

# Is Africa Ready for Electronic Commerce?

## A Critical Appraisal of the Legal Framework for Ecommerce in Africa

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### A. Introduction

It remains a daunting but not insurmountable challenge to actualize broad-based long term economic development in Africa. Statistics indicate that the poverty level in the continent is very high and the continent's contribution to global trade remains very low in terms of export outflows.<sup>1</sup> While acknowledging the negative aspects of Africa's development however, it is important to note that the future may yet become brighter if key steps are taken by law and policy makers in the continent to put in place laws and policies that can facilitate the development process. One of the ways in which economic development can be facilitated is to significantly boost Africa's contribution to global trade.<sup>2</sup> In this regard, it has been noted that 'After falling by 2.5% in 2009, export volumes of African countries are expected to increase on average by 3.2% in 2010 and by 5% in 2011.'<sup>3</sup>

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1 World Economic Forum, The World Bank and the African Development Bank, The Africa Competitiveness Report 2009, World Economic Forum, Geneva 2009, p. 110: "Despite many initiatives to liberalize and promote trade, the African continent has not participated fully in the growth of global trade over the past decades. The share of Africa's exports fell from 7.4 percent in 1948 to about 3 percent in 2007 [...] and the share of imports has fallen by the same order of magnitude"; United Nations Development Programme, Human Development Report 2010 (20th Anniversary edn): 'The Real Wealth of Nations - Pathways to Human Development'; H.R. Clark, 'Sustainable Economic Development: What the World Owes Africa, and What Africa Owes Itself', 7 *The Journal of Gender, Race & Justice* 2003, p. 75 *et seq.*

2 See R. Gordon, 'Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime', 8 *Berkeley J. Afr-Am. L. & Pol'y* 2006, pp. 79 and 80: "Subsisting on the margins of the global economy, (Sub-Saharan Africa) SSA has often been disregarded in international economic discourse as an afterthought at best or entirely irrelevant at worst. Economic development is the primary conduit through which SSA intersects with the international economy and trade ideology, and these nations now consider trade to be a central consideration in their economic development"; World Economic Forum, The World Bank and the African Development Bank, The Africa Competitiveness Report 2009, World Economic Forum, Geneva 2009, p. 109: "The benefits of trade are well known: it raises income through specialization, increased competition, and the exploitation of economies of scale. It increases the variety of products and services available in the market and promotes technological innovation. In addition, trade is often associated with better governance and economic policies, as competition to attract investment exerts discipline on policymakers. Recent studies also indicate that trade, particularly in agricultural products, can lead to significant poverty reduction."

3 See OECD and African Development Bank, *African Economic Outlook* 2010, p. 30.

For African countries to significantly improve their contribution to international trade however, it is important that they utilize innovative means of trading that have been facilitated by global technological advancements. Accordingly, the focus of this paper is on ecommerce and it specifically assesses the legal framework for ecommerce in Africa. The paper is in five parts. The first part discusses the nature of ecommerce and the potential benefits and risks associated with it. The second part analyses why it is important for Africa to fully engage in ecommerce, looks at some of the ecommerce developments that have occurred in Africa, and the risks of having an inadequate legal and regulatory framework to support these developments. The third part analyses the legal framework for ecommerce, starting with an evaluation of international efforts that have been made to provide such framework and then specifically assessing the situation in some African countries. With a view to ascertaining the suitability of international ecommerce laws for Africa, there is an evaluation of the extent of participation of African countries in their drafting process, specifically focusing on some laws drafted by the United Nations Commission on International Trade Law (UNCITRAL).

In recognition of the fact that it could take more than mere adoption of relevant laws for ecommerce to fully develop in Africa, the fourth part of the paper considers the social context in Africa within which these ecommerce laws will be implemented and identifies and analyses some other possible constraints to the widespread adoption and utilization of ecommerce in the continent. Accordingly, the paper's approach to the topic is from an interdisciplinary socio-legal viewpoint rather than a strictly black-letter perspective, as this was deemed to afford the best means of presenting the complexities of the subject matter. The final part is the conclusion, which draws together various strands of argument explored in the paper and makes suggestions on how to move the ecommerce agenda forward in the continent.

## **B. Definition, Benefits and Concerns of Ecommerce**

Ecommerce has been defined as 'commercial transactions conducted electronically on the Internet'.<sup>4</sup> According to another definition, 'Electronic commerce ("e-commerce") is the buying and selling of information, products and services via the computer networks which make up the Internet.'<sup>5</sup> A more comprehensive definition by the European Commission however sheds further light on the multifaceted nature of ecommerce. According to the Commission,

Electronic commerce is about doing business electronically. It is based on the electronic processing and transmission of data, including text, sound and

4 Oxford Dictionary, available at <<http://oxforddictionaries.com/definition/e-commerce>>.

5 See A.O. Mensah, A. Bahta & S. Mhlanga, 'E-commerce Challenges in Africa: Issues, Constraints, Opportunities', available at <[www.uneca.org/aisi/docs/PolicyBriefs/E-commerce%20challenges%20in%20Africa.pdf](http://www.uneca.org/aisi/docs/PolicyBriefs/E-commerce%20challenges%20in%20Africa.pdf)>.

video. It encompasses many diverse activities including electronic trading of goods and services, online delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions, collaborative design and engineering, online sourcing, public procurement, direct consumer marketing, and after-sales service. It involves both products (e.g. consumer goods, specialised medical equipment) and services (e.g. information services, financial and legal services); traditional activities (e.g. healthcare, education) and new activities (e.g. virtual malls).<sup>6</sup>

From the above definition we can see that ecommerce involves the utilization of information and communication technology to facilitate business transactions, occasioned by the fast pace of technological advancement especially in the later part of the 20<sup>th</sup> century. Increasing globalization has made it possible for people residing or doing business in different countries to trade with one another. These cross border transactions take place within the framework of contracts entered into by the parties, and their contractual rights, obligations and remedies are ascertained from the terms of their contract and various substantive and procedural laws that apply by virtue of the parties' choice of governing law as well as relevant mandatory provisions enacted to regulate business transactions in various jurisdictions. Disputes between the contracting parties are also settled by reference to these contractual provisions and applicable laws.

