HIV TESTING OF UN PEACEKEEPING FORCES: LEGAL AND HUMAN RIGHTS ISSUES

Canadian HIV/AIDS Legal Network

9 September 2001
(Revised)

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EXECUTIVE SUMMARY

What is the Purpose of this Paper?

At its meeting on 17 July 2000, the Security Council focussed specifically on HIV/AIDS in UN peacekeeping operations. In Resolution 1308, the Council expressed "... concern at the potential damaging impact of HIV/AIDS on the health of international peacekeeping personnel, including support personnel" and, among other things, encouraged "... UNAIDS to continue to strengthen its cooperation with interested Member States to further develop its country profiles in order to reflect best practices and countrys' policies on HIV/AIDS prevention, education, testing, counselling and treatment".[1]

In response to Resolution 1308, the UNAIDS Secretariat convened a strategy meeting in SWEDINT, Sweden from 11-13 December 2000 to address the broad array of issues concerning HIV/AIDS and peacekeeping. Further to the matters discussed at that meeting, the UNAIDS Executive Director has established the UNAIDS Expert Panel on HIV Testing in UN Peacekeeping Operations to analyze and formulate a comprehensive position on the issue of HIV testing. This Expert Panel will convene in New York on 17-18 September 2001 to begin its work.

The purpose of this paper is to contribute to the deliberations of the UNAIDS Expert Panel by reviewing the key legal and human rights principles that should guide the development of an HIV testing policy for UN peacekeeping personnel and the inclusion of people living with HIV/AIDS in peacekeeping service.

What are the Main Questions Addressed in the Paper?

The main questions addressed by the paper are as follows:

(1) Is it permissible for the UN to implement mandatory HIV testing of its peacekeeping personnel? and

(2) 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. This is because an employer such as 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 – i.e., in accordance with relevant principles of international human rights law – use that information to make employment-related decisions such as restriction or exclusion from service.

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[1] S/RES/1308 (2000) 17 July 2000, OP 1 and 5.

Have these Questions been Considered by Courts?

Yes. There are only a few cases, however, in which these questions have been considered specifically in the military context. The most important of those we have been able to identify are as follows:

- *N v. Minister of Defence* (Namibia): At issue in this case 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 service applicant's challenge before the Labour Court of Namibia succeeded.

- *Hoffmann v. South African Airways* (South Africa): At issue in this case was the ability of South African Airways 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. Although this case did not arise in the military setting, it is included because the rationales advanced by SAA in support of its position were similar to arguments that have been put forward in the military setting.

- *A. v. Union of India* (India): At issue in the case 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. The Commonwealth of Australia* (Australia): At issue in this case 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 the human rights tribunal to which he complained, was returned to the tribunal for a re-hearing and ultimately resulted in a settlement on undisclosed terms.

- *Thwaites v. Canada (Canadian Armed Forces)* (Canada): At issue in this case 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 the human rights tribunal to which he complained and was upheld on review by a court.

All of these cases are reviewed in the paper, together with other important sources of guidance.

How is the Paper Organized?

Following three brief sections which describe the Task, Issues and Sources considered, the paper addresses 4 substantive areas as set out below.

1. ***Importance of the Human Rights-Based Approach to HIV/AIDS***

This section explains that a human rights-based approach to HIV/AIDS is one that protects, respects and fulfils - rather than restricts - the human rights and fundamental freedoms of those who are HIV positive and vulnerable to HIV infection. A human rights-based approach to HIV/AIDS is important because it is (as affirmed by institutions such as the UN High Commissioner for Human Rights, UNAIDS, the World Health Organization and the International Labour Organization) the most effective means of preventing the spread of HIV/AIDS and of mitigating the social and economic impact of this pandemic. A human rights-based approach to HIV/AIDS is also important because it is morally right.

2. ***Role and Responsibilities of the UN and Security Council***

This section reviews provisions in the Charter of the United Nations and in other UN instruments that demonstrate commitment on the part of the UN and Security Council to act in conformity with international human rights law including, in particular, the Universal Declaration of Human Rights. The discussion highlights the Declaration of Commitment on HIV/AIDS in which the General Assembly affirmed its commitment to provide leadership in the protection of human rights in the employment context for people living with HIV/AIDS.

3. ***Service by UN Peacekeeping Personnel with HIV/AIDS***

This section analyzes the principles of human rights law that protect the right of people living with HIV/AIDS (including UN peacekeeping personnel) to equality of treatment in employment. The section explains:

- that HIV infection is considered a disability whether an individual is asymptomatic or symptomatic;

- that the right to equality of treatment in employment includes the right not to be discriminated against on the basis of disability in employment-related decisions such as restriction or exclusion from service;

- that employers can nonetheless legitimately distinguish between employees on the basis of characteristics, qualifications or standards that can be said to be "inherent requirements" of the job; and

- reviews cases that have arisen in the military (or a similar) context in which courts have addressed the question whether HIV positive individuals could be refused employment or excluded from employment on the basis of their HIV status.

This section also discusses the reasons why "off duty" conduct by peacekeeping personnel presenting a risk of HIV transmission to others is an appropriate matter for UN concern and intervention. It concludes with a list of Key Principles drawn from the cases and other authorities to help guide UN decision-making in this area. Those Key Principles are reproduced in their entirety (together with others from elsewhere in the paper) in Appendix I to this Executive Summary.

4. ***Mandatory HIV Testing of UN Peacekeeping Personnel***

This section analyzes the principles of human rights law that protect the right of people living with HIV/AIDS to the privacy of information about their health including, in particular, their HIV status. The section explains that:

- this right to privacy may be infringed, but only in certain limited circumstances; and

- reviews cases in which mandatory testing programmes have been challenged in order to better understand the circumstances in which employers are permitted to require employees to submit to testing.

This section also provides a list of Key Principles to guide UN decision-making in this area that are reproduced in the compilation found at Appendix I to this Executive Summary.

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 that it is necessary to assess their 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 and symptomatic may nonetheless function at full capacity. Rather, HIV testing should only be required at the point that it becomes necessary (i.e., on the basis of knowledgeable medical opinion) to assess physical and mental capacity for peacekeeping service.

HIV positive peacekeeping personnel cannot be excluded from service based on their HIV status alone. Nor can HIV positive applicants for peacekeeping service be refused employment based on their HIV status alone.

Rather, the UN must undertake appropriate and individualized assessment of the physical and mental capacity of HIV positive applicants for service and peacekeeping personnel in relation to physical and mental capacity for service 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 (i.e., down-grading all persons with symptomatic HIV infection regardless of the nature, extent and impact of symptomatology 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 (i.e., HIV negative peacekeeping personnel and/or civilians of host countries) during the course of employment is a legitimate subject for concern on the part of the UN in relation to its operational effectiveness.

Beyond this general proposition, however, the authorities are not prescriptive. In general terms, however, it is clear that before the UN could resort to a blanket rule of mandatory HIV testing for UN peacekeeping personnel and/or exclusion or restriction from service on this basis (i.e., to protect the health and safety of others):

(1) it must establish that reasonable alternatives to such a rule (including, but not limited, to the ability to accommodate individuals 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

(2) it must do so on the basis of the most authoritative and up-to-date medical, scientific and statistical information available.

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APPENDIX I

COMPILATION OF KEY PRINCIPLES

General:

1. The UN should act in conformity with international human rights law including, in particular, the human rights and fundamental freedoms protected by the UN Charter and UDHR.

2. Human rights enactments such as the UDHR are instruments intended to give rise to individual rights of vital importance. As such, the UN should interpret those rights expansively, not restrictively.

3. Conversely, limitations upon protected rights should be restrictively interpreted by the UN.

Principles Regarding Service:

4. HIV positive peacekeeping personnel are entitled to equality of treatment in employment. This includes protection against discrimination and positive assistance from employers.

5. A decision to exclude or restrict UN peacekeeping personnel from service is not discriminatory if the person is unable to perform the inherent requirements of his or her job.

6. 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 prejudices or stereotypes but, rather, in the interests of sound employment and public health practices.

7. The mental and physical capacity of peacekeeping personnel for the demands of service, the health and safety of HIV positive peacekeeping personnel, and the health and safety of others (i.e., HIV negative peacekeeping personnel and/or civilians of host countries) relate to the operational effectiveness of peacekeeping missions and, as such, are legitimate subjects of UN concern.

8. 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":

    (a) If the concern is one of health and safety, 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.

(b) The risk assessment must be made on an individualized basis.

(c) 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 as against other risks presented by UN peacekeeping service. If risks of comparable magnitude are acceptable in the work environment, then 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.

(d) The UN must establish that the requirement is not disproportionate in that there are no other means less prejudicial to the rights of HIV positive peacekeeping personnel to equal treatment to address the concern at issue. This requires the UN to search for reasonable alternatives before resorting to imposition of a blanket exclusionary policy or rule (including the ability to accommodate the individual to permit him or her to do the job or lessen the risk short of undue hardship).

Principles Regarding Testing:

9. UN peacekeeping personnel are entitled to the privacy of information about their health including, in particular, their HIV status. This privacy may be infringed only in limited circumstances.

10. The UN bears the burden of justifying infringements upon this right to privacy on the part of peacekeeping personnel.

11. The physical and mental capacity of UN peacekeeping personnel for the demands of service, the health and safety of HIV positive peacekeeping personnel, and the health and safety of others (i.e., HIV negative peacekeeping personnel and/or civilians of host countries) relate to the operational effectiveness of UN peacekeeping missions. They are legitimate subjects of UN concern and therefore possible sources of limitations on privacy rights.

12. The public health importance of protecting the human rights and fundamental freedoms of HIV positive peacekeeping personnel requires that the least intrusive, least restrictive measure be used to address the foregoing UN concerns (i.e., for physical and mental capacity and health and safety).

13. Mandatory employment-related medical examinations to assess the fitness of employees for the inherent requirements of their jobs are permissible.

14. 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 a medical examination is necessary. To be "necessary":

(a) if the objective of HIV testing is to respond to and identify the problem or risk, it must be real rather than hypothetical and it must be significant;

(b) HIV testing must be the most effective means of addressing the problem, in that alternatives would not suffice; and

(c) the UN's arguments in this regard must be supported by concrete evidence.

15. If a requirement for HIV testing can be justified, it must be implemented in a minimally intrusive manner. In particular:

(a) the informed consent of peacekeeping personnel must be sought before HIV testing is carried out; and

(b) a refusal to give informed consent must be respected in its entirety, and cannot be circumvented with surrogate HIV tests (i.e., CD4 counts or P24 Antigen testing).

