

THE ZAMBIA DEFENCE FORCE HIV POLICY ON MANDATORY PRE-RECRUITMENT TESTING – ZARAN’S POSITION

In a speech presented at the launching of the collaboration between the Defence Force Medical Services (DFMA) and Project Concern International at Mulungushi Hall on the 4th of March 2003, the DFMS Director-General James Simpungwe, announced that the military would conduct mandatory HIV screening at recruitment, and that ‘only HIV negative ones will be recruited’. This initiative is part of the Defence Force’s HIV Policy, which also says that serving members who are HIV positive would not be disposed of. They would be ‘re-categorised’ and offered available medical attention.

ZARAN raised a preliminary concern regarding the human rights implications and sought audience with the DFMS Director. Audience was given in which the following points were established:

1. That the military has, over a period of time developed a policy of mandatory testing for HIV status at military recruitment with pre and post test counselling.
2. That HIV positive candidates are excluded from service.
3. That the mandatory testing does not extend to civilian applicants.
4. That the policy was the result of an internal consultative process within the military. Furthermore, also consulted were medical practitioners, legal practitioners, pastors, civilians, National AIDS Council and embassies. No specific mention of people with HIV was made as being part of the consultative process.
5. That tests such as CD4 Count and viral load are not conducted at recruitment. It was agreed that in the absence of these tests, the health status of the applicant is not ascertained and thus it cannot be said that he/she is unfit for the job.
6. That serving personnel who are found to be HIV positive are ALL eligible for AZT provided they meet the clinical criterion. They are not demoted, but they are ‘re-categorised’ depending on their condition and training.
7. That the policy was based on epidemiological and scientific evidence which is unpublished and which shows that the military regime would accelerate the degeneration of HIV positive status to full blown AIDS.
8. That the policy in its present state is imperfect, but within the available knowledge and resources, it was the only answer the military had for Zambia.

The Zambia Defence Force is basically advancing two arguments to justify the mandatory testing and exclusion of HIV positive applicants;

Firstly, that the harsh psychological and physical conditions of military life will (eventually) affect the health of the HIV positive person.

Secondly, that the costs of care and treatment of HIV positive individuals is prohibitively high and must be kept to the barest minimum.

Thus the military contends, that by excluding HIV positive individuals at recruitment, and ‘re-categorising’ those already in service, the armed forces maintain their ability to mobilize, lengthen the life of military personnel and overall, secure National security. In

the words of a senior military personnel, “the law in Zambia does not allow passengers on the force”.

ZARAN’S POSITION

UNAIDS defines arbitrary discrimination as being ‘any measure entailing an arbitrary distinction among persons depending on their confirmed or suspected HIV sero status or state of health’ (UNAIDS: 2000).

Mandatory HIV testing and exclusion is such ‘arbitrary distinction’. In the absence of cognitive proof that military life is so peculiar as to cause the acceleration of HIV to AIDS, the testing and exclusion are violations of the applicant’s right to liberty and security of the person, right to privacy, rights to work and right to non discrimination and equality before the law.

ZARAN’s opposition to this policy is based on the following arguments;

1. The policy of mandatory testing for HIV and exclusion of HIV positive applicants is a violation of the rights enumerated above. The Zambian Constitution recognizes all of the above rights and annuls any acts, which are discriminatory in themselves or in their effect. Zambia is a signatory to the International Convention on Civil and Political Rights. Article 2 of that convention says that all individuals should enjoy their rights without any distinction on the basis of race, color...or other status. It has been internationally agreed that HIV status is health status within the meaning of ‘other status’. Therefore, to exclude a person exclusively on the basis of HIV status would be discriminatory and unconstitutional.

Furthermore, Zambia, along with all the other member states of the United Nations, made a Declaration of Commitment on HIV/AIDS at the United Nations General Assembly Special Session on HIV/AIDS (UNGASS) in June 2001. Two things were underscored in that declaration;

Firstly, the realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS. Secondly, that respect for the rights of people living with HIV/AIDS drives an effective response to the pandemic.

Against this background, Zambia’s government pledged, by 2003, to “enact, strengthen and 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 inter alia...employment,...legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic”.