The internet has significantly changed the way business is conducted globally and has provided a virtual forum for businesspeople to meet and enter into contractual relations premised on the buyer or service user making an offer for a product or service and the seller or service provider accepting the offer.<sup>7</sup> According to a source, global internet usage has increased by 444.8% from 2000 to 2010, and as

- 6 European Commission, 'A European Initiative in Electronic Commerce', Communication from the Commission to the Council, The European Parliament, The Economic and Social Committee and the Committee of the Regions, Brussels, 16 April 1997, COM(97) 157 final. Also note the definition by the Electronic Commerce Ad hoc Working Group (ECAWG) of the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT). See on this 'Electronic Commerce: Need For a Global Facilitation Approach 4 December 1997', available at <[www.unece.org/trade/untidd/download/eca97003.pdf](http://www.unece.org/trade/untidd/download/eca97003.pdf)>: "The sharing of structured or unstructured business information by any electronic means with suppliers, customers and other partners to conduct and execute trade transactions in business-to-business and business-to-consumer activities, without regard to business sectors, size of the enterprises concerned or the value of the transaction."
- 7 See A.L. Williams, 'Electronic Commerce: "Cutting Edge" Changes and Challenges to Commercial Law and Practice', 48 *University of New Brunswick Law Journal* 1999, pp. 217 and 219-220; See also T. Pistorius, 'Formation of Internet Contracts: An Analysis of the Contractual and Security Issues', 11 *South African Mercantile Law Journal* 1999, pp. 282, 282-283 and 286-287; P. Bagraim, 'Transacting in Cyberspace: Are Contracts Concluded on the Internet Binding', 6 *Juta's Business Law* 1998, p. 50.

of June 2010, there were an estimated 1,966,514,816 internet users around the world representing about 28.7% of the global population.<sup>8</sup>

There are many obvious advantages to this medium for entering into commercial transactions.<sup>9</sup> Explaining the importance of the internet for commercial transactions, a United States President (as he then was) noted as follows:

As the Internet empowers citizens and democratizes societies, it is also changing the way business is conducted: entrepreneurs are able to start new businesses more easily by accessing the Internet's worldwide network of customers; world trade involving computer software, entertainment products, information services, professional consulting, financial services, education businesses, medical diagnostics, advertising, and technical services is increasing rapidly as the Internet dramatically lowers costs and facilitates new types of commercial transactions; engineers, product developers, and managers thousands of miles apart can collaborate to design and manufacture new products more efficiently; businesses can work more efficiently with their suppliers and customers; consumers have greater choice and can shop in their homes for a wide variety of products from manufacturers and retailers all over the world, and they will be able to view these products on their computers or televisions, access information about the products, and order and pay for their choices, all from their living rooms.<sup>10</sup>

The ecommerce mode of doing business speeds up the pace of doing business due to the instantaneous nature of business communication, reduces the cost of transactions due to the absence of paperwork since ecommerce is dematerialized, and provides a much broader marketplace for potential buyers and sellers due to

8 Internet World Stats, available at <[www.internetworldstats.com/stats.htm](http://www.internetworldstats.com/stats.htm)>. Also note the United Nations General Assembly Resolution, 16 December 1996, A/RES/51/162, Preamble, 2nd para.: "Noting that an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as 'electronic commerce', which involve the use of alternatives to paper-based methods of communication and storage of information."

9 See T. Akomolede, 'Contemporary Legal Issues in Electronic Commerce in Nigeria', 11 *Potchefstroom Electronic Law Journal* 2008, pp. 1 and 2: "The objectives of e-commerce are legion. They include the facilitation of international co-operation through trade, making goods and services available to consumers all over the world irrespective of distance, the expansion of the consumer base for manufacturers or producers of goods and services, and a reduction in the costs of service delivery by delivering these electronically. [...] The objectives of e-commerce underscore its importance in the emerging global community. With the effect that today's consumers are able to have access to goods and services in the remotest parts of the world without having to see the sellers. The traditional buying and selling process is being gradually replaced by internet trading, especially in more advanced countries."

10 See W.J. Clinton, 'Electronic Commerce', Memorandum for the Heads of Executive Departments and Agencies (Presidential Directive), 1 July 1997, available at <[www.fas.org/irp/offdocs/pdd-nec-ec.htm](http://www.fas.org/irp/offdocs/pdd-nec-ec.htm)>. See also G. Ebersohn, 'The Internet: Its Possibilities and Risks', 12 *Juta's Business Law* 2004, pp. 156 and 157.

the virtual nature of the ecommerce market.<sup>11</sup> Ecommerce also increases the volume of business transactions that can take place any day due to the fact that goods and services can be ordered outside the normal business hours of the seller or service provider, who is able to conclude business transactions without having any personnel physically in the office. This also lowers transaction costs and the resulting cost savings could be passed on to the buyer in the form of reduced price for goods purchased online.