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HIV TESTING OF UN PEACEKEEPING FORCES: LEGAL AND HUMAN RIGHTS ISSUES

Canadian HIV/AIDS Legal Network[2]

9 September 2001
(Revised)

I. TASK

This paper reviews the key legal and human rights principles that should guide the development of an HIV testing policy for United Nations ("UN") peacekeeping personnel and the inclusion of people living with HIV/AIDS in peacekeeping service.

II. ISSUES

The following questions are at issue:

(1) Is it permissible for the UN to implement mandatory HIV testing[3] of its peacekeeping personnel? and

(2) Can HIV positive UN peacekeeping personnel be excluded or restricted from service on the basis of their HIV status or HIV disease progression?

Although these two questions seem distinct, they are inextricably linked. This is because an employer such as 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 – i.e., in accordance with relevant principles of international human rights law – use that information to make employment-related decisions such as restriction or exclusion from service.

This paper will therefore review the legal principles relating to service by UN peacekeeping personnel with HIV/AIDS first, followed by the legal principles relating to mandatory HIV testing.

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[2] Lori Stoltz, Goodman and Carr LLP, Barristers and Solicitors, Canada. The author gratefully acknowledges the assistance of Ralf Jürgens and David Patterson, Canadian HIV/AIDS Legal Network, and of Dayna Aaron and Rachel Craig, Goodman and Carr LLP.

[3] The term "mandatory testing" as used in this paper should be understood as referring to circumstances in which HIV testing is required of all individuals seeking to avail themselves of a service or to participate in an activity regardless whether that service or activity is voluntary or required. This usage is consistent with definition of the term by the World Health Organization ("WHO"): Unlinked Anonymous Screening for the Public Health Surveillance of HIV Infections, Proposed International Guidelines, GPA/SFI/89.3, Geneva, June 1989, Annex 7.

III. RELEVANT CASE LAW AND OTHER SOURCES

There are few reported cases in which these issues have been considered by courts or other tribunals in the military context. The most important of those we have been able to identify are as follows:

- ***N v. Minister of Defence*** **(Namibia):**[4] At issue in this case was the ability of the Namibian Defence Force ("NDF") to refuse to enlist an applicant for service on the basis of his HIV positive status alone. The service applicant's challenge before the Labour Court of Namibia succeeded.

- ***Hoffmann v. South African Airways*** **(South Africa):**[5] At issue in this case 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. Although this case did not arise in the military setting, it is included because the rationales advanced by SAA in support of its position were similar to arguments that have been put forward in the military setting.

- ***A. v. Union of India*** **(India):**[6] At issue in the case 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. The Commonwealth of Australia*** **(Australia):**[7] At issue in this case was the ability of the Australian Defence Force ("ADF") to terminate the service of an enlisted soldier solely on the basis of his HIV status. The soldier's challenge succeeded before the human rights tribunal to which he complained, was returned to the tribunal for a re-hearing and ultimately resulted in a settlement on undisclosed terms.

- ***Thwaites v. Canada (Canadian Armed Forces)*** **(Canada):**[8] At issue in this case was the ability of the Canadian Armed Forces ("CAF") 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 the human rights tribunal to which he complained and was upheld on review by a court.

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[4] Labour Court of Namibia, delivered 2000 05 10, Case No.: LC 24/98.

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

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

[7] [1999] HCA 63.

[8] [1993] C.H.R.D. No. 9 (7 June 1993); affirmed *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38 (F.C.T.D.).

These cases will be discussed in further detail below, along with others of relevance.

Also relevant to this discussion are international human rights instruments that may be reasonably be said to establish obligations on the part of the UN. Chief among these are the Charter of the United Nations ("UN Charter") and the Universal Declaration of Human Rights ("UDHR").[9] Relevant provisions of the UN Charter and the UDHR will therefore be reviewed below, together with related commentary, and policy statements, guidelines and other documents issued by key international organizations with relevant expertise such as the World Health Organization[10] ("WHO") and the International Labour Organization ("ILO").[11] Important sources of expert guidance from within the UN system to which reference will also be made in this paper include the UN Office of the High Commissioner on Human Rights[12] and the Human Rights Commission of the UN Economic and Social Council.[13]

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[9] Reference will be made to corresponding provisions of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR"), and related commentary, for interpretative assistance where relevant.

[10] The WHO's main functions include giving worldwide guidance in the field of health and setting global standards for health.

[11] The ILO has a tripartite constitution including representatives of government employers and employees, and develops and promulgates international labour standards to be used as a benchmark for the provision of human rights by intergovernmental agencies and international non-governmental agencies.

[12] The UN High Commissioner for Human Rights is the UN official with principle responsibility for UN human rights activities, charged with tasks including promoting and protecting the effective enjoyment by all of human rights, promoting international cooperation for human rights, and stimulating and coordinating action on human rights in the UN system.

[13] The UN Commission on Human Rights is the principal intergovernmental policy-making body for human rights at the UN, providing overall policy guidance, studies of human rights problems, development and codification of new international norms, and monitoring of the observance of human rights around the world.

IV. IMPORTANCE OF A HUMAN RIGHTS-BASED APPROACH TO HIV/AIDS

It is essential, at the outset, to have regard for the long-standing and widespread emphasis by global public health and other experts upon the need to protect rather than limit the human rights and fundamental freedoms of people with HIV/AIDS (and those vulnerable to HIV infection), integrating 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"; one that protects, respects and fulfills – rather than restricts – human rights.[14] The *International Guidelines on HIV/AIDS and Human Rights* that will be referred elsewhere in this paper provide a framework for a human rights-based approach to the HIV/AIDS pandemic by outlining how human rights standards apply in the context of HIV/AIDS in concrete and practical terms.[15]

The UN Office of the High Commissioner for Human Rights has explained the inextricable link between human rights and the spread of HIV/AIDS as follows:

> The relationship between HIV/AIDS and human rights appears in three areas:
>
> - *Increased vulnerability*: Certain groups are more vulnerable to contracting the HIV virus because they are unable to realize their civil and political, and economic, social and cultural rights. Individuals who are denied the right to freedom of association and freedom of information may be precluded from discussing issues related to HIV/AIDS, participating in AIDS service organizations and self-help groups, and taking other preventive measures to protect themselves from HIV infection, for example.
>
> - *Discrimination and stigma*: The rights of people living with HIV/AIDS often are violated because of their presumed or known HIV status, causing them to suffer both the burden of the disease and the consequential loss of other rights. This, in turn, contributes to the vulnerability of others to infection, since HIV-related stigma and discrimination discourages individuals infected with and affected by HIV from contacting health and social services. The result is that those most needing information, education and counselling will not benefit even where such services are available.
>
> - *Impedes an effective response*: Effective HIV prevention, treatment, support and care strategies are hampered in an environment where human rights are not respected.

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[14] 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.

[15] The *International Guidelines* were published jointly by the Office of the High Commissioner for Human Rights and UN AIDS 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, developing HIV/AIDS related legislation and advocacy: ibid, at footnote 2.

> ... An effective international response to the pandemic therefore must be grounded in respect for all civil, cultural, economic, political, and social rights as well as the right to development, in accordance with international human rights norms. [16]

Along these same lines, the Secretary-General of the UN Human Rights Commission has characterized discrimination and stigmatization of HIV positive persons as "hazardous to public health".[17]

As noted by the Special Rapporteur[18] to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, Economic and Social Council (the "Special Rapporteur"), the importance of a human rights-based approach to HIV/AIDS lies not just in its public health merit but in the fact that it is morally right:

> 165. ... there is a strong public health rationale for avoiding HIV- and AIDS-related discrimination, as this causes unnecessary suffering and can lead to a deterioration in the health and well-being of those already sick as a consequence of AIDS. Moreover, the threat of discrimination can deter many people who may be infected with HIV from coming forward for HIV testing, thus pushing AIDS underground and jeopardizing educational and other efforts to prevent the further spread of HIV. ...
>
> 173. The call to respect the human rights of all is not solely a requirement of effective public health programmes, [however,] but a moral imperative which binds us all. As Hausermann has written:
>
> > "AIDS is not simply a question of rights, but also of humanity. Any abuse of human rights impugns human dignity and thus affects us all, wounding not only the humanity of those suffering the abuse and those directly responsible for it, but each of us: for humanity is an interdependent whole. None of us should be indifferent to the suffering of others."[19]

Accordingly, *The Global Strategy Framework on HIV/AIDS*, endorsed by the UN General Assembly in December 2000, adopts an approach to HIV/AIDS "founded on the respect, protection and

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[16] 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 paras. 2 and 3.

[17] "Report of the Secretary-General on international and domestic measures taken to protect human rights and prevent discrimination in the context of HIV/AIDS", E/CN.. 4/1995/45 22 December 1994, at para. 11.

[18] The "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" developed by a group of distinguished experts in international law convened by the International Commission of Jurists and others, emphasize the importance of work undertaken by UN special rapporteurs (among others) in the field of human rights: *Human Rights Quarterly* 9 (1987) 122-135, at 124 para. 5.

[19] Sub-Commission on Human Rights, Economic and Social Council, "Discrimination against HIV-infected people or people with AIDS: Progress Report by Mr. Luis Varela Quiros, Special Rapporteur", E/CN. 4/Sub. 2/1991/10 24 July 1991, at paras. 164, 165, 170 and 173.

fulfilment of human rights".[20] Both the WHO and ILO have similarly issued strong calls for a human rights-based approach to HIV/AIDS.

In summary, the fundamental importance of human rights and the strong 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 are such that "particularly serious reasons"[21] would have to be put forward by the UN before measures infringing upon the human rights of HIV positive peacekeeping personnel could be considered compatible with relevant provisions of the UN Charter and the UDHR.

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[20] UNAIDS, *The Global Strategy Framework on HIV/AIDS* (Geneva: UNAIDS, June 2001), at 2, incorporated by reference into the UN General Assembly's Declaration of Commitment on HIV/AIDS, supra, at para. 35.

[21] See *Smith and Grady*, infra, footnote 90.

V. ROLE AND RESPONSIBILITIES OF THE UN AND SECURITY COUNCIL

Relevant provisions of the UN Charter and other UN instruments establish that the UN and its Security Council must play a preeminent role in ensuring the full enjoyment of human rights and UDHR in the context of HIV/AIDS.

In general terms, Article 1 of the UN Charter establishes the purposes of the UN to include the achievement of,

> ...international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; ...

