission, mean that particularly serious reasons would have to be put forward by the UN before measures that infringe upon the human rights of HIV-positive peacekeeping personnel could be considered acceptable.

Relevant provisions in the Charter of the United Nations, the Universal Declaration of Human Rights, and other UN instruments demonstrate a commitment on the part of the UN to act in conformity with international human rights law. In particular, in the Declaration of Commitment on HIV/AIDS,<sup>xii</sup> the UN General Assembly affirmed its commitment to provide leadership in the protection of human rights, including in the context of the employment of people living with HIV/AIDS.

### **Principles Derived from the Right to Equality of Treatment in Employment**

An analysis of the elements of human rights law that protect the right of people living with HIV/AIDS to equality of treatment in employment gives rise to the following key principles for guiding UN decision-making with respect to service by peacekeeping personnel.

- HIV-positive peacekeeping personnel are entitled to equality of treatment in employment. This includes protection against discrimination and positive assistance from employers.
- A decision to exclude or restrict UN peacekeeping personnel from service is not discriminatory where the inability to perform the inherent requirements of the job is an issue.
- The UN's purpose and underlying reasons in considering whether HIV status (or a given stage of HIV disease progression) should be identified as an inherent job requirement for UN peacekeeping service must not be founded on prejudice or stereotype, but rather on sound employment and public health practices.
- The mental and physical capacity of peacekeeping personnel to perform their duties, the health and safety of HIV-positive peacekeeping personnel, and the health and safety of others (ie, HIV-negative peacekeeping personnel) – all relate to the operational effectiveness of peacekeeping missions and, as such, are legitimate subjects of UN concern.
- In order for HIV status (or a given stage of HIV disease progression) to be characterized as an inherent job requirement of UN peacekeeping service, the UN would have to establish that it is *reasonably necessary* to address the stated concern. To be reasonably necessary:

- the UN must show that the risk assessment is based on the most *authoritative and up-to-date medical, scientific and statistical information* available, and not on impressions, assumptions, speculations or unfounded generalizations;
- the risk assessment must be made on an *individualized* basis;
- the identified risk must be *significant*. Whether the risk is significant must be measured on a comparative basis, in the context of a particular job, and against other risks presented by UN peacekeeping service. If risks of comparable magnitude are acceptable in the work environment, risks posed by an HIV-positive person cannot be considered significant. This “relative risk” standard recognizes that human endeavours are not totally risk free and that some risk is therefore tolerable;
- the UN must establish that the requirement is *not disproportionate* – ie, that to address the concern at issue, there are no other means less prejudicial to the rights to equal treatment of HIV-positive peacekeeping personnel. This requires the UN to search for reasonable alternatives before resorting to the imposition of a blanket exclusionary policy.

### Principles Derived from the Right to Privacy

An analysis of the elements of human rights law that protect the right of people living with HIV/AIDS to privacy of information about their HIV status gives rise to the following key principles for guiding UN decision-making with respect to mandatory HIV testing of peacekeeping personnel.

- UN peacekeeping personnel are entitled to privacy of information about their health, including, in particular, their HIV status. This privacy may be infringed only in limited circumstances.
- The UN bears the burden of justifying infringements on this right to privacy.
- The physical and mental capacity of UN peacekeeping personnel to perform their duties, the health and safety of HIV-positive peacekeeping personnel, and the health and safety of others, all relate to the operational effectiveness of UN peacekeeping missions. They are legitimate subjects of UN concern and are thus possible sources of limitations on privacy rights.
- The public health importance of protecting the human rights and fundamental freedoms of HIV-positive peacekeeping personnel requires that the least intrusive, least restrictive measures be used to address the foregoing UN concerns.
- Mandatory employment-related medical examinations to assess the fitness of employees for the inherent requirements of their jobs are permissible.
- A stringent approach to the protection of privacy requires that the UN demonstrate that the HIV testing of UN peacekeeping personnel, as part of such medical examinations, is *necessary*. To be necessary:
  - if the objective of HIV testing is to respond to and identify the problem or risk, the risk must be *real* rather than hypothetical, and it must be *significant*;
  - HIV testing must be the *most effective* means of addressing the problem, in that alternatives would not suffice; and

- the UN's arguments in this regard must be supported by concrete evidence.
- If a requirement for HIV testing can be justified, it must be implemented in a minimally intrusive manner. In particular:
- the informed consent of peacekeeping personnel must be sought before HIV testing is carried out; and
- a refusal to give informed consent must be respected in its entirety, and cannot be circumvented by surrogate forms of HIV testing.<sup>xiii</sup>

## **What Conclusions Can Be Drawn?**

### **Physical and mental capacity for peacekeeping service**

A policy of mandatory HIV testing for all UN peacekeeping personnel could not be justified on the basis of the necessity to assess physical and mental capacity for service. This is because HIV-positive status alone is not determinative of a lack of capacity for service. HIV-positive individuals who are asymptomatic or symptomatic may nonetheless function at full capacity. HIV testing should only be required when, in the opinion of a qualified medical practitioner, it becomes necessary to assess physical and mental capacity for peacekeeping service.