For all the advantages and benefits that ecommerce offers however, it also gives rise to some key concerns, two of which will be considered here. The first is the adequacy of the legal framework within which online business transactions are concluded; and the second is the various risks associated with online buying or selling of goods and services especially where there is no pre-established business relationship between the parties.<sup>12</sup>

Regarding the legal framework for concluding ecommerce business transactions, it is very important that technological advancements that facilitate ecommerce do not outpace the laws and regulations required to give adequate legal protection

11 See R. Sorieul, 'The United Nations Convention on Contracts for the International Sale of Goods (CISG) as a Set of Uniform Rules for Electronic Commerce', *Business Law International* 2000, p. 380; J. Coetzee, 'The Convention on the Use of Electronic Communications in International Contracts: Creating an International Legal Framework for Electronic Contracting', 18 *South African Mercantile Law Journal* 2006, p. 245 *et seq.*

12 There are some other concerns arising from ecommerce which will not be analysed in this paper, such as the possibility that it could lead to revenue loss for a government through tax avoidance or evasion, in absence of adequate regulation. See generally, D.M. Davis, 'Residence based taxation: Is it up to the e-commerce challenge?', *Acta Juridica* 2002, pp. 161 and 162; P. Bagraim, 'Tax in Cyberspace', 9 *Juta's Business Law* 2001, p. 33; S.C. Borkowski, 'Global Activity on the Electronic Commerce Front: A Taxation Update', 26 *International Tax Journal* 2000, p. 1 *et seq.*

to those that transact business online.<sup>13</sup> The Latin maxim *festina lente* (make haste slowly) is very relevant here. While a multimillion dollar business transaction can be quickly concluded online at the click of a mouse and several transactions are concluded online everyday without any trouble, any legal dispute that does arise from these deals could take years to settle especially where the interface between law and technology has not been carefully managed. Potentially contentious legal issues in ecommerce include:

the extent to which the communication between the parties is protected (data protection), the formation of a contract on the internet, the legal

- 13 See H.D. Gabriel, 'The United Nations Convention on the Use of Electronic Communications in International Contracts: An Overview and Analysis', *U. L. Rev.* 2006, pp. 285 and 286: "Although the need for legal regulation of electronic commerce follows the need for regulation of commerce in general, two important aspects of electronic commerce are important to keep in mind which make electronic commerce unique from other questions of international commerce. First is the unregulated nature of the Internet. The Internet has brought about fundamental changes to international commerce. Territorial borders and the borders that previously existed between companies and customers, sellers and purchasers and service providers and clients have all disappeared to some extent. Particularly in transnational commerce, international agreements have to be adopted to provide a level of legal certainty and enforceability for contracting parties. A second aspect of electronic commerce that makes it unique from other general questions of international commerce is the apparent inability of the law to foresee the rapid change in technology and therefore to respond with a set of transactional rules that reflect business practices that use the new technology. This has brought about great uncertainty in the law which has been largely caused by the shift from paper to electronic trading. Questions have continually arisen as to whether electronic contracts are binding and enforceable as well as when and where they are deemed to have been created."; M. van der Merwe, 'Cybercontracts: Streamlining the requirements for setting them up', 6 *Juta's Business Law* 1998, p. 138; W.J. Clinton, 'Electronic Commerce', Memorandum for the Heads of Executive Departments and Agencies (Presidential Directive), 1 July 1997, available at <[www.fas.org/irp/offdocs/pdd-nec-ec.htm](http://www.fas.org/irp/offdocs/pdd-nec-ec.htm)>: "Many businesses and consumers are still wary of conducting extensive business over the Internet because of the lack of a predictable legal environment governing transactions. This is particularly true for international commercial activity where concerns about enforcement of contracts, liability, intellectual property protection, privacy, security, and other matters have caused businesses and consumers to be cautious."; J. Coetzee, 'The Convention on the Use of Electronic Communications in International Contracts: Creating An International Legal Framework for Electronic Contracting', 18 *South African Mercantile Law Journal* 2006, pp. 245 and 246: "However, despite its apparent benefits [...] parties will be less willing to conduct transactions electronically if they are uncertain about the governing law, its contents, jurisdictional issues, or the availability of efficient alternative dispute-resolution mechanisms. [...] Uncertainty about the legal validity of electronic contracts and the safety and authenticity of electronic messages create uneasiness and even scepticism towards conducting business electronically. If electronic commerce is to reach its full potential, it is essential that trust and confidence be created."; N. Ribadu, 'Cybercrime and Commercial Fraud: A Nigerian Perspective', *Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL*, Vienna, 2007, available at <[www.uncitral.org/pdf/english/congress/Ribadu\\_Ibrahim.pdf](http://www.uncitral.org/pdf/english/congress/Ribadu_Ibrahim.pdf)>: "The Nigerian banking industry that hurriedly embraced the credit card system did not carry the law enforcement and criminal justice sector along in the capacity to understand the intricacies and multiple dimensions of the problem. The result is that today we have huge and rising incidence of cybercrime which, sadly are under-reported and for which the law enforcement, prosecutors, and judges are unable to match the crime with appropriate punishment."

means of effecting payment in e-commerce, which court will assume jurisdiction in the event of a dispute between parties to an internet contract, and what law or laws will govern the transactions. Is it the law of the seller or that of the buyer or consumer? Other issues relate to cyber crimes that are threatening e-commerce, and also the mode of proving internet-related transactions.<sup>14</sup>

The second key concern arising from ecommerce, also reflected in the above quotation is that a potential buyer or seller could fall victim to a host of vices proliferated through the internet, especially where there is a weak regulatory framework for tackling such activities. The Audit Commission (United Kingdom) notes that, 'While the benefits of technology are widely accepted, the risks are often less well appreciated'.<sup>15</sup> Amongst these vices is the issue of cybercrime, which principally stems from the faceless nature of ecommerce whereby the trading parties may never have seen or spoken with themselves before deciding to enter into a commercial relationship, with the entire transaction taking place in a virtual market. The buyer and the seller – are they really who they claim to be?<sup>16</sup> The goods advertised on the internet and ordered by the buyer may in fact not exist at all or may be defective and the means of payment used by the buyer may be fraudulent, for instance a forged credit card. An ecommerce businessperson could also fall victim to online identity theft.<sup>17</sup> Intellectual property rights are also prone to abuse on the internet including copyright and trademark infringement.<sup>18</sup> Personal data could also be collected without authorization and misused.<sup>19</sup>

