Sailor trains Gabonese students assigned to USS *Fort McHenry*

U.S. Navy (R.J. Stratchko)

Legal Impediments to USAFRICOM Operationalization

By JEFFREY S. PALMER

Westerners have aggressive problem-solving minds; Africans experience people.

—Kenneth David Kaunda
President of Zambia, 1964–1991

With the creation of the newest regionally focused unified combatant command, questions arose about the ability of U.S. Africa Command (USAFRICOM) to attain full operationalization. Indeed, from a legal perspective, numerous challenges have yet to be resolved or addressed. This article considers those legal challenges by first examining USAFRICOM's articulated mission and organizational structure. Moreover, an analysis of the legal instruments that would enable full operationalization is necessary, as well as a candid assessment of any agreements currently in force. Integral to that assessment is the perspective of the intended beneficiaries of the command. Additionally, one must consider the fiscal laws and statutory constraints that may pose an impediment in realizing the stated mission of USAFRICOM. Finally, recommendations are offered. This essay demonstrates that absent substantial expansion of international agreements in the new command, coupled with significant revision to existing statutes, USAFRICOM is unlikely to have an impact beyond the status quo.

International Agreements

If one considers the broad mandate of USAFRICOM to contribute to the stability, security, health, and welfare of the regional institutions, nations, and people of Africa, the logical conclusion is that command personnel must operate, to some degree, *in* Africa. Whenever officials enter the sovereign territory of another nation, it is pursuant to some sort of legal authority.[1] Typically, the presence of foreign military personnel within the boundaries of a nation is governed by international agreement. The Department of Defense (DOD) defines *international agreements* as those agreements concluded with one or more foreign governments, signed by a U.S. representative, and sig-

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nifying intent of the parties to be bound under international law and denominated as an international agreement or other name connoting similar legal consequence.[2] These agreements may be in the form of either a treaty or an executive agreement, both having the same binding obligation under international law.[3] The distinction between the two relates to U.S. domestic law, as treaties require the advice and consent of the Senate, while executive agreements do not.[4] Among the forms that an executive agreement may take are a memorandum of agreement, exchange of notes, or agreed minute.[5] The selection of an executive agreement over a treaty may depend on whether the agreement, standing alone, can achieve its intended purpose or requires some implementing legislation.[6] By avoiding the Senate, the obvious appeal of the executive agreement, especially for DOD foreign military arrangements, should be apparent. DOD has concluded hundreds of executive agreements on matters of military cooperation, status arrangements, rights and privileges, facility use, and basing rights.[7]

Status of Forces Agreements. A crucial international agreement for American forces operating abroad is the Status of Forces Agreement (SOFA), which addresses the presence of military personnel in a foreign sovereign's territory and can be accomplished via executive agreement or treaty. One of the most comprehensive agreements in force is the North Atlantic Treaty Organization (NATO) SOFA, a multilateral treaty that covers the following matters: respect for laws of the host nation; exemption from passport/visa requirements; rules concerning driving; uniform wear in host country; guidelines for possession of arms; shared framework for criminal jurisdiction; limited immunity for civil jurisdiction; waiver or compensation formula for damages and liability; the provision of services (use of civilian local labor, financial, medical, postal); and personal tax and customs exemptions.[8] The utility and efficiency of this agreement are self-evident—signatory states' troops can train, organize, and equip, en masse, without the burdens of visa applications, weapons permits, import duties, foreign taxes, or foreign driving tests. The operational efficiency gained in having a smooth working relationship between sovereign states should not be underestimated. Yet as exhaustive as the NATO SOFA may seem, most member states have further refined their obligations through supplemental agreements.[9] Arguably, through these legal instruments, friendly forces are able to carry out their military missions with proper legal authority and clear understanding of respective rights and responsibilities. In many ways, a robust SOFA serves to facilitate military operations in a foreign setting.

If we consider the functionality of the SOFA in the context of USAFRICOM, we find a less than ideal arrangement. Among the states that comprise the command, fewer than one-third have some form of international agreement that addresses the presence of American forces in their country.[10] Thus, for the majority of countries in the USAFRICOM area of responsibility (AOR), U.S. military personnel have the same status as tourists—they are subject to visa requirements, customs restrictions, taxes, and all the laws of the host state. Note that states have no independent obligation to provide visitors with even basic due process rights. Essentially, absent specific legal authority, one enters and operates in a foreign setting at his own peril.