Article 55(c) of the UN Charter further requires the UN to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

The UN General Assembly recently adopted a resolution "reaffirming the importance of the purposes and principles of the UN Charter and of the UDHR" and "stressing that all members of the international community shall fulfil, jointly and separately, their solemn obligation to promote and encourage respect for human rights and fundamental freedoms...".[22]

With respect to HIV/AIDS, the UN General Assembly has affirmed its commitment to assume responsibility for leadership on the part of all relevant UN system organizations in protecting human rights in the employment context[23] for people living with HIV/AIDS by taking the following steps:

> 49. By 2005, strengthen the response to HIV/AIDS in the world of work by establishing and implementing prevention and care programmes in public, private and informal work sectors and take measures to provide a supportive workplace environment for people living with HIV/AIDS; ...
>
> 58. By 2003, enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia ... employment, ... prevention, support, treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic.

Tying these concepts together, the Security Council has in a series of recent resolutions demonstrated its recognition and acceptance of the need to comply with international human rights law in the conduct of peacekeeping operations including, among other things, addressing the problems posed by HIV/AIDS. The clearest of these is Resolution 1318 adopted on 7 September 2000, in which the

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[22] A/RES/53/144 8 March 1999.

[23] Declaration of Commitment on HIV/AIDS adopted by the UN General Assembly Special Session on HIV/AIDS concluding 27 June 2001.

Security Council pledged "to uphold the Purposes and Principles of the [UN Charter]", underlined "the need for respect for human rights and the rule of law", and emphasized "its determination to continue to sensitize peacekeeping personnel in the prevention and control of HIV/AIDS in all operations".[24]

The ***Key Principle*** to emerge from the analysis set out above is as follows:

☐ The UN should act in conformity with international human rights law including, in particular, the human rights and fundamental freedoms protected by the UN Charter and UDHR.

[24] S/RES/1318 (2000), Annex at Parts I and VI. See also: S/RES/1296(2000) adopted 19 April 2000, at para. 19; S/RES/1308 (2000) 17 July 2000, at paras. 1-6; S/RES/1325 (2000) 31 October 2000, at para. 6; and S/RES/1327 (2000), at Preamble and Annex Part I. To similar effect, see also: UN Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a resolution on 28 August 1997 entitled "Respect for Humanitarian and Human Rights Law Provisions in United Nations Peacekeeping Operations". In this resolution, the Sub-Commission:

> 1. Emphasizes that the conduct of military contingents put at the disposal of the United Nations should always be in conformity with the norms of international humanitarian law and international human rights law;
>
> 2. Recommends that the rules of engagement applicable to United Nations peacekeeping operations should contain explicit references to these obligations.

VI. SERVICE BY UN PEACEKEEPING PERSONNEL WITH HIV/AIDS

This section analyzes the principles of human rights law that protect the right of people living with HIV/AIDS (including UN peacekeeping personnel) to equality of treatment in employment. The section explains:

- that HIV infection is considered a disability at law whether an individual is asymptomatic or symptomatic;
- that the right to equality of treatment in employment includes the right not to be discriminated against on the basis of disability in employment-related decisions such as restriction or exclusion from service;
- that employers can nonetheless legitimately distinguish between employees on the basis of characteristics, qualifications or standards that can be said to be "inherent requirements" of the job; and
- reviews cases that have arisen in the military (or a similar) context in which courts have addressed the question whether HIV positive individuals could be refused employment or excluded from employment on the basis of their HIV status.

The section provides a list of Key Principles drawn from the cases and other authorities to help guide UN decision-making in this area. Those Key Principles are reproduced in their entirety (together with others from elsewhere in the paper) in Appendix I to the Executive Summary.

A. The Right to Equal Treatment:

The starting point for analyzing the UN's obligations to retain HIV positive peacekeeping personnel in service is provisions of the UN Charter and UDHR that entitle persons with disabilities to equality of treatment in the employment setting.

Article 55 of the UN Charter provides that the UN shall promote, "...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Articles 2, 7 and 23(1) of the UDHR provide more specific protections, as follows:

> 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...
>
> 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

23(1). Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.[25]

The protection afforded by these provisions has two important components: a legal prohibition against discriminatory treatment; and a positive obligation to undertake positive or affirmative action to achieve equality. [26]

Although the UDHR provisions set out above do not expressly identify "disability" as a prohibited ground of discrimination, it is now generally accepted that persons with disabilities are guaranteed the same rights as other persons. In particular, the Declaration on the Rights of Disabled Persons adopted by the UN General Assembly on 9 December 1975 establishes a broad definition of disabled persons ("any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities"[27]) and an expansive statement of rights including, "... the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation...".[28]

B. HIV/AIDS as a Disability:

In the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the UN General Assembly on 20 December 1993 (the "Standard Rules"), the term "disability" is defined to include functional limitations caused by "physical, intellectual or sensory impairment, medical conditions or mental illness" that "may be permanent or transitory in nature".[29] HIV infection is clearly a permanent "medical condition" regardless whether an infected individual is asymptomatic or symptomatic.[30] As such, HIV positive people are entitled to the protections afforded to persons with disabilities regardless of their stages of disease progression.

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[25] Related provisions in the ICESCR include Articles 2, 6 and 7. Related provisions in the ICCPR include Article 26.

[26] UN Human Rights Committee, General Comment 4/13, *Official Records of the General Assembly, 36th Session, Supplement No. 4D*, at 109, document A/36/40 (1981); cited by Special Rapporteur Progress Report, supra, at para. 216.

[27] Declaration on the Rights of Disabled Persons, proclaimed by General Assembly Resolution 3447(XXX) of 9 December 1975.

[28] See also: The World Programme of Action concerning Disabled Persons, A/37/351/ Add. 1, paras. 6, 21-25 and 82 adopted by the UN General Assembly by Resolution A/RES/37/52 18 February 1983; and Standard Rules on the Equalization of Opportunities for Persons with Disabilities, UN General Assembly Resolution A/RES/48/96 adopted 20 December 1993, at para. 9.

[29] Standard Rules, ibid, para. 17.

[30] *International Guidelines*, supra, para. 30(a).

To similar effect, the UN Commission on Human Rights has expressed its view by resolution that,

> ... discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards, and that the term "or other status" in non-discrimination provisions in International Human Rights texts can be interpreted to cover health status, including HIV/AIDS; [31]

C. The Meaning of "Discrimination" in the Employment Setting:

Non-discrimination is a core principle of human rights law.[32]

Hoffman v. South African Airways is a case in which an applicant for employment as a cabin attendant was ordered instated (i.e., hired) by the Constitutional Court of South Africa after being characterized as "unsuitable for employment" by SAA solely on the basis of his HIV status. In that case, Justice Ngcobo expressed in compelling language the importance of protecting people with HIV/AIDS from discrimination in their employment:

> People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatism and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law. ...
> People who are living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them. They must not be condemned to "economic death" by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high. ... (at paras. 28 and 38; internal cites omitted)

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[31] The Protection of Human Rights in the context of Human Immunodeficiency Virus ("HIV") and Acquired Immune Deficiency Syndrome ("AIDS"), E/CN. 4/RES/1995/44 3 March 1995, at para. 1.

[32] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, "Discrimination Against HIV-infected People or People with AIDS: Preliminary Report prepared by Mr. Luis Varela Quiros, Special Rapporteur" E/CN.4/Sub.2/1990/9 2 August 1990, at Para.30.

In relation to UN activities, the Special Rapporteur has similarly expressed the firm opinion,

> ... that the United Nations should not practise any kind of political discrimination against officials of the Organization affected by the AIDS virus or any other terminal disease. All United Nations bodies and agencies should be given instructions to this effect so that they make every effort to avoid discriminatory practices that run counter to the recommendations made by the World Health Organization and the bodies responsible for the protection and promotion of human rights. Were the United Nations to act otherwise, it would forfeit the legitimacy it has achieved since its inception in the fight against discrimination and would violate its own Charter.[33]

But what is "discrimination"? The term "discrimination" has been broadly defined by UN Human Rights Committee to include,

> ... any distinction, exclusion, restriction or preference which is based on any of the grounds listed, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [34]

Not every difference in treatment, however, amounts to discrimination at law. As stated by the European Court of Human Rights in *Van Raalte v. The Netherlands*,

> ... a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. [35] [emphasis added]

In the employment context, the ILO has defined discrimination to specifically exclude "[a]ny distinction, exclusion or preference irrespective a particular job based on the inherent requirements thereof". This means, in other words, that an employer such as the UN is permitted to differentiate between employees on the basis of characteristics, qualifications or standards that can be said to be "inherent requirements" of the job. The question then becomes, what are the "inherent requirements" of a given job?

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[33] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, "Discrimination against HIV - Infected People or People with AIDS: Conclusions and Recommendations of the Special Rapporteur on the Sub-Commission" E/CN. 4, Sub. 2/1993/9 August 1993, at para. 12. To the same effect, see: as stated in *an ILO code of practice on HIV/AIDS in the world of work*: In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.

[34] UN Human Rights Committee, General Comment No. 18 on non-discrimination, at para. 15, reproduced in A. Hendricks, ("Disabled Persons and their Right to Equal Treatment: Allowing Differentiation While Ending Discrimination", 1(2) *Health and Human Rights* 153, at 163.

[35] Case No. 108/1995/614/702, European Court of Human Rights (28 January 1997).

D. Defining the "Inherent Requirements" of a Job:

It is useful at this point to review in more detail the cases introduced in Part III above. In all of these cases, despite using slightly different language to refer to the concept of an "inherent job requirement", the courts applied this concept and addressed the question whether HIV positive individuals could be refused employment or excluded from employment on the basis of their HIV status.

In ***N. v. Minister of Defence*** **(Namibia),** N. challenged the NDF's refusal to accept him as an enlisted soldier based on his HIV positive status. The NDF defended its action on the basis of stated concern for the physical and mental capacity of its recruits for the demands of military service. The Labour Court of Namibia ruled that the NDF's conduct amounted to discrimination on an unfair basis. The evidence established that notwithstanding N's HIV infection, he was "in sound and good health and capable of performing his duties anywhere in Namibia".[36] N also had previous military experience and training. As such, N's HIV status alone was not determinative of his fitness for military service and was not a reasonable basis upon which to refuse to enlist him. The Court did find that an HIV test together with CD4 and viral load counts could provide meaningful information as to fitness, however, and ordered that all applicants for service (including N) undergo all 3 tests. The basis of this part of the Court's decision was testimony from experts on both sides of the case to the effect that a person with a CD4 count below 200 and a viral load in excess of 100,000 would not be fit for military duty.