The two key concerns discussed above could give rise to considerable uncertainty for those intending to transact ecommerce business and the resulting legal risk

- 14 T. Akomolede, 'Contemporary Legal Issues in Electronic Commerce in Nigeria', 11 *Potchefstroom Electronic Law Journal* 2008, pp. 1 and 3. See also G. Bamodu, 'Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and the Judiciary', 2 *The Journal of Information, Law and Technology* 2004, available at <www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\_2/bamodu/>: "At some point or other, disputes are likely to arise out of activities, the transnational activities, conducted on the Web. Possible examples include: dissatisfaction with goods bought or services procured over the Web and fraud on the consumer (e.g. by fraudulent website operators or by hackers who steal financial information)."
- 15 The Audit Commission, 'ICT Fraud and Abuse 2004: An update to yourbusiness@risk', Audit Commission, London 2005.
- 16 See J. Coetzee, 'The Convention on the Use of Electronic Communications in International Contracts: Creating An International Legal Framework for Electronic Contracting', 18 *South African Mercantile Law Journal* 2006, p. 245: "Although international trade can contribute to the economic growth and development of a country, the remoteness of trading parties remains a factor that influences the efficiency of such transactions. Not only are the goods to be transported over huge distances, something that creates the potential for damage and loss during transit, but in many instances trading partners have no personal or previous knowledge of each other."
- 17 See M. Watney, 'Identity Theft: The Mirror Reflects Another Face', *Journal of South African Law* 2004, pp. 511-512.
- 18 See G. Ebersohn, 'The Internet: Its Possibilities and Risks', 12 *Juta's Business Law* 2004, p. 156 et seq.
- 19 See A. Roos, 'Data Protection: Explaining the International Backdrop and Evaluating the Current South African Position', 124 *South African Law Journal* 2007, p. 400.

could dampen their appetite for ecommerce. It is therefore very important that an adequate legal and regulatory mechanism should be put in place for ecommerce with a view to reducing the risks associated with it, and giving confidence to businesspeople to use it in lieu of traditional paper-based transactions.

### C. Africa and Ecommerce

A lot of business transactions in Africa are still paper-based, involve cash payments and often involve the physical meeting of the business parties, from booking flights to paying for utilities and buying household goods and business supplies. However, Africa has not been left behind in the increasing adoption and utilization of the ecommerce mode of transacting business. There is increasing awareness about its potential benefits and technological developments in the continent especially over the past decade has paved way for a serious consideration of how African countries can enhance economic growth and development by utilizing ecommerce as a means of expanding the frontiers of business involving their nationals and the rest of the world. While Africa still lags behind in internet usage relative to most other parts of the world, internet usage has witnessed phenomenal growth over the past decade and there were an estimated 110, 931, 700 internet users in Africa as of June 2010, representing 10.9% of the African population.<sup>20</sup> An increasing number of Africans now utilize social networking websites like Facebook with one estimate putting the figure at 17.6 million as of August 2010.<sup>21</sup> Perhaps the most fascinating data is that internet usage in Africa increased by 2, 357.3% from 2000 to 2010.<sup>22</sup> These figures point to a future where a rapidly increasing number of people residing in Africa will likely use the internet to transact their business. If ecommerce becomes fully operational within Africa, there are many economic benefits to be derived from the wider scope it provides for national, regional and international commercial transac-

20 Internet World Stats, available at <[www.internetworldstats.com/stats.htm](http://www.internetworldstats.com/stats.htm)>. Slightly different statistics are available from the International Telecommunication Union (ITU) but the picture is still dismal for Africa. See ITU, 'The World in 2010: ICT Facts and Figures', available at <[www.itu.int/ITU-D/ict/material/FactsFigures2010.pdf](http://www.itu.int/ITU-D/ict/material/FactsFigures2010.pdf)>: "By the end of 2010, internet user penetration in Africa will reach 9.6%, far behind both the world average (30%) and the developing country average (21%)."

21 Internet World Stats, available at <<http://www.internetworldstats.com/africa.htm>>. There is a more modest estimate of 9.9 million as of March 2010. See C. Morrison, 'Africa is Slowly but Steadily Adding Facebook Users', available at <[www.insidefacebook.com/2010/03/18/africa-is-slowly-but-steadily-adding-facebook-users/](http://www.insidefacebook.com/2010/03/18/africa-is-slowly-but-steadily-adding-facebook-users/)>.

22 Internet World Stats, available at <[www.internetworldstats.com/stats.htm](http://www.internetworldstats.com/stats.htm)>.



tions.<sup>23</sup> News emerging from many African countries indicate that with respect to virtual and physical goods and services, opportunities are opening up within Africa in the 4 key facets of ecommerce – Business to Business (B2B), Business to Consumer (B2C), Government to Business (G2B) and Government to Consumer (G2C), including online payment services, travel and tourism services, tax collection and tax returns, and contract tendering.<sup>24</sup>

Even as ecommerce opens up doors of opportunities for enhanced business transactions in Africa, which could boost economic growth and development in the continent, the attendant concerns it generates are close at hand. The two key concerns about ecommerce earlier discussed are both relevant in the African context. The first issue is whether there is an adequate legal framework for ecommerce transactions in the continent or whether technology has outpaced the law in this area. Is the legal framework robust enough to give confidence to people to transact business online? The second issue is whether there is adequate regula-