While it has been stated that large-scale deployments and bases are not part of the USAFRICOM vision,[11] the absence of SOFAs presents challenges to the flexibility and mobility of military personnel. The strategic implications should not be discounted or overlooked. Consider the following hypothetical scenario: a USAFRICOM training team wishes to develop a crisis response force composed of Eastern Africa nations. Without SOFAs, the movement of equipment, weapons, and personnel would be severely hampered by disparate entry requirements for each country. An initiative that could take several years to materialize under ideal circumstances could be protracted indefinitely if personnel, supplies, and equipment could not be moved with any degree of fluidity.

Of those SOFAs currently in force, most are arguably inadequate for the purposes of USAFRICOM. Almost all of these agreements are in the form of an "exchange of notes," which confers status equivalent to the administrative and technical (A&T) staff of the U.S. Embassy under the Vienna Convention on Diplomatic Relations. A SOFA conferring A&T status is inadequate for two reasons. The first is that such status provides military forces with a variety of diplomatic immunities, most significantly complete protection from the host state's criminal jurisdiction.[12] While the coverage or immunities provided for American forces seems operationally advantageous, it may be counterproductive. An agreement conferring A&T status does not authorize the presence of the force; rather, it affords the status only to those forces invited to enter the borders of the host nation. While a country facing catastrophe may allow foreign forces to enter under a grant of immunity, history indicates that those arrangements tend to be limited in duration.[13] The practical result of an A&T SOFA is that the U.S. military may be permitted to enter for only limited purposes and for short durations.[14] Essentially, if nations are hesitant to allow American forces to enter under a veil of diplomatic immunity, this may undermine USAFRICOM engagement strategy.

Secondly, the A&T SOFAs are arguably inadequate given their superficial nature, providing cursory treatment of multiple, complex subjects in a single sentence. Indeed, these executive agreements, usually reduced to a single page or two, incorporate a wide variety of subjects without much detail. While there is certainly no requirement under international law that all questions be addressed within the body of an agreement, the brevity of the A&T status agreement reflects its limited purpose. This type of A&T SOFA may be useful for touch-and-go military operations; however, it may not adequately address issues necessary for a robust USAFRICOM engagement. The failure of an A&T SOFA to address anticipated issues may create more disputes than it resolves. In fact, the historical experience of DOD suggests that foreign military engagements that encounter issues not addressed in a SOFA invariably lead to discord.[15]

The mosaic arrangement of USAFRICOM nations having either no SOFA (thus subjecting military guests to all laws and regulations of the host) or an A&T SOFA (which provides sweeping diplomatic immunities for military personnel) is a strategic impediment to operationalization. Without a SOFA, visiting forces are provided no protections—even for acts arising from the performance of official duties. Elsewhere, where there is an A&T SOFA in place, the broad immunities provided may discourage peacetime engagement. If one considers the legal theory underlying diplomatic immunity—that the person afforded the status is a personification of his sovereign[16] and thereby should be afforded privileges of the sovereign itself—one recognizes that this status, which has been promoted as a "serious long-term partnership,"[17] is clearly inappropriate for a military engagement with African nations. These one-sided agreements have little to do with partnership.

International Criminal Court. This potentially unworkable mosaic configuration for USAFRICOM is further complicated by the impact of the obligations due the International

Criminal Court (ICC). The ICC, as a permanent tribunal, exercises jurisdiction over individuals who are accused of crimes, including genocide, crimes against humanity, war crimes, and crimes of aggression.[18] To date, there are 105 parties to the Rome Statute.[19] Although the United States was originally a signatory, it subsequently refused to ratify the agreement, fearing the ICC could make Americans subject to baseless, politicized prosecutions.[20] In the wake of the establishment of the ICC, the United States embarked on a global campaign to secure assurances from the various nations that American military personnel would not be surrendered or extradited to the ICC.[21] These so-called nonsurrender agreements are pursued on the basis of the language of Article 98(2) of the Rome Statute: "The Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements."[22]

Among USAFRICOM countries, there are 30 parties to the Rome Statute.[23] Parties to the statute who have simultaneously conferred complete immunity under an A&T SOFA could be in contradiction to their obligations under the Rome Statute not to deprive the ICC of its object and purpose.[24] This potential conflict raises a further deficiency in the use of A&T SOFAs for USAFRICOM. Furthermore, the American Servicemembers' Protection Act of 2002 (ASPA) impacts USAFRICOM parties to the Rome Statute.[25] Under ASPA, the United States is prohibited from providing military assistance to any state party to the Rome Statute, with limited exceptions for major allies (none of those enumerated being in Africa), those states that have accomplished a nonsurrender agreement, and those states specifically waived by the President.[26] The United States has concluded 39 nonsurrender agreements with USAFRICOM nations, including nonparties to the Rome Statute,[27] thus averting application of ASPA to some historic beneficiaries of military assistance. Nevertheless, the assortment of USAFRICOM states with varied obligations, entitlements, and SOFAs creates innumerable legal and logistic barriers to realistic engagement on a multinational scale.