In ***Hoffman*** **(South Africa)**, the applicant challenged SAA's refusal to employ him as a cabin attendant based on his HIV positive status. The SAA defended its action on the basis of stated concerns for:

- Hoffman's safety due to the possibility that as an HIV positive person he may not be able to take the yellow fever vaccine as required and would therefore be vulnerable to contracting yellow fever, given that flight crew (including cabin attendants) had to be fit for "world-wide duty" which included yellow fever-endemic countries;

- the safety of other crew members and passengers from the risk of contracting yellow fever and/or opportunistic infections from Hoffman;

- the undue costs of training Hoffman given his short life expectancy; and

- the competitive disadvantage SAA would suffer as a result of public perception if it was not seen to promote the health and safety of its passengers by applying his policy given that its competitors employed a similar policy.

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[36] *N v. Minister of Defence*, supra, at 8.

The Constitutional Court of South Africa ruled that the SAA had discriminated unfairly against Hoffman. The evidence established that Hoffman was asymptomatic, had a CD4 count of 469 cells/mL of blood, was able to be vaccinated against yellow fever, was not prone to opportunistic infections, and was able to perform the work of a cabin attendant competently. Moreover,

> any hazards to which an immunocompetent cabin attendant may be exposed can be managed by counselling, monitoring, vaccination and the administration of the appropriate antibiotic prophylaxis if necessary. Similarly, the risks to passengers and other third parties arising from an asymptomatic HIV positive cabin crew member are therefore inconsequential and, if necessary, well-established universal precautions can be utilised....even immunosuppressed persons are not prone to opportunistic infections and may be vaccinated against yellow fever as long as their CD4+ count remains above a certain level.[37]

As such, Hoffman's HIV status alone was not determinative of his fitness for service as a cabin attendant and was not a reasonable basis upon which to refuse to employ him.

In its reasons for judgement, the Court did not comment directly upon SAA's arguments as to the undue costs of training Hoffman due to his life expectancy.[38]

In ***A.* v. *Union of India*** **(India)**, A. challenged the Indian Navy's refusal to re-engage him as crew member in the Submarine Branch based on his HIV status (he was seeking re-engagement for an additional three years following his due date for retirement). The Navy defended its action on the basis that A. had no legal right to re-engagement. He had joined the Navy in 1985 and, following his HIV positive diagnosis in 1997, was permitted to serve for a further two years (in a down-graded medical category) so as to enable him to complete fifteen years of service and entitle him to full pension and other benefits. The Navy argued further that the position to which A. sought to be re-engaged was working in a highly specialized submarine cadre where he was subject to various

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[37] Ibid, at para. 15.

[38] In another employment case outside the military setting, however, *MX v. M/s. ZY* (3 April 1997), Justice Tipnis of the High Court of Judicature of Bombay rejected an employer's argument that it ought to be entitled to refuse to employ HIV positive persons on the grounds that the disease was "most likely to assume serious proportions in due course" imposing significant financial and administrative costs. The employee in question was asymptomatic, and the evidence established that it would be at least 8-10 years before he developed AIDS. Justice Tipnis stated :

> In our opinion, the State and public Corporation like respondent No. 1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment til superannuation ... the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest ... The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such case. (para.56)

working hazards and would endanger its proper functioning given his HIV status. It is unclear whether the underlying concern advanced by the Navy was A.'s physical and mental capacity for service, the safety of others, or both. The evidence established that A. was otherwise medically fit, and had been recommended for re-engagement on two separate occasions (by his Commanding Officer and by his Staff Officer (Personnel)).

A.'s challenge failed. The Court agreed with the arguments made by the Navy including, in particular, that "national security cannot be jeopardized in any manner by endangering the proper functioning of (SIC) submarine".

In ***X. v. Commonwealth*** **(Australia)**, X challenged the ADF's refusal to accept him as an enlisted soldier based on his HIV positive status. The ADF defended its action on the basis of stated concern for:

- the safety of fellow soldiers, due to the "undue risk" of HIV transmission if X were to be injured and spill blood during training or combat; and

- operational efficiency and effectiveness, in that X could not be deployed in training or in the field as a result of the asserted risk of HIV transmission to others during the course of employment.

A Commissioner of the Human Rights and Equal Opportunity Commission ruled that the ADF had discriminated unlawfully against X. The evidence established that X's HIV infection was asymptomatic and his health "excellent". X had previously served for a number of years without incident as a signaller in the General Reserve of the Australian Army and sought these same duties in the ADF. The Commission accepted "that in some extreme circumstances transmission of bodily fluids might readily occur in the course of [army] service but that in others the risk was 'very low' but 'not a fanciful risk'":[39]

> ...in the course of training or in combat there is a risk, the measure of which will vary with the circumstances, that a soldier may be infected with HIV by another who is HIV positive.[40]

The Commission found that the ADF had failed, however, to establish "a clear and definite relationship" between X's HIV positive status and his alleged inability to be deployed without undue risk of HIV transmission to fellow soldiers. The ADF had failed on this point because of the uncertainty as to whether X would actually be deployed in circumstances in which a risk of HIV transmission might reasonably be expected to present itself; the theoretical possibility that X might be so deployed was insufficient to establish that he would be unable to carry out the inherent requirements of his employment. As such, X's HIV status alone was not determinate of his fitness for service and was not a reasonable basis upon which to refuse to enlist him.

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[39] *X v. Commonwealth*, HCA, supra, at 8 para. 1.

[40] Ibid.

The Commissioner's decision was challenged by the ADF, and a majority of the High Court of Australia ultimately (at the third level of judicial review) concluded that the Commissioner had made an error of law in his consideration of the matter. The error identified (with which Justice Kirby disagreed) was that the Commissioner had failed to accept in principle that the inherent requirements of a soldier's job could include his or her ability to undertake the specific tasks of a soldier "with reasonable safety to others with whom that individual will come into contact during the course of employment". The High Court sent the case back for re-hearing on that point.[41] The re-hearing ordered by the Court never took place as the dispute was settled between the parties on undisclosed terms.

In ***Thwaites*** **(Canada)**[42], an enlisted soldier classified and trained in the military trade of naval-electronic sensor operator (a "hard sea trade") challenged the CAF's decision to discharge him from service on the grounds that his HIV disease had progressed from an asymptomatic stage to a symptomatic stage. (Thwaites's HIV positive status was previously known to the CAF, and he had served for 3 and a half years following his diagnosis without adverse impact upon his career while asymptomatic.) The CAF defended its action on the basis of stated concern for:

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[41] The High Court majority expressly refrained from making any finding on this point:

> ... deciding what is a "reasonable" degree of risk to others, in a context that is said to require consideration of training for and participation in armed conflict, will present difficult questions of judgment. Much would turn on the nature and size of the risks that are said to arise. These, however, are not questions that can be resolved in the present appeal. (*X v. The Commonwealth*, HCA at 36 para. 12).

At the first level of judicial review, however, Justice Cooper (who did not remit the case for further consideration) answered this question without hesitation. He concluded that HIV positive soldiers in the ADF "required to go anywhere and to perform any lawful duties required of him or her by the Australian Army ... [including] training, combat, combat-related and peace-keeping duties as, when and where required by the Australian Army" do not present an unreasonable risk of loss or harm:

> Risk of injury in the workplace which may give rise to bleeding or loss of bodily fluid, as a matter of theoretical possibility, exists in all employment situations. Someone may trip on a stair, fall and suffer an injury which bleeds and co-workers may run to offer assistance and come into contact with blood or bodily fluid. In this respect, a soldier is in no different position to any other person in employment. If it is lawful to discriminate against a person who wishes to enlist in the Australian Army solely on the basis that the person is HIV positive because it is an inherent requirement of employment as a soldier that the person "bleed safely", in the sense used above, if injured, then logically such a discriminatory practice against carriers of HIV would be lawful in all employment situations. Such a result would be anathema to the statutory objects of the Act. (*X v. The Commonwealth*, FC per Cooper J at 12-13.

[42] In a recent ILO document, *Thwaites* was characterized as "throwing light on the policy implications of...the defence of inherent requirements for a job under human rights law": J. Hodges-Aeberhard, International Labour Office, "Policy and Legal Issues relating to HIV/AIDS in the World of Work" (Geneva: International Labour Organization, November 1999), at 11-12.

- Thwaites's safety due to the fact that he now required specialist medical services and treatment that would not be readily available to him while serving in remote regions and at sea; and

- operational effectiveness and the safety of fellow soldiers as a result of the risk that a mission in which Thwaites was participating might need to be aborted should he require emergency medical care.

The Canadian Human Rights tribunal ruled that the CAF had discriminated against Thwaites and that Thwaites could not be excluded from employment by the CAF. The Tribunal held that:

- The CAF's implementation of a "category approach" to the stages of HIV infection as a basis for assessing Thwaites's fitness for duty was discriminatory, since within those stages individuals vary as to their abilities to function and their need to access regular services and care. Rather, appropriate and individualized consultation with Thwaites's treating physician was required so that a decision could be made on the basis of his real, and not perceived, condition. The evidence before the Tribunal established that Thwaites's rating in respect of his ability to perform tasks involving physical and mental activity and stress remained constant including while at sea where the demands were more severe and prolonged.

- Although there was no doubt that Thwaites's going to sea and being away from direct specialist care would increase the risk that he might not receive appropriate care, the Tribunal was not satisfied that the increased risk to himself or to others was sufficient to warrant his exclusion.

- Finally, the Tribunal was of the view that the CAF had failed to adequately explore alternatives to Thwaites's discharge such as changes in the nature and extent of his duties or re-muster to some other occupation.[43]

This decision was upheld by the Federal Court of Canada (Trial Division).

E. "Off Duty" Conduct by Peacekeeping Personnel and the Safety of Others:

The cases summarized above focus most clearly upon alleged risks of HIV transmission during "on duty" conduct. In *X. v. Commonwealth*, for example, the ADF sought to exclude HIV positive persons from serving as enlisted soldiers because of the risk that they might be injured and spill blood during combat, presenting a risk of HIV transmission to fellow soldiers. Similarly, in *Hoffman*, South African Airways argued that HIV positive cabin attendants presented a risk of disease transmission (yellow fever, opportunistic infections and HIV) to other crew members and to passengers during flight. In the context of UN peacekeeping missions, however, the possibility

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[43] *Thwaites,* CHRT, at 31-32.

of HIV transmission presenting a risk of harm to others during "off duty" conduct is also an important subject of concern.

Recent reports have highlighted the potential risk of HIV transmission presented by HIV positive peacekeeping personnel to the civilians of host countries as a result of intimate personal relationships and commercial sexual relations.[44] The potential for HIV transmission also exists where peacekeeping personnel engage in intimate sexual activity or injection drug use with one another.

While it may be argued that such "off duty" activities are the private concern of individual peacekeepers, the link between such "off duty" activities and the operational effectiveness of peacekeeping missions is close enough to warrant UN concern and intervention.