- 23 The Economic Commission for Africa, 'The Development of an E-Commerce Legal Framework for ECOWAS', Report May 2005, available at <[www.uneca.org/disd/events/2006/ecowas-uemoa/content/The%20Development%20of%20an%20E-Commerce%20Legal%20Framework%20for%20ECOWAS%20-%20EN.pdf](http://www.uneca.org/disd/events/2006/ecowas-uemoa/content/The%20Development%20of%20an%20E-Commerce%20Legal%20Framework%20for%20ECOWAS%20-%20EN.pdf)>: "E-commerce has potential to drive regional trade and integration and improve global competitiveness within the ECOWAS region. However, to reap these benefits member states will have to, among other things, implement policies that extend the underlying ICT infrastructure and ensure broad network access." For an analysis of intra-Africa trading opportunities, see UNCTAD, 'Strengthening Regional Economic Integration for Africa's Development', Economic Development in Africa Report 2009, United Nations, New York, 2009.
- 24 See P. Esselaar & J. Miller, 'Towards Electronic Commerce in Africa: A Perspective from Three Country Studies', 2(1) *The Southern African Journal of Information and Communication* 2002, available at <<http://link.wits.ac.za/journal/j0201-me.html>>; 'Kenyan Bank Unlocks E-Commerce With Online Payment Portal', *New Balance*, No. 488, 2010, available at <[www.balancingact-africa.com](http://www.balancingact-africa.com)>; 'FNB & PayPal Bring Global E-Commerce to South Africa', *US E-Commerce* 2010, available at <[www.us-ecom.com/fnb-paypal-bring-global-e-commerce-to-south-africa/](http://www.us-ecom.com/fnb-paypal-bring-global-e-commerce-to-south-africa/)>; F. Oluoch-Ojiwah, 'Kigali to Host Continental Electronic Payment Switch', *The New Times* 2010, available at <<http://allafrica.com/stories/201005120151.html>>; D. Oketola, 'E-Payment: Inter-switch Acquires 60% Stake in Ugandan Firm', *Punch on the Web* 2010, available at <[www.punchng.com/Articl.aspx?theartic=Art201010220381481](http://www.punchng.com/Articl.aspx?theartic=Art201010220381481)>; 'Uganda Achieves 80 Percent Tax Collections Online', *New Balance*, No. 525, 8 October 2010, available at <[www.balancingact-africa.com/news/en/issue-no-525/web-and-mobile-data/uganda-achieves-80-percent-tax-collections-online](http://www.balancingact-africa.com/news/en/issue-no-525/web-and-mobile-data/uganda-achieves-80-percent-tax-collections-online)>; 'Electronic Tax Returns Are Gaining Ground in SA', *Businessday*, 16 September 2009, available at <<http://allafrica.com/stories/200909160364.html>>; 'Kenya goes online for Tax Returns and more to follow', *New Balance*, No. 462, 10 July 2009, available at <[www.balancingact-africa.com/news/en/issue-no-462/internet/kenya-goes-online-for-tax-returns-and-more-to-follow](http://www.balancingact-africa.com/news/en/issue-no-462/internet/kenya-goes-online-for-tax-returns-and-more-to-follow)>; 'Online livestock auctions a hit in Namibia', *New Balance*, No. 482, 27 November 2009, available at <[www.balancingact-africa.com/news/en/issue-no-482/useful/online-livestock-auctions-a-hit-in-namibia](http://www.balancingact-africa.com/news/en/issue-no-482/useful/online-livestock-auctions-a-hit-in-namibia)>; S. Butera, 'Procurement Officers Train on E-Tendering', *The New Times*, 14 March 2009, available at <<http://allafrica.com/stories/200903160062.html>>; P. Casal, 'East Africa Turns to E-commerce for Travel', *Euromonitor Global Market Research Blog*, 23 September 2010, available at <<http://blog.euromonitor.com/2010/09/east-africa-turns-to-e-commerce-for-travel.html>>; 'e-Tranzact will offer more global e-payment solutions to protect cardholders, CEO', *Vanguard Online*, 5 December 2010, available at <[www.vanguardngr.com/2010/12/e-tranzact-will-offer-more-global-e-payment-solutions-to-protect-cardholders-ceo/](http://www.vanguardngr.com/2010/12/e-tranzact-will-offer-more-global-e-payment-solutions-to-protect-cardholders-ceo/)>; J. Iboma, 'CBN grants Chams approval for electronic payment switch', *Punch on the Web*, 29 October 2007, available at <[www.punchng.com/Articl.aspx?theartic=Art2007102912231693](http://www.punchng.com/Articl.aspx?theartic=Art2007102912231693)>.

tory framework for tackling various vices that undermine the integrity of online business transactions. Despite the fact that ecommerce is still at its infancy in Africa, news reports indicate that cybercrime is a serious problem that needs to be addressed.<sup>25</sup>

An inadequate legal framework for transacting business online would leave African businesspeople and their potential business partners or customers worried about not having adequate remedies or recompense or even the means of seeking redress where a particular transaction goes wrong. While the risk of cybercrime and other online vices could make many international businesspeople and consumers to be wary about transacting business with African businesses, Africans themselves do not have immunity against these risks and could also be victims of these online vices within the context of national, regional and international commercial transactions.

The end result of not having a robust supporting framework for ecommerce in Africa may be that many Africans could fail to utilize emerging ecommerce opportunities and rather prefer the certainty of time-honoured and antiquated modes of transacting business with people they already have established business relationships with. This would no doubt severely limit the scope of African business transactions and will not augur well for rapid economic growth and development which the continent desperately needs.

#### D. Ecommerce Legal and Regulatory Framework

In this part, we will proceed to consider efforts that have been made to address ecommerce legal and regulatory concerns both at an international level and specifically within Africa.