Recommendation for Pan-African SOFA. One possible solution to this unworkable configuration of incongruent legal frameworks across the continent is the execution of a pan-African SOFA (PAFSOFA). This agreement could initially be accomplished on a regional basis, as an extension of the existing subregional capabilities identified by the African Union,[28] by incorporating reciprocal provisions for signatory states. The advantages to such an agreement should be obvious. Fluid movement of troops, equipment, and supplies would increase exponentially, while military operations would proceed without legal and regulatory hindrances that would otherwise impair or degrade mission accomplishment.

A pan-African SOFA would provide comprehensive coverage of rights and obligations for its contracting parties. It could be tailored either to the states belonging to the Economic Community of West African States (ECOWAS) or to other regional security arrangements, such as the Southern African Development Community or the East African Community. Since these states enjoy a working relationship by virtue of their regional organization, an agreement that builds on such an enduring relationship has a greater chance of success. Intergovernmental organizations such as ECOWAS possess what is known under international law as "international legal personality" to function on behalf of their member states.[29] Ultimately, agreements between regional groups, incorporating the terms of a PAFSOFA by reference, would provide the widest range of flexibility and operationalization on the continent. However, one may question what interests any African states or intergovernmental organizations would have in executing such an agreement.

The agreement could serve several state interests. First, it would be reciprocal. Thus, each signatory would be either the Sending State (that deploying forces) or the Receiving State (that hosting forces), providing flexibility among signatory states and their forces. This reciprocity allows African states an international agreement *as between* African states, creating the opportunity to cross borders when mutually agreed upon, not unlike the arrangement captured in the NATO SOFA. Indeed, if USAFRICOM seeks to promote African solutions to African problems, such an arrangement is ideal. The fact that the agreement is reciprocal with the United States also provides a certain amount of prestige that may serve as an inducement to member countries to sign, while the impact on the United States is fairly insignificant. The raw numbers of African military personnel invited to America annually are likely to remain minimal. Reciprocity is also consistent with concepts of partnership, emphasizing a sharing of "sovereign prerogatives"[30] between parties to a PAFSOFA. In lieu of the one-sided A&T SOFA, which affords the United States all the benefits at the expense of the hosting sovereign, a PAFSOFA would provide a more equitable jurisdictional framework that ensures basic due process and provides accountability to outside observers, possibly to include the ICC.[31] A PAFSOFA would manifest the frequently touted collaboration between the United States and African states, while vastly improving the operationalization of the command.

Critics may argue that a PAFSOFA would be rejected as proof that America is expanding its influence to secure oil interests.[32] Admittedly, negotiating a multinational agreement with diverse states pursuing competing interests and agendas is not a simple undertaking; it would take a Herculean effort. However, the alternative is status quo, a mosaic of incongruent international agreements obstructing the USAFRICOM mission. The enduring success of the NATO SOFA, binding together distinct sovereigns, cultures, and languages, should serve as inspiration to skeptics that such an agreement can be reached. Remarkably, the NATO SOFA took only 6 months to negotiate.[33] Key to the success of attaining consensus from envisioned partner states is not allowing the power-based arrogance that has historically undermined U.S. judgment in international relations to sour the process.[34] Critics may also argue that under a PAFSOFA, the United States would relinquish too much sovereignty when it acts as the Receiving State. However, it must be remembered that the United States asks fellow signatory nations to relinquish the same degree of sovereignty when its forces are present in their countries. The improbability of large-scale African forces deploying to the United States further undermines that argument. In sum, if USAFRICOM has a long-term interest in pan-African stabilization, building capability through partnership and conflict prevention, a robust multinational agreement that enables a full spectrum of military engagement is essential.