ZARAN therefore reiterates the declared Zambian position i.e. that discriminatory acts have no place in an effective HIV/AIDS response, and thus we condemn the mandatory screening and wholesale exclusion of people who are HIV positive from recruitment in the military.

2. Practically, only one HIV test is conducted. This test will not identify all those who have contracted HIV in the previous three months as they may be in the window period, when no anti-bodies indicating the presence of the HIV virus are detectable. Thus the test may be negative when in fact, the applicant is positive but is in the latent/window period. The military would thus not have achieved its objective.
3. UNAIDS has argued that mandatory testing has not demonstrated individual or public health benefits and it can result in significant negative outcomes for those testing positive. They argue that mandatory testing;
 - (i) Does not, on its own help people change their behaviour to prevent infecting others.
 - (ii) Can lead to stigma and discrimination, psychological, social and economic harm to the persons concerned.
 - (iii) Discourages people from accessing health care services.
 - (iv) May involve false negatives for those in the window period. Such individuals then may not realise the need to seek care and to protect others from infection.
 - (v) May lead to a false sense of security in the military, that over time, an 'HIV-free' environment has been created and thus, there is no need to take precautions.
 - (vi) Can (does) divert funds from more effective interventions (UNAIDS: 2001).

Furthermore, UNAIDS argues that the military can only justify mandatory testing if it can demonstrate the following;

- (a) Compelling aspects that make it different from other workplaces.
 - (b) That mandatory testing and its consequences (rejection, limitation on employment options etc) are the least restrictive means available and will achieve its goals more effectively than voluntary testing.
 - (c) That HIV is not being singled out from other similar diseases that raise comparable issues.
4. In addition, the question of mandatory screening and exclusion of people with HIV has been litigated upon in other countries and Zambia will do well to take a leaf.

In Namibia, in 2000, the Labour Court of Namibia heard how the applicant was mandatorily screened for HIV and when he tested positive, was excluded on the grounds of HIV status ALONE, from enlistment in the Namibian Defence Force.

The applicant took the Namibian Defence Force (NDF) through the Minister of Defence to Court. Among other things, expert evidence was given by medical practitioners, epidemiologist etc. “ The medical experts who testified agreed that an HIV positive person can be as fit and as healthy as any normal person in similar circumstances, but as that person’s CD4 Count decreases, and the viral load increases, such person’s well being progressively deteriorates....Basic training is strenuous...medical experts were of the opinion that a person who contracts HIV is fit and healthy for several years and that the training would not be to his or her detriment. Dr. Steinberg (MB ChB (Wits) MSc Epidemiology, London) in fact said that regular exercise would be to such persons benefit (depending on the progress of the diseases in later years)”

The court made **two orders**, firstly, **that the NDF enlist the applicant provided that his CD4 Count is not below 200 and his viral load not above 100,000.** Secondly, **that no person may be excluded from enlistment into the NDF solely on the basis of such person’s HIV status where such person is otherwise fit and healthy unless such person’s CD4 Count is below 200 and viral load is above 100,000.** The medical examinations should thus include an **HIV test, together with a CD4 Count test and a viral load test.**

THE APPLICANT SUCCEEDED. (Haindongo and Minister of Defence).

Another instructive case is a Canadian one, Simon Thwaites V Canadian Armed Forces (CAF). The Canadian Human Rights Tribunal was faced with the concerns by the CAF for the health of their members infected with HIV on the one hand and the right of such individuals to be gainfully employed in positions which they can perform satisfactory standards, but which, because of their nature, subject their safety or health to increased risk. The complainant was an electronic warfare operator of the Naval Electronics Sense Operator. He alleged that CAF has discriminated against him by refusing to continue to employ him and by differentiating adversely in relation to his employment by restricting his duties and opportunities because of his disability (i.e. being HIV positive). The complainant was on AZT therapy and his health was improving. The tribunal discussed at length that **significant risk can best be measured in the context of a particular job and then only in comparison with other risks posed by that workplace.** In this way, **other tolerable risks arising from the employment establish risk thresholds. If risks of comparable magnitude are acceptable in a particular work environment, then risks posed by a person who is HIV positive cannot be considered significant.** It was held that **CAF failed to make a full assessment of Thwaite’s condition and determine whether he was exposed o risks significantly greater than the usual risks for those who are not disabled o going out at sea and being remote from hospital facilities and specialist care should an unexpected medical emergency arise.** The CAF also failed to show that they would not otherwise reasonably accommodate him. It was held that **CAF WAS TO ADEQUATELY COMPENSATE THE COMPLAINANT.**