The argument is compelling with respect to civilians in host countries. At the core of a peacekeeping mission is the duty to protect the safety of civilians affected by conflicts and their aftermath.[45] Women and girls are especially vulnerable to the risk of HIV transmission in such circumstances:

> ... During armed conflict and political instability, women and girls may face systematic rape and other war crimes. Girls are particularly vulnerable to abuse, both as civilians and as child soldiers. Because of armed conflict, men may be away from the household for extended periods, which increases their own vulnerability to HIV infection, and that of their partners on their return. In post-conflict situations, peace-keeping forces may put local women and girls at increased risk as they barter or sell sex for survival.[46]

Recklessness regarding the risk of HIV transmission from UN peacekeeping forces to vulnerable civilians is obviously inconsistent with peacekeepers' mandate of protection and will impair the confidence of host countries in the ability of UN peacekeeping forces to fulfil that mandate. More broadly, such conduct may be expected to undermine international confidence in the overall effectiveness of UN peacekeeping missions. These are sound reasons in and of themselves for UN concern regarding "off duty" conduct by peacekeeping personnel presenting a risk of HIV transmission.

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[44] For example: International Crisis Group, *HIV/AIDS as a Security Issue* (Washington/Brussels: International Crisis Group, 19 June 2001), at 22-23.

[45] The Security Council has repeatedly affirmed the entitlement of civilians to the protections afforded by existing international humanitarian law, in situations of armed conflict and in peacekeeping situations: for example, S/RES/1296 (2000) paras 3, 9, and 19. This point was also stressed by the Panel on UN Peace Operations in its recent *Report of the Panel on United Nations Peace Operations*: A/55/305 S/2000/809, at paras. 37, 41 and 272-273.

[46] *The HIV/AIDS Pandemic and its Gender Implications: Report of the Expert Group Meeting* Windhoek, Namibia, (13-17 November 2000), organized by the United Nations Division for the Advancement of Women, the World Health Organization (WHO) and the Joint United Nations Programme on HIV/AIDS (UNAIDS), EGM/HIV-AIDS/2000/Rep.1, at 18.

In addition, however, the UN must also consider the right to health of civilians in host countries, as protected by Article 25.1 of the UDHR:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including ... medical and necessary social services ...

The right to health is comprised of both freedoms and entitlements.[47] The UN Committee on Economic, Social and Cultural Rights recently analyzed the meaning of the right to health as protected by the UDHR and the ICESCR. With respect to the entitlement of persons to prevention, treatment and control of diseases including HIV/AIDS, the Committee stated:

> "The prevention, treatment and control of epidemic, endemic, occupational and other diseases [as specifically referenced in Article 12.2(c) of the ICESCR, which provides the most comprehensive statement of the right to health]" requires the establishment of prevention and education programmes for behaviour-related concerns such as sexually transmitted diseases, in particular, HIV/AIDS ... and the promotion of social determinants of good health, such as ... education, economic development and gender equity.[48]

The Committee also specifically commented upon the use of public health grounds to limit the exercise of other fundamental rights, using as specific examples restriction of movement or incarceration of people with transmissible diseases such as HIV/AIDS to preserve the public order (i.e., the health of uninfected members of the population). On this subject, the Committee made three important points:

- the onus is upon the party imposing such a serious measure to justify its use;
- any such restrictions "must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the [ICESCR], in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society"; and
- any such restrictions "must be proportional, i.e., the least restrictive alternative must be adopted where several types of limitations are available".[49]

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[47] Ibid:
"The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health." (at para.8)

[48] Ibid, at para.16.

[49] Ibid, at paras. 28 and 29. The limiting provisions of Article 4 of the ICESCR specifically considered by the Committee are similar to those established by Article 29 of the UDHR.

In summary, it is clearly appropriate for the UN to take steps to protect civilians in host countries from the risk of HIV transmission and other sexually transmitted diseases. It is essential, however, that these steps be carefully designed so as to avoid, as far as possible, infringing upon the human rights of peacekeeping personnel, including personnel with HIV infection.

F. Key Principles:

The ***Key Principles*** that emerge from these cases and the preceding analysis may be summarized as follows:

- ☐ Human rights enactments such as the UDHR are instruments intended to give rise to individual rights of vital importance. As such, the UN should interpret those rights expansively, not restrictively.

- ☐ Conversely, limitations upon protected rights should be restrictively interpreted by the UN.

- ☐ 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 if the person is unable to perform the inherent requirements of his or her job.

- ☐ 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 prejudices or stereotypes but, rather, in the interests of sound employment and public health practices.

- ☐ The mental and physical capacity of peacekeeping personnel for the demands of service, the health and safety of HIV positive peacekeeping personnel, and the health and safety of others (i.e., HIV negative peacekeeping personnel and/or civilians of host countries) 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 <u>reasonably necessary</u> to address the stated concern. To be "reasonably necessary":

    - ☐ If the concern is one of health and safety, the UN must show that the risk assessment is based on the most <u>authoritative and up-to-date medical, scientific and statistical information</u> 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 as against other risks presented by UN peacekeeping service. If risks of comparable magnitude are acceptable in the work environment, then 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 in that there are no other means less prejudicial to the rights of HIV positive peacekeeping personnel to equal treatment to address the concern at issue. This requires the UN to search for reasonable alternatives before resorting to imposition of a blanket exclusionary policy or rule (including the ability to accommodate the individual to permit him or her to do the job or lessen the risk short of undue hardship).

G. The Importance of Reasonable Alternatives/Reasonable Accommodation:

In *Thwaites*, the Canadian Human Rights Tribunal explained the importance of requiring employers to search for reasonable alternatives and accommodations to disabled persons before imposing a blanket rule of exclusion based on an identified characteristic, qualification or standard:

> The importance of searching for reasonable alternatives or accommodating the individual to permit him or her to do the job or to lessen any risk (if risk is a factor) is now the bedrock of human rights law ... . Indeed, without such accommodation, the protection given ... to certain groups, the disabled in particular, would be quite illusory. ...
>
> > "For persons with disabilities, the right to accommodation goes to the very heart of equality. To appreciate the importance of this right, one must understand the reality of discrimination. Much of the problem is attitudinal. The barriers to people with disabilities in employment are rarely rooted in loathing or malevolence. On the contrary, the discrimination is quite often perpetrated with the best of intentions - a genuine concern about the capabilities of persons with disabilities, a desire to protect the disabled person from harm or injury or to shield him or her from the embarrassment of what is seen as the inevitability of his failure to measure up. While this may explain the discrimination, it does not, of course, excuse it nor does it make the ugliness of its result any more acceptable. The accommodation of differences for persons with disabilities therefore requires overcoming the ignorance, stereotypical attitudes and paternalism that are the source of much of the overt disability discrimination."
>
> Accordingly, the pendulum has swung such that a bona fide occupational requirement can rarely be established as a defence to discriminatory treatment if the rule or practice makes generalizations about people solely on the basis of disability without regard to the particular circumstances of the specific class of individuals affected. Moreover, in order for there to be true individualization, a close assessment should be made of the individual in question since even persons with the same disability

> vary markedly in how they personally function and cope with their affliction or vary in the degree of impairment because of the different stages of their infirmity. ...
>
> It should be acknowledged that this may add some risks and make matters somewhat more burdensome for employers but this is a small price to pay for the higher value that society has placed on equal opportunity.[50]

To the same effect in *X v. Commonwealth*, all members of the High Court of Australia (including Justice Kirby) were in agreement that, in considering whether an HIV positive enlisted soldier is able to perform duties with reasonable safety to himself or herself and to others, consideration must be given to the extent to which an otherwise unreasonable risk may be rendered reasonable or eliminated altogether by services that could be provided by the employer without an unjustifiable hardship[51]. Where, as in that case, the identified concern was the ability of an HIV positive soldier to "bleed safely" a reasonable alternative to exclusion would be the full implementation of universal precautions.

The concept of a duty of adjustment or accommodation is well-established in UN instruments. For example:

- As stated by the Special Rapporteur:

> Non-discrimination includes corrective and compensatory policies in favour of those that are vulnerable to discrimination and those which have been subject to it. The Human Rights Committee found that thee was an obligation on the part of the State to undertake "affirmative action designed to ensure the positive enjoyment of rights". Such affirmative action may consist of laws, policies, measures or actions needed to remedy discrimination, in fact, that is, to redress de facto inequalities. When aimed at redressing inequalities, to enable people to enjoy and exercise their rights on an equal footing, differential treatment is legitimate, hence it does not constitute discrimination. The Human Rights Committee said that "the principle of equality sometimes required States to take affirmative action in order to diminish or eliminate conditions which cause or held to perpetuate discrimination", and therefore "action needed to correct discrimination in fact is a case of legitimate differentiation. [52]

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[50] *Thwaites*, CHRT, supra, at 20-21.

[51] *Xv. Commonwealth*, HCA supra, per Gummow and Hayne JJ at 34 para. 5 (for example).

[52] Special Rapporteur, Preliminary Report, supra, 2 August 1990, at para. 38 (internal cites omitted). To similar effect, see: *World Programme of Action Concerning Disabled Persons*, supra, at para. 25; UN Standard Rules, at para. 25; ILO Recommendation 168 concerning Vocational Rehabilitation and Employment (Disabled Persons) adopted 20 June 1983, at paras. 7 and 11(k); and the ILO's *Draft Code of Practice on Managing disability in the workplace*, at Art. 7.

- In its General Comment No. 18 on Non-Discrimination, the UN Human Rights Committee defined disability-based discrimination to specifically include a "denial of reasonable accommodation based on disability".[53]

- The UN's 1993 Standard Rules include the right of persons with disabilities to "receive the support they need within the ordinary structures of ... employment". Rule 7, in particular, requires that:

> ... States should actively support the integration of persons with disabilities into open employment. This active support could occur through a variety of measures ... States should also encourage employers to make reasonable adjustments to accommodate persons with disabilities.[54]

The Preamble to the Standard Rules emphasizes the validity of the concepts on which the Rules are based for developing and industrialized countries.

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[53] Committee on Human Rights, General Comment No. 18, Non-Discrimination, UN Official Records, Supple. No. 40 (A/45/40), at para. 15, reproduced in A. Hendricks, ("Disabled Persons and their Right to Equal Treatment: Allowing Differentiation While Ending Discrimination", 1(2) *Health and Human Rights* 153, at 163

[54] To similar effect, see: the ILO's Convention 159 concerning Vocational Rehabilitation and Employment (Disabled Persons) adopted 20 June 1983, at Art. 7; and the ILO's 2001 *Draft Code of Practice on managing disability in the workplace*, at Arts. 2 and 7.