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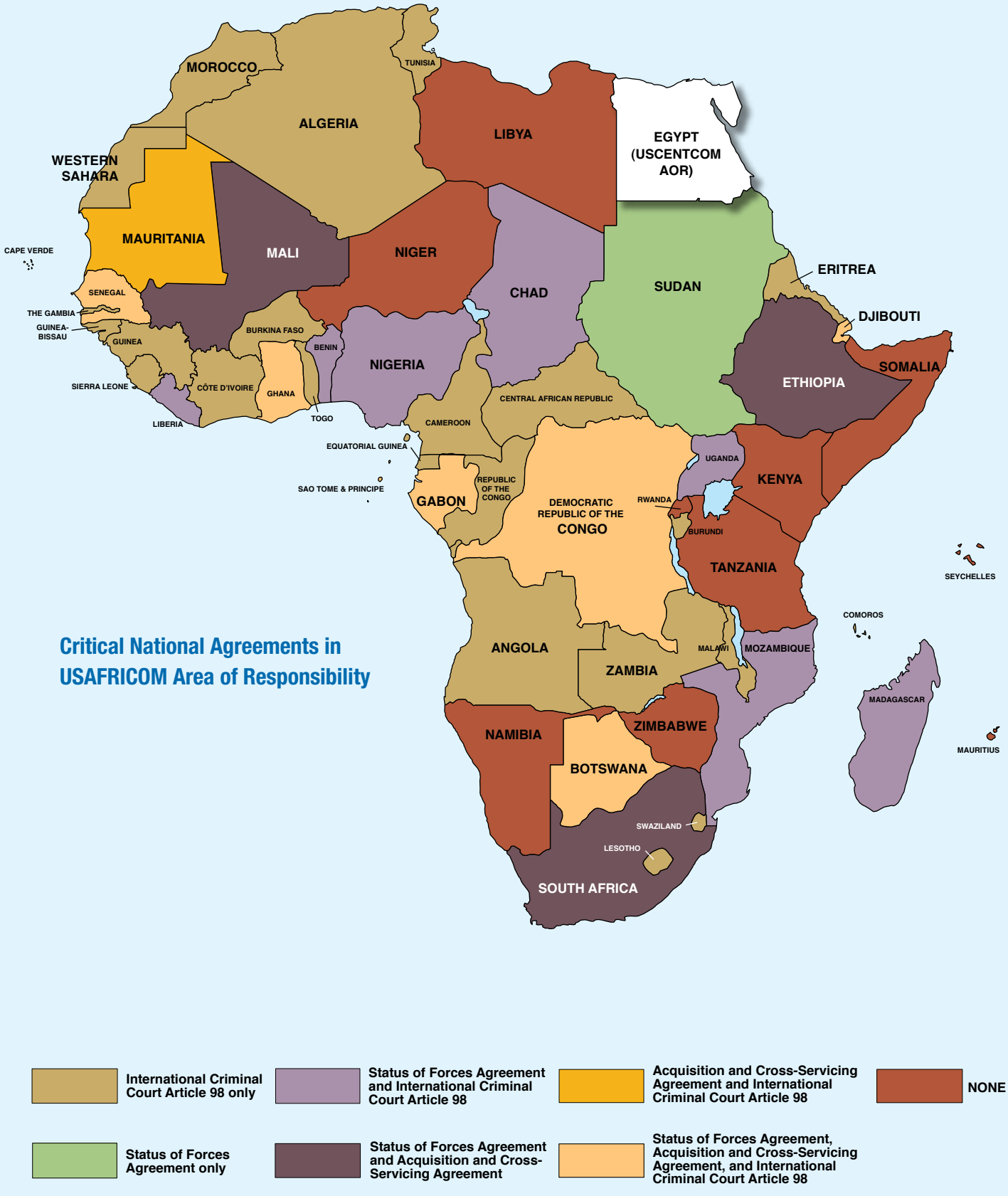
Acquisition and Cross-servicing Agreements

A collateral consideration to the need for comprehensive SOFAs in USAFRICOM is



Source: "Treaties in Force," Section 2: Bilateral Agreements, U.S. Department of State, April 10, 2007.

the requirement for an Acquisition and Cross-servicing Agreement (ACSA), which is also an international agreement. Its focus, however, is on logistics and resupply rights. The ACSA provides a mechanism to acquire, on a reciprocal basis, logistic support, supplies, and services between the parties to the agreement, usually on a cash basis, replacement-in-kind, or an equal value exchange. Highly flexible, the ACSA serves as a useful means for a deployed or transiting force to resupply without the usual DOD procurement bureaucracy. While there are some restraints, any country that has a SOFA with the United States is a candidate for an ACSA.[35]