The two cases illustrate that “arbitrary” exclusion, restriction etc of people with HIV solely on the basis of their HIV status amounts to unfair discrimination. Various methods may be used to challenge such discrimination. Clearly articulated criteria and procedures are necessary in order to remove the arbitrariness and these must not unnecessarily distinguish HIV from other similar conditions.

5. The issue of HIV/AIDS in the military is not a novel one, peculiar to Zambia. Other institutions/countries have addressed themselves to the issue and are recording some success. The Civil – Military Alliance (CMA) to combat HIV and AIDS is a worldwide interest group representing military and civilian organisations. The objective is to promote global civil-military co-operation in combating HIV/AIDS through the pursuit of fair and effective policies, strategies and programs in civilian and military populations. Activities in the sub-region include inter alia such countries as Angola, Botswana, Malawi, Namibia, South Africa and Zambia. UNAIDS (1998), reported that 93% of militaries surveyed in 1995/6 were performing some form of HIV screening. 80% of those militaries rejected all HIV positive applicants. The CMA argues against these responses. It concludes that “asymptomatic HIV positive men and women are able to fulfill their military duties and have a right to be engaged in the work for which they have been trained and which they have chosen without discrimination or exclusion”. (Kingama:1996).

In Brazil, Government spokesman Paulo Junqueira explains the policy of **not testing** on the following grounds, “Mandatory HIV testing is an inefficient tool to bring the epidemic under control, for it stimulates the increase in AIDS related intolerance and stigma, and above all hinders the access to health services by these groups most affected. Additionally, the use of compulsory screening as a prevention strategy has increasingly lead to a misplaced sense of safety in what concerns HIV/AIDS infection, increasing the overall vulnerability of the population”. (Combat AIDS: HIV and the World’s Armed Forces).

Furthermore, recognizing the health concerns underling the support for mandatory testing, the Brazilian government proposes a combination of approaches that both allows individuals with HIV to serve in the military and protects those who do not have HIV. (Combat AIDS).

In Conclusion, unless Zambia’s response to HIV/AIDS respects, protects and promotes the rights of infected and affected persons, the pandemic will continue to ravage and its effects will continue to be felt. We will not succeed.

The purpose of any medical examination in the context of pre-recruitment procedures IS and SHOULD ALWAYS BE to ascertain FITNESS FOR THE JOB! Unless the military can demonstrate the unfitness of an HIV positive applicant to carry out military activities for which such applicants are otherwise qualified, the military would be DISCRMINATING UNFAIRLY against the applicants by rejecting their applications! HIV status IN and OF ITSELF is not an

appropriate indicator of whether a person is fit or can or cannot perform certain duties!!!

ZARAN therefore joins countless others in condemning the Zambia Defence Force's policy of mandatory screening and exclusion of HIV positive applicants.

We demand:

- 1. That whatever scientific evidence the military purports to have, be published and subjected to scrutiny by independent/non-military scientists.**
- 2. That either**
 - (a) The policy of mandatory testing for HIV be accompanied by a cd4 count test and viral load test to ascertain the progress of the virus vis-à-vis the applicant's immunity and only those falling below a reasonable, specified criteria e.g. cd4 count below 200/ccm and viral load of above 100,000/ccm should be excluded or**
 - (b) The policy be scrapped off altogether!!!**
- 3. We further challenge the minister of health, Dr. Brian Chituwo, to publicly respond to this statement, as he has repeatedly defended the military's position and has said it is consonant with government policy.**

The people of Zambia have fought long and hard to rid themselves of discrimination every time it has reared it's ugly head, be it as racism, apartheid, sexism, religious fanaticism etc. The people of Zambia must now say no to this new "ism" and resist it before it takes root!!!