VII. MANDATORY HIV TESTING OF UN PEACEKEEPING PERSONNEL

This section analyzes the principles of human rights law that protect the right of people living with HIV/AIDS to the privacy of information about their health including, in particular, their HIV status. The section explains that:

- this right to privacy may be infringed, but only in certain limited circumstances; and
- reviews cases in which mandatory testing programmes have been challenged in order to better understand the circumstances in which employers are permitted to require employees to submit to testing.

This section also provides a list of Key Principles to guide UN decision-making in this area that are reproduced in the complete list found at Appendix I to the Executive Summary.

A. The Importance of Privacy:

As is clear from the comments of Justice Ngcobo in *Hoffman* reproduced above,[55] information about a person's HIV status is of the most sensitive kind. Knowledge that a person is HIV positive exposes him or her to prejudice, stigma, marginalization and discriminatory treatment of the most serious kind in all aspects of life including, in particular, in employment. Knowledge that a person is HIV positive may also indirectly disclose his or her participation in conduct presenting a risk of HIV transmission (or expose the person to assumptions about his or her participation in these activities) that may serve as yet a further basis of prejudice, stigma, marginalization and discriminatory treatment.

The following extract from the *International Guidelines on HIV/AIDS and Human Rights* provides a succinct explanation of the importance of protecting privacy in this context, and of the relationship between protecting privacy and protecting public health:

> The individual's interest in his/her privacy is particularly compelling in the context of HIV/AIDS, firstly in view of the invasive character of the mandatory HIV test and, secondly by reason of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status is disclosed. The community has an interest in maintaining privacy, so that people will feel safe and comfortable in using public health measures, such as HIV/AIDS prevention and care services. [56]

B. The Right to Privacy:

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[55] Supra, at 11.

[56] Supra, at para. 98.

The mandatory HIV testing of all UN peacekeeping personnel would implicate their rights to privacy.[57] Article 12 of the UDHR establishes the right to privacy in the following terms:

> **Article 12, UDHR**
>
> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In *X v. Commission of the European Communities,* the European Court considered the meaning of Article 8(1) of the European Convention on Human Rights ("ECHR"), which is similar in its wording to Article 12 of the UDHR.[58] This case involved an applicant for employment with the European Commission who challenged the Commission's refusal to engage him on the basis of a test (T4/T8 blood test) which he argued was a surrogate HIV test to which he had not given informed consent. X had specifically refused to undergo an HIV test when asked to do so by the medical examiner at this pre-recruitment medical examination, and argued that his informed consent was similarly required in order for the T4/T8 test. Without consent, the T4/T8 test amounted to an unauthorized surrogate test for HIV in violation of his right to privacy. The Commission denied that this was the case, arguing that X's informed consent was not required for the T4/T8 test; that his tacit consent had been given when he submitted to the medical examination.

The Court ruled that "... respect for private life ... includes in particular a person's right to keep his state of health secret." [59] The Court agreed with X, and annulled the Commission's decision to refuse to engage him on the grounds that he was physically unfit.

In its reasons for judgment, the Court acknowledged the legitimacy of pre-recruitment medical examinations in the following terms:

> ... the pre-recruitment examination serves a legitimate interest of the Community institutions, which must be in a position to fulfil the tasks required of them, ...

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[57] It may also be argued that the mandatory HIV testing of all UN peacekeeping personnel would implicate the right of these individuals to security of the person pursuant to Article 3 of the UDHR, which provides that, "[e]veryone has the right to life, liberty and security of the person". In its 1994 Declaration on the Promotion of Patients' Rights in Europe, for example, the WHO identified the rights of individuals to self-determination and security of the person as "human rights and values in health care", linking them with the right to give or refuse informed consent to a proposed medical intervention (i.e., such as HIV testing: (WHO, 1994), Articles 1.2, 1.3, 3.1 and 3.2. This argument raises issues largely duplicative of those considered in relation to privacy interests and therefore will not be pursued further in this paper.

[58] Article 8(1) of the ECHR provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

[59] 1994 ECR I-4737 5 October 1994, at para. 17

> If the person concerned, after being properly informed, withholds his consent to a test which the medical officer considers necessary in order to evaluate his suitability for the post for which he has applied, the institutions cannot be obliged to take the risk of recruiting him.[60]

This case, and others to similar effect, [61] lead to the conclusion that a requirement for HIV testing in the employment context will be considered justified if considered necessary on the basis of knowledgeable medical opinion in the context of a medical examination required by an employer to assess the physical and mental capacity of an employee or applicant for employment.

It is important to point out, however, that X was not asked to undergo HIV testing or subjected to the T4/T8 test as part of a mandatory HIV testing program. Rather, HIV testing was proposed (and, when X refused, unlawfully substituted with the surrogate T4/T8 test) as part of a medical examination that had raised concerns about his fitness for employment which, in the view of the medical officer responsible for the conduct of his examination, required HIV testing to enhance the reliability of his medical opinion.[62] The Commission stated very clearly in its defence that "the fact of being an asymptomatic carrier of [HIV] is not in itself a cause of unfitness since there is no risk of transmission in normal working relations" and, as such, HIV tests were only undertaken when considered necessary on the basis of expert medical opinion and, even then, only on the basis of informed consent.[63]

C. Limitations on the Right to Privacy:

It is necessary, to try to define more precisely the parameters of an employer's entitlement to require an HIV test for the purpose of assessing "suitability" or "fitness" for employment. A helpful way to do so is by considering the limitations of an individual's right to privacy.

Article 29 of the UDHR limits the right to privacy established by Article 3 of the UDHR, as follows:

> **Article 29, UDHR**
>
> 1 Everyone has duties to the community in which alone the free and full development of his personality is possible.

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[60] Ibid, at paras 20-21.

[61] See, for example: *A.V. Commission of the European Communities,* European Court Reports 1994, page II-0179; IIA-0119; II-0387(21 January 1993).

[62] X was seeking employment as a typist for a six (6) month period. The evidence established that the pre-recruitment medical examination disclosed abnormalities in his anamnesis (recall) and other clinical findings that prompted the examining medical officer to request the HIV test to enhance the reliability of his medical opinion: *XV. Commission*, supra, at para. g.

[63] Ibid, at para. 14.

> 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
>
> 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Again, in *X v. Commission of the European Commission*, considering language almost identical to Article 29 of the UDHR, the Court held that,

> ... restrictions may be imposed on fundamental rights provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected ....[64] [emphasis added]

To similar effect, the *International Guidelines on HIV/AIDS and Human Rights* provide that:

> 82. Under international human rights law, States may impose restrictions on some rights, in narrowly defined circumstances, if such restrictions are necessary to achieve overriding goals, such as public health, the rights of others, ... the general welfare in a democratic society and national security. ... In order for restrictions on human rights to be legitimate, the State must establish that the restriction is:
>
> (a) Provided for and carried out in accordance with the law, i.e., according to specific legislation which is accessible, clear and precise, so that it is reasonably foreseeable that individuals will regulate their conduct accordingly;
>
> (b) Based on a legitimate interest, as defined in the provisions guaranteeing the rights;
>
> (c) Proportional to that interest and constituting the least intrusive and least restrictive measure available and actually achieving that interest in a democratic society, i.e., established in a decision-making process consistent with the rule of law.[65]

Two general conclusions emerge from this analysis of possible limitations upon privacy rights.

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[64] Ibid, at para. 18. Article 8(2) of the ECHR provides:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[65] Supra, at para. 82 (internal cites omitted). These principles also correspond closely to: Limburg Principles, supra, at 128-129 paras. 48-55; and Siracusa Principles "Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" 7(1) *Human Rights Quarterly* 3 (February 1985), at paras. 15-38

The first general conclusion is that the physical and mental capacity of UN peacekeeping personnel for the demands of service, the health and safety of HIV positive peacekeeping personnel, and the health and safety of others (i.e., HIV negative peacekeeping personnel and/or civilians of host countries) are legitimate subjects of UN concern and therefore possible sources of limitations on the privacy rights.[66]

The second general conclusion is that the need to adopt the least intrusive and least restrictive measure available to achieve that interest requires a stringent approach to testing. This second point is reinforced by the strong preponderance of expert opinion that protection, respect and fulfilment of human rights – rather than restriction or limitation – is the most effective means of protecting the public health from HIV transmission.[67]

There are few cases in which Courts have considered the legality of mandatory HIV testing programs in the employment setting,[68] and none at all (that we were able to find) in the military context. What follows, therefore, is a selection of cases that are relevant by analogy.

Chandler v. Miller **(United States)**,[69] a decision of the Supreme Court of the United States, is the leading authority on the criteria to be met by a US government authority in defence of a mandatory testing program.

This case concerned the legality of a statute enacted by the state of Georgia which required all candidates seeking to qualify for designated state officers to submit to drug testing (for illicit drugs) and certify that they had obtained negative results. Three candidates for state offices challenged the statute on the grounds that it was an unconstitutional violation of their rights to privacy. Although initially unsuccessful, the challenge ultimately succeeded before the Supreme Court.

The Supreme Court confirmed that the requirement for a drug test intruded upon candidates' reasonable expectations of privacy.[70] At issue was whether this intrusion could be justified by a state

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[66] It is well established that the need to protect the public health can constitute an acceptable basis for restricting human rights. See, for example: Special Rapporteur, Preliminary Report, supra, at para 42.

[67] Supra, at 4.

[68] In *Hoffman*, the Constitutional Court of South Africa was invited to express an opinion on the legitimacy of SAA's policy of testing applicants for employment for HIV and excluding all HIV positive applicants, but declined to do so on the basis that the issue had not been addressed in the court below and was more appropriately dealt with in the first instance by the Labour Court: supra, at p.18-19.

[69] 520 US 305 (15 April 1997).

[70] In US jurisprudence, the right to privacy is protected by the Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

interest (i.e., a "special need"). This required the Court to "undertake a context-specific inquiry, examining closely the competing private and public interests". In order to justify the program, the Court held that:

> ... the proffered special need for drug testing must be substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the ... normal requirement of individualized suspicion.[71] [emphasis added]

The mandatory drug testing program failed to meet this standard and was found to be unconstitutional for the following reasons:

- Georgia failed to demonstrate that there was a real (as opposed to hypothetical) problem with illegal drug use among candidates for state office;
- the program was not well designed to identify candidates who violated anti-drug laws;
- the program was not a credible means to deter users of illicit drugs from seeking election; and
- Georgia offered no reason why ordinary law enforcement methods would not suffice to apprehend candidates addicted to illicit drugs.[72]

In closing, the Court emphasized that the testing program was merely "symbolic" and, as such, did not justify violating candidates' rights to privacy. Quoting a former Supreme Court Justice, the Court stated:

> ... "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest danger is to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding".
>
> However, well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The [Constitution] shields society against that state action.[73] [internal cites omitted]

> probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

[71] Ibid.