Given the vast dimension of the USAFRICOM AOR, the usefulness and desirability of an ACSA should be apparent. In Africa, however, there are 11 ACSAs presently in force, thus providing coverage in less than 25 percent of the countries within the AOR.[36] As mentioned above, a SOFA is typically a prerequisite to the execution of an ACSA; thus, the imperative to increase SOFAs in USAFRICOM grows in significance. Without a robust constellation of ACSAs across the continent, forces will be further constrained in fluidity of movement. A routine training mission may require elaborate planning, supply prepositioning, or indirect routes in order to sustain a mission that otherwise would lack complexity. Arguably the inadequacy of SOFAs, and in turn ACSAs, will continue to hinder the full operationalization of USAFRICOM.

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Fiscal Considerations

The USAFRICOM mission to partner with African states includes "directly contributing to the stability, security, health and welfare of the nations."[37] While this admirable goal should encourage potential beneficiaries, there are complex U.S. laws governing the expenditure of funds on foreign entities. Basic principles of fiscal law must be considered to comprehend the statutory framework in which USAFRICOM must operate. The legislative control most relevant to the command (and other military operations) is the Purpose Statute,[38] which provides that appropriations shall be applied only to objects for which the appropriations were made, except as otherwise provided by law. When considering whether an appropriation has been used for a proper purpose, a three-part test is applied. The test is essentially whether the expenditure is for a particular statutory purpose, whether the expenditure is prohibited by law, and whether the expenditure falls into some other category of appropriation.[39]

This proper purpose test has also been articulated by the Supreme Court to mean "the expenditure of funds is proper only when authorized by Congress" and, conversely, should never be construed to mean "unless prohibited by Congress."[40] In other words, USAFRICOM latitude over expenditure of appropriated funds is limited. The impact of this limitation is startling. For example, in fiscal year 2005, the commander of U.S. European Command (with most African nations within its AOR) controlled a paltry 3 percent of the discretionary theater security cooperation funding.[41] Creative deviations or workarounds to these constraints are ill advised, as activities improperly charged to one source of funds, where the appropriate fund charge is subsequently obligated, can lead to violations of the Anti-Deficiency Act, which carries criminal liabilities as its penalties.[42]

Use of Operations and Maintenance Funds. Most military operations are funded with operations and maintenance (O&M) appropriations, which provide for the routine expenses associated with operating an installation and those incurred during exercises, operations, and deployments as required. However, the use of O&M general purpose funds to benefit a foreign state or foreign military is not authorized; Congress has appropriated funds for foreign military assistance under the Foreign Assistance Act (FAA).[43] This prohibition includes training of foreign forces by DOD personnel, as articulated by the Comptroller General, in the investigation of Army misuse of O&M funds:

Training provided to Honduran troops during the exercise, although certainly related to exercise activities, was essentially the same as that ordinarily provided through security assistance, and consequently should have been funded as such: *security assistance funds are specifically provided by the Congress to be used to train the military forces of friendly foreign governments* [emphasis added].[44]

Naturally, there are exceptions to the prohibition of O&M for military assistance, such as the joint combined exchange training (JCET) conducted by special operations forces. While this program may seem ideal for USAFRICOM militaries, it is far from unencumbered. The JCET has the "primary purpose" of training the special operations forces of the combatant command.[45] Thus, in the eyes of Congress, the foreign military receiving training is an incidental beneficiary of the JCET. The needs of a USAFRICOM nation are therefore not central to authorizing a JCET.

Additionally, there are constraints placed on the use of these appropriations for civic and humanitarian activities. Humanitarian assistance is carried out under the FAA, rather than O&M funding.[46] All FAA funds, under Title 22, are controlled by the Department of State, although DOD may execute some FAA programs. Congress has recognized the utility of DOD-sponsored humanitarian and civic assistance (HCA) and provided limited statutory authority for appropriated HCA: transportation of relief supplies, humanitarian demining, foreign disaster assistance, and transfer of excess nonlethal supplies.[47] However, this statutory authority also has limitations that hinder the stated USAFRICOM mission.