25 See N. Ribadu, 'Cybercrime and Commercial Fraud: A Nigerian Perspective', *Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL, Vienna, 2007*, available at <[www.uncitral.org/pdf/english/congress/Ribadu\\_Ibrahim.pdf](http://www.uncitral.org/pdf/english/congress/Ribadu_Ibrahim.pdf)>; AfricaNews Monitoring Team, 'Nigeria, Ghana in world cyber crime ranking', *Africa News*, 2 December 2010, available at <[http://www.africanews.com/site/list\\_message/32128](http://www.africanews.com/site/list_message/32128)>; P. Muncaster, 'Symantec issues South Africa cyber crime warning: Broadband rollouts and World Cup creating 'perfect storm' for cyber criminals', *V3.co.uk*, 4 January 2010, available at <[www.v3.co.uk/v3/news/2255545/symantec-south-africa-cyber](http://www.v3.co.uk/v3/news/2255545/symantec-south-africa-cyber)>; E. Aginam, '419 Mails Account for 8.6% of Spam Blocked by Microsoft', *Vanguard Online Edition*, 15 December 2010, available at <[www.vanguardngr.com/2010/12/%E2%80%98419%E2%80%99-mails-account-for-8-6-of-spam-blocked-by-microsoft/](http://www.vanguardngr.com/2010/12/%E2%80%98419%E2%80%99-mails-account-for-8-6-of-spam-blocked-by-microsoft/)>; A. Mede, 'EFCC Hosts West African Anti-Cyber Crime Summit', *Daily Independent*, 23 November 2010, available at <<http://allafrica.com/stories/201011240209.html>>; D. Oketola, 'Protecting small businesses from cyber threats', *Punch on the Web*, 16 December 2010, available at <[www.punchng.com/Articl.aspx?theartic=Art20101216072723](http://www.punchng.com/Articl.aspx?theartic=Art20101216072723)>; K. Nwezeh, 'UK Police Uncover £8m Internet Scam in Nigeria', *Thisday*, 5 October 2007, available at <[www.thisdayonline.com/](http://www.thisdayonline.com/)>; E. Ikhilae, 'Eight in EFCC net over internet crime', *Sunday Tribune*, 23 September 2007, available at <<http://tribune.com.ng/index.php>>.

### *I. Global Efforts*

Owing to increasing globalization, a lot of effort has been going on in diverse forums aimed at creating and/or harmonizing the legal, regulatory and contractual framework for undertaking regional and international commercial transactions such as sale of goods, transportation of goods and trade finance. Institutions and organizations such as the International Chamber of Commerce (ICC), the International Institute for the Unification of Private Law (UNIDROIT), Comité Maritime International (CMI), the United Nations Commission on International Trade Law (UNCITRAL), the Organisation for the Harmonization of Business Law in Africa (OHADA) and the European Union (EU) have all played key roles in this regard. These efforts have yielded many harmonised legal instruments over the years including the Hague Rules 1924 and Hague-Visby Rules 1968 developed by CMI, the United Nations Convention on Contracts for the International Sale of Goods 1980 developed by UNCITRAL and the Uniform Customs and Practice for Documentary Credits (UCP) 600 (and earlier versions) developed by the ICC.

The rapid evolution of information and communication technology, increasing use of the internet for business transactions especially over the past two decades and the borderless nature of the internet have led to concerns about the adequacy of most commercial legal instruments previously enacted or adopted at national and international levels at a time when business transactions were primarily paper-based – are these laws adequate to cater for electronic transactions that do not involve the use of paper or will new legal instruments be required? Regarding this issue, it has been noted that,

The Internet is emerging as a global marketplace. The legal framework supporting commercial transactions on the Internet should be governed by consistent principles across State, national, and international borders that lead to predictable results regardless of the jurisdiction in which a particular buyer or seller resides.<sup>26</sup>

In many instances, various institutions and organizations involved in legal harmonization projects have undertaken the review and amendment of existing commercial rules or the adopting of entirely new laws specifically produced to ensure that electronic transactions are not conducted in a legal vacuum with the

26 See W.J. Clinton, 'Electronic Commerce', Memorandum for the Heads of Executive Departments and Agencies, Presidential Directive, 1 July 1997, available at <[www.fas.org/irp/offdocs/pdd-nec-ec.htm](http://www.fas.org/irp/offdocs/pdd-nec-ec.htm)>.

associated heightened legal risk.<sup>27</sup> Legal instruments that cater for electronic transactions include the CMI Rules for electronic bills of lading 1990 developed by the Comité Maritime International. The Incoterms 2000 (as well as the earlier 1990 version) developed by the ICC contains relevant provisions that support the use of electronic transport documents and electronic communication between the parties to an international sales contract.<sup>28</sup> The ICC also developed the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ('eUCP'), which is a supplementary provision to the UCP600 to be used where the letter of credit payment mechanism is electronic in nature rather than paper based. In the preparation of the UNIDROIT Principles of International Commercial Contracts 2004, certain provisions were included to ensure conformity with ecommerce contracting, which were not there in the earlier 1994 edition.<sup>29</sup> The European Union (EU) Electronic Commerce Directive 2000/31/EC