[72] In this regard, the Court emphasized the contrast between this case and another case in which a mandatory drug testing program had been upheld. In that other case (*Treasury Employees v. Van Raab*, 489 US 656), the evidence established that it was not feasible to address the drug use problem in another way.

[73] To similar effect, the Special Rapporteur has stated with specific reference to the limitation of individual rights and liberties in order to protect public health:

> It is certain that such a restriction cannot be legitimate solely on the grounds that it reflects public

The *Chandler* decision has been characterized as narrowing the circumstances in which "special needs" testing programmes will be upheld by US Courts.[74]

***Glover v. Eastern Nebraska Community Office of Retardation* (United States)**,[75] employees of an agency providing health services to developmentally disabled persons challenged the legality of a mandatory HIV and Hepatitis B testing policy introduced by their employer. The employees argued that the policy violated their privacy rights. The agency's stated purpose for the policy was to protect the safety of its clients from HIV and Hepatitis B transmission given violent and aggressive behaviours by some (such as biting and scratching) as a result of their conditions.

The Court assessed the reasonableness of the policy by balancing the nature and quality of the intrusion upon employees' privacy rights against the importance of the governmental interests at stake.[76] It ruled that the policy was unreasonable:

> Because the risk of disease transmission has been shown to be negligible in the [service] environment, [the agency's] articulated interest in requiring testing does not constitutionally justify requiring employees to submit to a test for the purpose of protecting the clients from an infected employee.[77]

The Court emphasized that it "did not take lightly ... the severe nature of the diseases at which ... [the] policy is aimed".[78] In its judgment, however, the policy would have "little, if any, effect in preventing the spread of HIV/AIDS or in protecting the clients".[79]

Of particular interest in this case is the Court's explicit rejection of the agency's argument (drawn from drug-testing cases) that the employees had only a diminished expectation of privacy because

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> concern. It must be shown that there is a scientific rationale for the policy which is required in order to protect public health. [Special Rapporteur, Progress Report, supra, para.151; emphasis added]

[74] S. Anderson, "Individual Privacy Interests and the "Special Needs" Analysis for Involuntary Drug and HIV Tests" 86 *California Law Review* 119 (January 1998).

[75] 867 F. 2d 861 (8TH Cir. 1989).

[76] Ibid, at 463.

[77] Ibid, at 464. The Court's specific findings regarding the risk of HIV transmission included the following:

> The medical evidence is undisputed that the disease is not contracted by casual contact ... further, there is absolutely no evidence of drug use or needle sharing at [the agency], nor is there a problem of sexual abuse of clients by staff. (at 463)

[78] Ibid, at 464.

[79] Ibid, at 463.

they worked for a highly regulated state agency. The Court held, quite simply, that this argument "missed the mark" in view of the evidence.[80]

***Anonymous Fireman v. The City of Willoughby et al.* (United States)**,[81] the plaintiff was a fireman who challenged the City of Willoughby's decision to require mandatory HIV testing of its firefighters and paramedics as part of its annual physical examination for fitness to serve. He alleged that the mandatory testing requirement violated his right to privacy. The City defended its policy on the grounds that it was necessary to protect the public from HIV transmission from firefighters and paramedics. The Ohio District Court agreed with the City, and ruled that the mandatory HIV testing policy did not violate the plaintiff's right to privacy.[82]

The Court accepted that, "[t]he protection of the public from the contraction and transmission of AIDS by firefighters and paramedics is a compelling governmental interest".[83] It noted, however, that the burden was upon the City to, "to prove that mandatory testing is necessary and that other precautions against the transmission and contraction of AIDS will not be effective" [emphasis added].[84] The Court emphasized the limited nature of its decision in the following terms:

> This is a very limited decision and only stands for the proposition that mandatory testing may be ordered for high-risk government employees such as firefighters and paramedics. A high-risk government employee is one who has a high risk of contracting AIDS or transmitting AIDS.[85]

In this particular context, the Court was persuaded that the situation was one of "high-risk" on the basis of evidence introduced by the City to the effect that:

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[80] Ibid, at 464.

[81] 779 F. Supp. 402 (US Dist. Ct., Ohio; 13 December 1991).

[82] With respect to the difference in result reached by the Court in *Glover* as opposed to Court in *Fireman*, one commentator has noted: "...one suspects the difference in results rests more upon each court's attitude toward HIV and privacy than on any meaningful factual differences" (S. Anderson, "Individual Privacy Interests" and the "Special Needs" analysis, supra.

[83] Ibid, at para. 36.

[84] Ibid, at para. 38. This is consistent with para. 4 of the Siracusa Principles, supra.

[85] Ibid, at para. 47. One of the cases relied upon in *Fireman* was *Local 1812, American Federation of Government Employees v. US Department of State et al.* (United States): 662 F. Supp. 50 (DDC 1987). At issue in this case was the legality of the US Department of State's decision to subject all prospective and current Foreign Service employees to mandatory HIV testing and make employment decisions based on those test results. A union representing some Foreign Service workers brought a preliminary court challenge to prevent implementation of the mandatory testing program. This preliminary challenge failed, and the challenge was not pursued further on the merits of interest, however, is the fact that the Department has very recently terminated its mandatory HIV testing programme for Foreign Service workers: B. Schweid, "State Department Ends HIV Screening of Foreign Workers at US Diplomatic Posts" (Associated Press, 23 August 2001).

- firefighters and paramedics were in a high-risk group for HIV transmission because their duties included a significant risk of being exposed to blood, bodily secretions and bodily fluid through their exposure "to high risk of bodily injury, lacerations, exposure to bleeding victims, puncture wounds and the like";[86]

- once a person's HIV status is known, extra precautions can be taken to avoid the risk of HIV transmission by these people including the practice of the universal precautions "in a more thorough and meaningful manner" or, alternatively, assignment to non-high-risk work where the chance of HIV transmission is mitigated or eliminated.[87]

- universal precautions for firefighters ("such as a space-suit, boots, masks, gloves, etc.") are impractical because it is difficult for firemen to function and work efficiently wearing these garments.[88]

- "universal precautions are not used and do not mean a thing in practice";[89]

The Court also placed reliance upon the City's argument that "the fire and police industries are among the most highly regulated of any industry with respect to the performance of their employees" so as to ensure safety and, as such, have diminished expectations of privacy.[90]

The Committee for GI Rights v. Callaway **(United States),**[91] a group of soldiers brought a class action to challenge certain aspects of a drug abuse prevention and control program introduced by the US Army. The program was a comprehensive one with many components. The drug testing component required testing only in the limited circumstances in which a soldier had been medically determined to be a "confirmed drug abuser" and was undergoing active rehabilitation and/or follow-up observation. It was not a mandatory testing program (i.e., one which required drug testing of all soldiers). Other components of the comprehensive program included drug searches of soldiers' rooms and property, and non-penetrative skin inspections.

The Court considered whether these searches violated soldiers' rights to privacy. The Court explicitly acknowledged that, "GI's are entitled to the protection of the Fourth Amendment [(which is the basis of the right to privacy in US law)] as are all other American citizens," but did note that

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86 Ibid, at para. 84.

87 Ibid, at para. 39.

88 Ibid, testimony of Dr. Brian McNamee, expert for the City.

89 Ibid, testimony of Dr. Stanley Fox, expert for the City.

90 Ibid, at para. 24.

91 518 F. 2d 466 (2 September 1975).

the military context nonetheless had to be considered. Quoting one of its own earlier judgments on this point, the Court stated:

> To strike the proper balance between legitimate military needs and individual liberties we must enquire whether "conditions peculiar to military life" dictate affording different treatment to activity arising in a military context.

The Court concluded that those components of the program under challenge (including the drug testing requirements) did not violate soldiers' rights to privacy for the following reasons:

- extensive evidence before the Court established that the increased incidence of drug abuse in the Armed Forces posed a substantial threat to the readiness and efficiency of the US Army;

- soldiers' expectations of privacy in relation to their rooms and personal belongings are different (i.e., lesser) than in civilian life;[92]

- the primary purpose identified by the army in support of its program was the physical and mental capacity of its soldiers for service;

- given the nature of drugs and related paraphernalia, unannounced drug inspections appeared to be the most effective means of identifying drug users so that they might receive treatment, and of eliminating illegal and debilitating drugs from the unit; and

- In authorizing drug inspections, the army had attempted to guard the dignity and privacy of the soldier insofar as practical (i.e., so as to minimize the degree of intrusion).

In ***Smith and Grady v. The United Kingdom***[93] and ***Lustig-Prean and Beckett v. The United Kingdom*** [94] **(Europe)**, the applicants (former members of the Royal Air Force and Royal Navy) complained that investigations into their homosexuality and their discharge on that basis constituted violation of their privacy rights under Article 8 of the ECHR. The Government defended its position on the basis of stated concern for "the maintenance of the morale of service personnel and, consequently, of the fighting power and operational effectiveness of the Armed Forces".[95] Although

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[92] It is important to note that the Court's comments in this regard did not suggest that soldiers have a lesser expectation of privacy in relation to their bodily integrity but focused upon the question of personal belongings: "the soldier cannot reasonably expect the army barracks to be a sanctuary like his civilian home".

[93] Application and O.S. 33985/96 and 33986/96, European Court of Human Rights (judgment dated 27 September 1999).

[94] Application and O.S. 31417/96 and 32377/96, European Court of Human Rights (judgment dated 27 September 1999).

[95] *Smith and Grady*, supra, para. 74.

these cases deal with the question of open acceptance of homosexuals in the military rather than mandatory testing, they are relevant to the matters under consideration in this paper for three reasons:

- First, the nature of the privacy rights at stake for the applicants were similar to those at issue in this context. As with disclosure of a person's HIV status, disclosure of homosexuality can give rise to prejudice, stigma, marginalization and discriminatory treatment of the most serious kind including, in particular, in employment.

- Second, the United Kingdom sought to defend its position with arguments relating to forces' fighting power and operational effectiveness, an argument made to justify the exclusion of HIV positive soldiers in *X v. Commonwealth.*

- Third, the Court was called upon to balance these competing interests with reference to Article 8(2) of the ECHR which, as noted above,[96] is almost identical in wording to Article 29 of the UDHR (which serves to limit the privacy protection afforded to UN peacekeeping personnel by Article 12 of the UDHR).