Funding Humanitarian and Civic Assistance. The HCA authorizations, collectively referred to as Overseas Humanitarian, Disaster, and Civic Aid (OHDACA), have specific criteria that must be met prior to the expenditure of earmarked funds:

- expenditures are in conjunction with military operations/exercises
- specific U.S. operational readiness skills are promoted
- labor is performed by the American military
- other U.S. efforts are complemented, not duplicated
- it is approved by the Secretary of State.[48]

The Secretary of Defense has decreed that the DOD humanitarian assistance "role must not be reduced to simply providing resources or writing checks."[49] These efforts are validated by the Defense Security Cooperation Agency, which allocates the funds for combatant command execution.[50] Not only will USAFRICOM be subject to meeting the above criteria before undertaking an OHDACA project, but it will also face limitations on the nature of HCA provided.

The types of HCA that may be carried out in conjunction with military operations are

rural medical, dental, and veterinary care; construction of rudimentary surface transportation systems; well-drilling and construction of basic sanitation facilities; and rudimentary construction/repair of public facilities.[51] Additionally, it should be noted that only funds specifically earmarked for OHDACA may be used for OHDACA programs, as traditional O&M is prohibited for use, absent minimal expenditures for incidental costs. The total earmarked funds for OHDACA projects are minor, considering the spectrum of global DOD operations. For example, in fiscal year 2007, the OHDACA budget was about $62 million, only $40 million of which was allocated to HCA.[52] Thus, the USAFRICOM HCA mission will be constrained by the portion of the overall OHDACA budget they can leverage. Once this portion is secured, it will also be limited to specific activities within the parameters of overall guidance.

Additional Funding Sources. Despite the limitations on O&M expenditures for training and humanitarian assistance, several other significant statutory mechanisms will enable the USAFRICOM mission in varying degrees. The long-term implications of these mechanisms on the mission are difficult to assess. Admittedly, these programs have been administered in Africa by predecessor combatant commands with varied emphasis, despite the constraints that accompany them for decades in some cases. However, these projects or engagements were allocated lower priorities (and on a fairly small scale) by those warfighting commands. Of course, these types of programs are the primary focus of USAFRICOM rather than a tangential pursuit. Under existing statutory provisions, USAFRICOM will be impeded by both specific parameters of the programs and the competition for scarce resources among the commands. Furthermore, USAFRICOM lacks ownership over many engagement programs central to its mission.

USAFRICOM latitude over expenditure of appropriated funds is limited

Finally, the fiscal law constraints that limit specific sources of appropriation for specific purposes also apply to the multiagency structure proposed for USAFRICOM. Obviously State, Commerce, U.S. Agency for International Development, or Treasury employees are not DOD employees. Personnel from these agencies are funded through their own appropriation, pursuing their specific authorizations. Rules governing pooling resources are remarkably rigid, as Congress mandates that funds cannot augment "any bureau or agency beyond that contained in its respective appropriation."[53] USAFRICOM presents challenges, as each agency must reconcile its funding and mandates when collaborating. Indeed, the U.S. European Command commander has acknowledged that it "will be difficult to get subscription and participation by the interagency."[54]

Recommendation for USAFRICOM Enabling Legislation. The USAFRICOM mission can only be accomplished through meaningful engagements, whether in the form of training, humanitarian assistance, or supply of equipment and materials. Interface with militaries and populations in the AOR is central. The unique mission of the command clearly distinguishes it from the other geographic combatant commands. Accordingly, it deserves specific enabling legislation to legitimize, empower, and fund its operations.

Akin to the congressional establishment of U.S. Special Operations Command, USAFRICOM must be chartered to pursue a nontraditional agenda. While it is possible that operations might continue on the same scale as previous years, using existing funding regimens to execute a piecemeal engagement strategy can only be a short-term solution. Indeed, to realize a continent-wide goal of stability, conflict prevention, economic prosperity, suppression of terrorism, and fostering of respect for human dignity, specific legislation must be enacted to empower this command. Failure to provide the statutory mechanisms to carry out its mission will leave the command hamstrung, in need of funds, limited in effect, and lacking credibility.