HIV-positive peacekeeping personnel cannot be excluded from service, and HIV-positive applicants for peacekeeping service cannot be refused employment, based on their HIV status alone. The UN must undertake appropriate and individualized assessments of the physical and mental capacity of HIV-positive people so that employment-related decisions can be made on the basis of real, and not perceived, facts.

A categorized approach to assessment and restriction from service – ie, downgrading all those with symptomatic HIV infection – regardless of the nature, extent, and impact of such symptoms upon the individual – should be avoided. The UN must make reasonable adjustments and/or provide reasonable accommodation to HIV-positive peacekeeping personnel to enable them to continue to serve as long as possible.

### **Health and safety of others**

The ability of HIV-positive UN peacekeeping personnel (or applicants for service) to serve with reasonable safety to others is a legitimate subject for concern on the part of the UN in relation to its operational effectiveness.

Beyond this general principle, however, the authorities are not prescriptive. In general terms, it is clear that before the UN could resort to a blanket rule of mandatory HIV testing for UN peacekeeping personnel, or to exclusion or restriction from service, in order to protect the health and safety of others:

- it must establish that reasonable alternatives to such a rule (including, but not limited, to the ability to accommodate people so as to lessen the risk) do not reduce the risk to the point that it is of comparable magnitude to other risks presented by peacekeeping service; and
- it must do so on the basis of the most authoritative and up-to-date medical, scientific, and statistical information available.

## Conclusions of the UN Expert Panel

The Expert Panel on HIV Testing in UN Peacekeeping Operations unanimously rejected mandatory testing and endorsed voluntary HIV counselling and testing (VCT) for UN peacekeeping operations. The Panel concluded that VCT is the most effective means of preventing the transmission of HIV, including among peacekeepers, host populations, and the spouses and partners of peacekeepers. The Panel stressed that VCT should be provided to peacekeeping personnel within a comprehensive and integrated package of HIV prevention and care services.

*This paper was prepared by Ralf Jürgens. Lead author of the paper on which this paper is based is Lori Stoltz, who was President of the Network when the paper was written. The third contributing author was David Patterson, Director of International Programs and Capacity Building for the Network.*

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<sup>i</sup> S/RES/1308 (2000) 17 July 2000, OP 1 and 5.

ii See UNAIDS. Report of the UNAIDS Expert Panel on HIV Testing in United Nations Peacekeeping Operations. 28-30 November 2001, Bangkok, Thailand. Available via [www.unaids.org/publications/documents](http://www.unaids.org/publications/documents) by clicking on “Uniformed Services.”

iii The full background paper on “Mandatory HIV Testing of UN Peacekeeping Forces: Legal and Human Rights Issues” prepared by the Canadian HIV/AIDS Legal Network for UNAIDS is available via [www.unaids.org/publications/documents](http://www.unaids.org/publications/documents) by clicking on “Uniformed Services.”

iv Labour Court of Namibia, delivered 2000 05 10, Case No. LC 24/98.

v CCT 17/00, Constitutional Court of South Africa (28 September 2000).

vi Although this case did not arise in a military setting, it is included because the rationale advanced by SAA in support of its position was similar to arguments that have been put forward in the military setting.

vii Writ Petition No. 1623 01 2000, High Court of Judicature at Bombay (28 November 2000).

viii [1999] HCA 63.

ix [1993] CHR No. 9 (7 June 1993); affirmed Canada (Attorney General) v Thwaites, [1994] 3 FC 38 (TD).

x UN Office of the High Commissioner for Human Rights. A Human Rights–Based Approach to HIV/AIDS. UN General Assembly Special Session on HIV/AIDS, 25-27 June 2001, at para 4.

xi The International Guidelines were published jointly by the Office of the High Commissioner for Human Rights and UNAIDS in February 1998 and have since been used by governments, human rights institutions, UN agencies and bodies, non-governmental organizations, and people living with HIV/AIDS, as a tool for HIV/AIDS and human rights training, policy formation, the development of HIV/AIDS related legislation, and advocacy. The Guidelines are available via [www.unaids.org](http://www.unaids.org).

<sup>xii</sup> Adopted by the General Assembly in June 2001. Available on the website of UNAIDS at [www.unaids.org/UNGASS/index.html](http://www.unaids.org/UNGASS/index.html).

<sup>xiii</sup> The standard form of testing for HIV involves detecting the presence of HIV antibodies in the blood. Examples of surrogate testing are CD4 count measurement and P-24 antigen testing.