- 27 See S. Eiselen, 'The UNEDIC: International Trade in the Digital Era', 10 *Potchefstroom Electronic Law Journal* 2007, pp. 1 and 3-4; T. Akomolede, 'Contemporary Legal Issues in Electronic Commerce in Nigeria', 11 *Potchefstroom Electronic Law Journal* 2008, p. 1 *et seq.*: "The major significance of e-commerce thus lies in the fact that it encourages a single world trading system which is facilitated by access through electronic means to goods and services from different parts of the world. This has led to the emergence of uniform regulatory rules on internet governance to ensure the homogeneity of the conditions under which transactions are made to suppliers or sellers and consumers of goods and services through the internet."
- 28 International Chamber of Commerce (ICC), ICC Official Rules for the Interpretation of Trade Terms: Incoterms 2000, Paris, 1999, p. 25: "In spite of the particular legal nature of the bill of lading it is expected that it will be replaced by electronic means in the near future. The 1990 version of Incoterms had already taken this expected development into proper account. According to the A8 clauses, paper documents may be replaced by electronic messages provided the parties have agreed to communicate electronically." Note for instance, CIF A8 titled "Proof of delivery, transport document or equivalent electronic message" and note the B8 clauses as well. See also J. Coetzee, 'Incoterms, Electronic Data Interchange, and the Electronic Communications and Transactions Act', 15 *South African Mercantile Law Journal* 2003, p. 1.
- 29 See UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts 2004 (UNIDROIT Principles), Rome, April 2004, available at <[www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf](http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf)>, vii: "it was decided to consider whether and, if so, to what extent the 1994 edition of the UNIDROIT Principles required additions or amendments to adapt it to the increasingly important practice of electronic contracting. Eventually, only a few changes were made to this effect to the black letter rules (see Art. 1.2, Art. 2.8(1) (now 2.1.8), Art. 2.18 (now 2.1.18)), while more changes were made to the comments and illustrations (see Comment 1 to Art. 1.2, Comments 1 and 4 to Art. 1.9 (now 1.10) and Illustrations, Comment 3 to Art. 2.1 (now 2.1.1) and Illustration, Comment to Art. 2.7 (now 2.1.7) and Illustration, Comment to Art. 2.8 (now 2.1.8).") Also see M.J. Bonell, 'UNIDROIT Principles 2004 - The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law', *U. L. Rev.* 2004, p. 19: "On the other hand, it was considered necessary to see whether the 1994 edition of the UNIDROIT Principles required additions or amendments to adapt it to the increasingly important practice of electronic contracting. [...] Ultimately, it turned out that not too many changes were needed for this purpose. [...] Thus, in Arts. 1.2 and 2.18 (now 2.1.18) 'writing' was replaced by 'a particular form'. In Art. 2.8(1) (now 2.1.8) the specific reference to telegrams and letters was deleted so as to cover all means of communications, and a general rule on when the period for acceptance starts to run was adopted which would also be suitable for electronic messages. Moreover, in Chapters 1 and 2 a number of comments and illustrations were amended so as to refer specifically to electronic contracting. [...]" See also p. 39.

was adopted by the European Parliament and Council of Europe in June 2000 with a view to creating a harmonised legal framework for electronic transactions in the European Internal Market, and has been incorporated into the domestic legal regimes of various EU countries. The Council of Europe ('Budapest') Convention on Cybercrime 2001 (ETS No. 185) seeks to create a harmonised legal framework for combating the menace of cybercrime, which would create a safer online environment for ecommerce to thrive.<sup>30</sup>

The UNCITRAL has exerted a lot of effort to develop many legal instruments that lend support to ecommerce including the UNCITRAL Model Law on Electronic Commerce 1996,<sup>31</sup> the UNCITRAL Model Law on Electronic Signatures 2001 and the United Nations Convention on the Use of Electronic Communications in International Contracts 2005. While the model laws were aimed at facilitating the electronic compliance of national commercial transactions, the aim of the Convention is to achieve across the board harmony of ecommerce rules in order to ensure seamless international electronic transactions.<sup>32</sup> While the Convention is yet to come into force<sup>33</sup>, many countries in different parts of the world have

- 30 See F. Cassim, 'Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: A Comparative Study', 12 *Potchefstroom Electronic Law Journal* 2009, pp. 64-65; S. Snail, 'Cyber Crime in South Africa – Hacking, cracking, and other unlawful online activities', 1 *Journal of Information, Law & Technology* 2009, p. 1, available at <[http://go.warwick.ac.uk/jilt/2009\\_1/snail](http://go.warwick.ac.uk/jilt/2009_1/snail)>.
- 31 Note issue of functional equivalence: (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- 32 See United Nations Convention on the Use of Electronic Communications in International Contracts, 23 November 2005, A/RES/60/21, Preamble, paras. 2 and 3: "Considering that problems created by uncertainties as to the legal value of electronic communications exchanged in the context of international contracts constitute an obstacle to international trade, Convinced that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes"; UNCITRAL, 'Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods', United Nations, Vienna 2009, p. 102, available at <[www.uncitral.org/pdf/english/texts/electcom/08-55698\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf)>; S. Eiselen, 'The UNECIC: International Trade in the Digital Era', 10 *Potchefstroom Electronic Law Journal* 2007, pp. 3-4: "The two model laws were aimed at standardising and facilitating the response of domestic legal systems to the challenges of electronic commerce and have subsequently been used in the drafting of the domestic legislation of a fairly large number of countries, including South Africa. [...] The UNECIC (United Nations Convention on the Use of Electronic Communications in International Contracts 2005), in turn, aims at establishing legal certainty in international trade by providing solutions and harmonizing rules on electronic communications for international transactions." For a detailed critique of UNCITRAL efforts to create an adequate legal framework for ecommerce see A.H. Boss, 'Evolution of Commercial Law Norms: Lessons to be Learned from Electronic Commerce', 34 *Brook. J. Int'l L.* 2008-2009, p. 673.
- 33 Art. 23(1) of the Convention provides that: "This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession." While it has been signed by 18 countries, only 2 have ratified it (Honduras, 15 June 2010 and Singapore, 7 July 2010).

adopted legislation that implemented the provisions of the two model laws, or enacted laws that were largely influenced by them, with the 1996 model law having much wider adoption and influence.<sup>34</sup> The model laws potentially provide a broad jurisprudential base for the interpretation of their provisions, based on judicial and arbitral decisions from various jurisdictions where they are being utilised. Specifically in the area of international carriage of goods, another legal instrument produced by UNCITRAL, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 provides for the use of electronic transport records as alternative to paper documents if the carrier and the shipper agree on this.<sup>35</sup>