When one considers the broad mandate of U.S. Africa Command,[55] one recognizes that the Department of Defense has made a serious departure from the historic role of the geographic combatant commander. The creation of this command is more than the paper transfer of areas of responsibility from the rosters of other commands; it marks a major shift in military function away from kinetic operations and toward capability-building via strategic engagement. Yet while the command sprints toward full operationalization, the realities of the operating environment appear overlooked. One finds a fragmented international agreement framework that, although satisfactory for the previous combatant commands, undermines the flexibility in engagement that is the raison d' être of U.S. Africa Command. The limited existing framework lacks parity among sovereign states. Clearly, a concerted effort by Defense, with State approval, to negotiate and conclude comprehensive Status of Forces and Acquisition and Cross-servicing Agreements will facilitate long-term USAFRICOM strategic objectives. Additionally, while the command hopes to fully engage its African partners, its fiscal hands are tied. A statutory regime that strictly limits the U.S. military contribution to stability, security, health, and welfare is unworkable. Authority for these efforts must be vested in the commander, using specifically appropriated funding. Accordingly, legislation that validates the nontraditional role of USAFRICOM should be favorably considered by Congress.

A combatant command that cannot effectively execute its stated mission or fund its operations might as well relinquish its area of responsibility to the previously responsible combatant commanders. Absent substantive revision of laws and pronounced expansion of the framework of international agreements, USAFRICOM will offer nothing beyond the status quo legacy of its predecessors. Failure to deliver what is currently being represented will do little to foster rapport and may actually undermine U.S.-Africa relations. The United States holds a rare opportunity to effect posi-

U.S. Navy (Brian A. Goyak)

Marine instructs Ghanaian soldier in martial arts

tive change in the world while simultaneously enhancing its national security interests. The opportunity should not be lost through collective inaction. **JFQ**

NOTES

[1] Arthur Bredemeyer, "International Agreements: A Primer for the Deploying Judge Advocate," *Air Force Law Review* 42 (1997), 102.

[2] Department of Defense (DOD) Directive 5530.3, "International Agreements," encl. 2, June 11, 1987.

[3] Richard J. Erickson, "The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress," *Boston University International Law Journal* 13 (Spring 1995), 46.

[4] The Case-Zeblocki Act of 1972, however, requires that executive agreements be reported to Congress within 60 days of conclusion.

[5] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series* 1155 (May 23, 1969), 331.

[6] Erickson, "The Making of Executive Agreements," 47.

[7] Ibid., 45.

[8] "NATO Status of Forces Agreement," *United States Treaties and Other International Agreements*, vol. 4 (Washington, DC: U.S. Government Printing Office, 1953), 1792.

[9] See "Agreement to Supplement the NATO SOFA w/r/t Foreign Forces stationed in the Federal Republic of Germany," *United States Treaties and Other International Agreements*, vol. 1 (Washington, DC: U.S. Government Printing Office, 1959), 531; and the "Agreement on Friendship, Defense and Cooperation, with Complimentary Agreements and Exchange of Notes," U.S.-Spain, *Treaties & International Agreements Service* (1982), 10589.

[10] U.S. Department of State, *Treaties in Force*, Section 2: Multilateral Agreements, April 10, 2007, indicates that there are 18 international agreements with countries in Africa. These agreements govern the U.S. military presence in these countries.

[11] Elizabeth Blunt, "Uncertainty over U.S. Africa Force," BBC News, November 8, 2007, available at <http://news.bbc.co.uk/2/hi/africa/7085775.stm>.

[12] Article 37(2), Vienna Convention on Diplomatic Relations, *United States Treaties and Other International Agreements* vol. 22 (Washington, DC: U.S. Government Printing Office, 1961), 3227.

[13] John W. Egan, "The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements," *Emory International Law Review* 20 (Spring 2006), 341.

[14] Bredemeyer, 105.

[15] Richard J. Erickson, "Status of Forces Agreements: A Sharing of Sovereign Prerogative," *Air Force Law Review* 37 (1994), 140.

[16] Michael McDonough, "Privileged Outlaws: Diplomats, Crime and Immunity," *Suffolk Transnational Law Review* 20 (Summer 1997), 486.

[17] Theresa Whelan, "Why AFRICOM? An American Perspective," Situation Report, Institute for Security Studies, August 17, 2007, 8.

[18] Rome Statute of the International Criminal Court, Article 5(1)(a)-(d), available at <www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf>.

[19] International Criminal Court, Assembly of States Parties, "The States Parties to the Rome Statute," available at <http://www.icc-cpi.int/asp/statesparties.html>.

[20] Thomas Franck and Stephan Yuhan, "The United States and the International Criminal Court: Unilateralism Rampant," *New York University Journal of International Law & Politics* 35 (Spring 2003), 520.

[21] Chet J. Tan, "The Proliferation of Non-Surrender Agreements among Non-Ratifiers of the Rome Statute of the International Criminal Court," *American University International Law Review* 19 (2004), 1118.