The European Court of Human Rights ruled in favour of the applicants in both cases, concluding that the Government's actions amounted to violations of the applicants' rights to privacy that could not be justified as "necessary in a democratic society".

Of particular interest are the Court's findings in both cases that:[97]

- The Government's stated purpose (to maintain fighting power and operational effectiveness) was a legitimate aim.[98]

- Notwithstanding the military context, which the government had argued called for a wide measure of discretion to be left to the state in view of its security interests, and

> ...when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8(2) of the [ECHR] ...
>
> ... it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise

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[96] Supra at, footnote 58.

[97] The citations that follow are to the Court's judgment in *Smith and Grady*. Similar findings and statements are made in *Lustig-Prean*.

[98] Ibid, para. 74.

by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State.[99] [emphasis added]

- The Government had failed to substantiate its argument that admitting homosexuals to the Armed Forces would have a significant and negative effect on morale, fighting power and operational effectiveness with concrete evidence. It failed, for example, to show that "a strict code of conduct applicable to all personnel" could not adequately deal with any behavioural issues on the part of homosexuals or heterosexuals that might follow open acceptance of homosexuals into the Armed Forces.[100]

- As to whether negative attitudes might constitute sufficient reason to justify the exclusion of homosexuals from service, the Court held that,

> ... these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease ... To the extent that they represent a predisposed bias ..., these negative attitudes cannot, of themselves, be considered by the Court to amount sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes toward those of a different race, origin or colour.[101]

D. Key Principles:

The ***Key Principles*** that emerge from these cases and the preceding analysis may be summarized as follows:

☐ UN peacekeeping personnel are entitled to the 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 upon this right to privacy on the part of peacekeeping personnel.

☐ The physical and mental capacity of UN peacekeeping personnel for the demands of service, the health and safety of HIV positive peacekeeping personnel, and the health and safety of others (i.e., HIV negative peacekeeping personnel and/or civilians of host countries) relate to the operational effectiveness of UN peacekeeping missions. They are legitimate subjects of UN concern and therefore possible sources of limitations on privacy rights.

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[99] Ibid, at paras. 87-89.

[100] Ibid, at paras. 99-103.

[101] Ibid, para. 97.

- ☐ The public health importance of protecting the human rights and fundamental freedoms of HIV positive peacekeeping personnel requires that the least intrusive, least restrictive measure be used to address the foregoing UN concerns (i.e., for physical and mental capacity and health and safety).

- ☐ 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 a medical examination is necessary. To be "necessary":

    - ☐ if the objective of HIV testing is to respond to and identify the problem or risk, it 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 with surrogate HIV tests (i.e., CD4 counts or P24 Antigen testing).

VIII. CONCLUSIONS

Appendix I contains a complete list of the "Key Principles" that appear throughout the body of this paper. They are listed in Appendix I to the Executive Summary in the same order they appear in the paper, and have been organized under 3 separate headings: General Approach; Principles Relating to Service; and Principles Relating to Testing.

These principles provide a framework to assist the UN in making decisions in response to the questions posed at the outset of this paper:

(1) Is it permissible for the UN to implement mandatory HIV testing of its peacekeeping personnel? and

(2) Can HIV positive UN peacekeeping personnel be excluded or restricted from service on the basis of their HIV status or HIV disease progression?

The conclusions set out below attempt to take those Key Principles one step further, to provide answers to the questions posed to the extent reasonably possible in view of the case law and other authorities reviewed in the paper.

A. 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 that it is necessary to assess their 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 (as in *N* v. *Minister of Defence*) and who are symptomatic (as in *Thwaites*), may nonetheless function at full capacity. Rather, HIV testing should only be required at the point that it becomes necessary (i.e., on the basis of knowledgeable medical opinion) to assess physical and mental capacity for peacekeeping service.[102]

Indeed, if as a matter of knowledgeable medical opinion, one could always assess the physical and mental capacity of a class or classes of UN peacekeeping personnel with reference to measures other than HIV status without undue hardship, a stringent approach to protecting privacy rights would preclude ever requiring employees within that class or classes to undergo HIV testing. Knowledge of their HIV status would always be irrelevant because employment-related decisions could be made on the basis of other measures equally able, or perhaps better able, to measure capacity.

HIV positive peacekeeping personnel cannot be excluded from service based on their HIV status alone. Nor can HIV positive applicants for peacekeeping service be refused employment based on their HIV status alone.

Rather, the UN must undertake appropriate and individualized assessment of the physical and mental capacity of HIV positive applicants for service and peacekeeping personnel in relation to physical and mental capacity for service so that employment-related decisions can be made on the basis of real and not perceived facts.

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[102] In this regard, one aspect of the decision in *N.* v. *Minister of Defence* may be subjected to criticism. Having concluded that HIV status alone was not determinative of whether a recruit is fit for military service and therefore not a reasonable basis upon which to exclude N. from enlistment, the court then ordered the NDF to subject applicants for military service to an HIV test together with a CD4 count test and a viral load test. An approach that would be more protective of the privacy interests of applicants, and probably less expensive for the Ministry of Defence, would be to defer any need for HIV and related testing unless and until concerns regarding physical and/or mental capacity became evident upon medical examination or otherwise during the course of service

A categorized approach to assessment and restriction from service (i.e., down-grading all persons with symptomatic HIV infection regardless of the nature, extent and impact of symptomatology upon the individual as in *Thwaites*) 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.

These conclusions are consistent with the provisions of the current "UN HIV/AIDS Personnel Policy", first introduced in 1993.[103]

They are also consistent with relevant provisions of the *International Guidelines on HIV/AIDS and Human Rights*, as follows:

> The right to work entails the right of every person to access to employment without any precondition except the necessary occupational qualifications. This right is violated when an applicant or employee is required to undergo mandatory testing for HIV and is refused employment or dismissed ... on the grounds of a positive [HIV test] result. States should ensure that persons with HIV/AIDS are allowed to work as long as they can carry out the functions of the job. Thereafter, as with any other illness, [people living with HIV/AIDS] should be provided with reasonable accommodation to be able to continue working as long as possible ...[104]

and with relevant provisions of *An ILO code of practice on HIV/AIDS and the world of work*, as follows:

> 4.6 HIV/AIDS screening should not be required of job applicants or persons in employment.
>
> 4.8 HIV infection is not a cause for termination of employment. As with many other conditions, persons with HIV-related illnesses should be able to work for as long as medically fit in available, appropriate work.
>
> 5.2(j) Employers, in consultation with the worker(s) and their representatives, should take measures to reasonably accommodate the worker(s) with AIDS-related illness. These could include

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[103] As summarized in the "Report of the Secretary-General on international and domestic measures taken to protect human rights and prevent discrimination in the context of HIV/AIDS":

> "...in accordance with ILO standards and international human rights instruments, the United Nations Secretariat has prepared a document analysing the impact of HIV/AIDS on United Nations personnel and operational policy (ACC/1991/DEC/10 and ACC/1993/PER/R.6, annex III). ... with regard to terms of appointment and service, HIV infection is not taken in itself to constitute a lack of fitness to work and no HIV screening of candidates is required for recruitment. Similarly, HIV infection or AIDS should not in itself be considered a basis for termination of employment, and should fitness to work be impaired by HIV-related illness, then reasonable alternative working arrangements should be made."
>
> E/CN.4/1995/45 22 December 1994, at para. 49.

[104] Supra, at para. 127. See also para. 30(d).

rearrangement of working time, special equipment, opportunities for rest breaks, time off for medical appointments, flexible sick leave, part-time work and return-to-work arrangements. [105]

B. Health and Safety of Others:

The ability of HIV positive UN peacekeeping personnel (or applicants for service) to serve with reasonable safety to others (i.e., HIV negative peacekeeping personnel and/or civilians of host countries) during the course of employment is a legitimate subject for concern on the part of the UN in relation to its operational effectiveness.

Beyond this general proposition, however, the authorities are not prescriptive. They do not yield obvious conclusions as to what the content of such a policy should be but, instead, a framework of Key Principles to guide decision-making. Again, these Key Principles are set out in their entirety in Appendix I to the Executive Summary.

In general terms, however, it is clear that before the UN could resort to a blanket rule of mandatory HIV testing for UN peacekeeping personnel and/or exclusion or restriction from service on this basis (i.e., to protect the health and safety of others):

(1) it must establish that reasonable alternatives to such a rule (including, but not limited, to the ability to accommodate individuals 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

(2) it must do so on the basis of the most authoritative and up-to-date medical, scientific and statistical information available.

Alternative approaches to be investigated by the UN in this regard should include, for example:

- those recommended by UNAIDS in *AIDS and the Military*:
- improved or expanded prevention education;
- condom education and distribution;
- expanded STD treatment;
- provision of counselling and voluntary testing services;
- changes to posting practices, including an emphasis on maintaining a family life;
- changes to military culture;
- changes to military attitudes towards civilian populations;
- partnerships with the civilian sector in the delivery of prevention and care programmes; and

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[105] ILO, "An ILO Code of Practice on HIV/AIDS and the World of Work" (Geneva: International Labour Office, 2001), at 13.

- acceptance and care of HIV positive peacekeeping personnel, including full confidentiality, to create a non-stigmatizing and non-discriminatory environment.[106]

Of particular interest in this regard would be an evaluation of the effectiveness of HIV prevention programmes adopted by Member States that do not rely upon a mandatory HIV testing/exclusionary approach such as those implemented by the Canadian and Belgian armed forces and equally, a careful study of programmes believed to have been ineffective.

Other approaches to be investigated for implementation so as to minimize the risk of HIV transmission presented by UN peacekeeping personnel would include:

- full implementation of universal precautions for the health care setting (including health care activities in the field);[107]

- harm reduction measures to reduce the risk of HIV transmission associated with the use of injection drugs (to the extent this is a source of risk within the context of UN peacekeeping missions);

- implementation of measures by host countries to educate their civilian populations regarding the risks of HIV infection and to enable them to take effective steps to minimize those risks (i.e., through public education, widespread availability of counselling and voluntary HIV testing services, and widespread availability of the means to protect themselves from HIV infection, including, in particular, male and female condoms; and strategies directed toward the empowerment of vulnerable populations, especially women and girls).

Implicit in the foregoing is the need to deploy adequate resources to enable these alternative approaches to succeed.

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[106] UNAIDS, *AIDS and the Military,* from the UNAIDS Best Practice Collection (May 1998), at 6-7.

[107] As provided in the *International Guidelines on HIV/AIDS and Human Rights*:

> 28 (i) Public health law should require the implementation of universal infection control precautions in health-care and other settings involving exposure to blood and other bodily fluids. Persons working in these settings must be provided with the appropriate equipment and training to implement such precautions.