[22] Rome Statute, Article 98(2), 75.

[23] International Criminal Court, Assembly of States Parties, "African States," available at <http://www.icc-cpi.int/region&id=3.html>.

[24] Tan, 1149.

[25] American Servicemembers Protection Act, Public Law 107–206, 116 Stat 899 (2002), 81–91, available at <http://history.nih.gov/01docs/historical/documents/PL107-206.pdf>.

[26] Ibid., Section 2007 (a)-(d).

[27] U.S. Department of State, *Treaties in Force*, Section 2: Multilateral Agreements, indicates that there are 39 international agreements with countries in Africa that relate to extradition of U.S. personnel to the ICC. It is not without significance that countries that may be perceived as power brokers on the African continent, including South Africa, Ethiopia, Kenya, and Mali, have not concluded a nonsurrender agreement with the United States.

[28] African Union, Policy Framework for the Establishment of the African Standby Force and Military Staff Committee, part II annexes (May 15–16, 2003), 16.

[29] Thomas Burgenthal and Harold Maier, *Public International Law*, 2d ed. (St. Paul, MN: West Publishing Company, 1990), 36.

[30] Erickson, "Status of Forces Agreements," 140.

[31] A growing body of commentators argues that the international agreements referred to in Article 98(2) of the Rome Statute are SOFAs. See Tan, 1136.

[32] "West African Military Heads Denounce U.S. Approach to Africa Command," *International Herald Tribune*, November 7, 2007.

[33] Mette Prasse Hartov, "NATO Status of Forces and a Suggestion for the Scope of Application," *Baltic Defense Review* 2, no. 10 (2003), 49.

[34] Jaime Gher, "Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to be Learned from the United States–Japan Agreement," *University of San Francisco Law Review* 37 (Fall 2002), 253.

[35] DOD Directive 2010.9, "Acquisition and Cross-Servicing Agreements," April 28, 2003, Section 4.2.1.3.4.

[36] Countries that the United States has concluded an ACSA with include Botswana, Democratic Republic of Congo, Djibouti, Ethiopia, Gabon, Ghana, Mali, Mauritania, Rwanda, Senegal, and South Africa. See *Treaties in Force*, Section 2: Multilateral Agreements.

[37] U.S. Africa Command Public Affairs and International Outreach, "USAFRICOM Dialogue by General William 'Kip' Ward, Commander," December 27, 2007, available at <www.africom.mil/africomDialogue.asp>.

[38] Title 31, U.S. Code, Section 1301(a).

[39] See Bill Alexander, B–213137, *Comptroller General Opinions* 63 (1984), 422.

[40] *United States v. MacCollom*, *U.S. Reporter* 426 (1976), 317.

[41] Thomas P. Galvin, "Extending the Phase Zero Campaign Mindset," *Joint Force Quarterly* 45 (2d Quarter 2007), 50.

[42] Title 31, U.S. Code, Section 1341(a).

[43] Title 22, U.S. Code, Section 2301.

[44] Alexander, 442.

[45] Title 10, U.S. Code, Section 2011b.

[46] Title 22, U.S. Code, Section 2151.

[47] Title 10, U.S. Code, Sections 401, 402, 404, 2557, and 2561.

[48] Title 10, U.S. Code, Section 401(a)-(b).

[49] Message, R25168Z February 2004, Secretary of Defense, "Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA)."

[50] DOD Manual 5105.38M, "Security Assistance Management Manual," fig. C12.F1, Humanitarian Assistance Programs.

[51] DOD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations," sec. E.1.1.2, October 6, 1994.

[52] Defense Security Cooperation Agency, "Overseas Humanitarian Disaster and Civic Aid (OHDACA), Operation and Maintenance, Defense-wide Fiscal Year (FY) 2007 Budget Estimate Submission," available at <www.dsca.osd.mil/programs/HA/new/OHDACA%20FY%202007%20Budget%20Estimate.pdf>.

[53] Matter of Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network, B–238024, *Comptroller General Opinions* 70 (1991).

[54] Lauren Ploch, *Africa Command: U.S. Strategic Interests and the Role of the U.S. Military in Africa*, Congressional Research Service Report RL34003, July 6, 2007, 23.

[55] Advance questions for General William E. Ward, USA, nominee for Commander, U.S. Africa Command, Senate Armed Services Committee, September 27, 2007, 5.