## II. National and Regional Efforts in Africa

Given the rapidly increasing internet usage in Africa, and the opportunities gradually opening up for ecommerce transactions in the continent, the rate of adoption of ecommerce laws and regulations in Africa is not encouraging at the moment. Less than 25% of the 53 member states of the African Union have adopted or enacted ecommerce legislation, accordingly, what exists is a patchwork of laws from a number of African countries which is insufficient to create a robust framework for regional or international trade. Only three African countries have

34 UNCITRAL, 'Status - 2005 United Nations Convention on the Use of Electronic Communications in International Contracts', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html)>; UNCITRAL, 'Status - 2001 UNCITRAL Model Law on Electronic Signatures', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html)>; UNCITRAL, 'Status - 1996 UNCITRAL Model Law on Electronic Commerce', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html)>. Also see H.D. Gabriel, 'United Nations Convention on the Use of Electronic Communications in International Contracts and Compatibility with the American Domestic Law of Electronic Commerce', 7 *Loyola Law and Technology Annual* 2006-2007, pp. 4-5; C. Hultmark Ramberg, 'The Ecommerce Directive and formation of contract in a comparative perspective', *Eur. L. Rev.* 2001, pp. 429 and 432; D. Collier, 'E-Mail and SMS Contracts: Lessons from the Labour Court', 16 *Juta's Business Law* 2008, p. 20 *et seq.*; T. Akomolede, 'Contemporary Legal Issues in Electronic Commerce in Nigeria', 11 *Potchefstroom Electronic Law Journal* 2008, p. 15.

35 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 11 December 2008, A/RES/63/122, Preamble, para. 2: "Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents". See Art. 1 for the definitions of 'Electronic communication', 'Electronic transport record', 'Negotiable electronic transport record' and 'Non-negotiable electronic transport record.' See also M. Alba, 'Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea', 44 *Texas International Law Journal* 2008-2009, p. 387. Note that the Convention has not yet come into force. According to Art. 94(1): "This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession." So far it has been signed by 23 countries (last signed by the Democratic Republic of the Congo on 23 September 2010) but has not been ratified by any of them. See UNCITRAL, 'Status - 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the Rotterdam Rules', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/rotterdam\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html)>.

adopted legislation that implemented the UNCITRAL Model Law on Electronic Commerce 1996 namely Cape Verde, Mauritius<sup>36</sup> and South Africa,<sup>37</sup> while Cape Verde is the only African country that has adopted legislation based on the UNCITRAL Model Law on Electronic Signatures 2001.<sup>38</sup>

Regarding the United Nations Convention on the Use of Electronic Communications in International Contracts 2005, this has been signed by only 4 African countries namely the Central African Republic, Madagascar, Senegal, Sierra Leone, but none of them has ratified it. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 has signed, but not yet ratified by Cameroon, Congo, Democratic Republic of Congo,<sup>39</sup> Gabon, Ghana, Guinea, Mali, Niger, Nigeria, Senegal and Togo.

On a national level, Uganda recently enacted 2 laws namely the Electronic Transactions Act and the Electronic Signature Act which provide a legal framework for ecommerce transactions and the recognition of electronic signatures in Uganda. They also contain some provisions for checking cybercrime. The Computer Misuse Bill, which is a much more encompassing law for checking cyber crime remains in parliament.<sup>40</sup> Ghana has enacted the Electronic Transactions Act 2008, which also outlaws many cyber offences and creates a regulatory mechanism for enforcing the rules.<sup>41</sup> Tunisia enacted the Electronic Exchanges and Electronic Commerce Law 2000.<sup>42</sup> Egypt also has an ecommerce law which was passed in 2004,<sup>43</sup> Zambia enacted the Electronic Communications and Transactions Act no 21 of 2009, while Senegal has enacted a number of laws to facilitate ecom-

36 Mauritius Electronic Transactions Act 2000. Mauritius has also enacted the Information Technology (Miscellaneous Provisions) Act 1998 and the Computer Misuse and Cybercrime Act 2003.

37 South Africa Electronic Communications and Transactions Act (ECTA) (25 of 2002) also contains key provisions for tackling cybercrime. See Chapters 12 (sects. 80 to 84 ECTA) and 13 (sects. 85-89 ECTA). See also S. Snail, 'Cyber Crime in South Africa – Hacking, cracking, and other unlawful online activities', 1 *Journal of Information, Law & Technology* 2009, p. 1, available at <[http://go.warwick.ac.uk/jilt/2009\\_1/snail](http://go.warwick.ac.uk/jilt/2009_1/snail)>; F. Cassim, 'Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: A Comparative Study', 12 *Potchefstroom Electronic Law Journal* 2009, p. 57.

38 Cape Verde Electronic Commerce Decree-Law 46/2000.

39 This is the most recent signatory to the Convention (23 September 2010).

40 'Uganda Passes Cyber Laws', *New Balance*, No. 527, 22 October 2010, available at <[www.balancingact-africa.com/news/en/issue-no-527/computing/uganda-passes-cyber-laws](http://www.balancingact-africa.com/news/en/issue-no-527/computing/uganda-passes-cyber-laws)>; S.E. Blythe, 'The Proposed Computer Laws of Uganda: Moving Toward Secure E-Commerce Transactions and Cyber-Crime Control', in S.P. Signé (Ed.), *Repositioning African Business and Development for the 21st Century: International Academy of African Business and Development (IAABD) Peer-Reviewed Proceedings of the 10th Annual International Conference*, Kampala, 2009.

41 Ghana Electronic Transactions Act 2008, pp. 98-140.

42 See also S.E. Blythe, 'Computer Law Of Tunisia: Promoting Secure E-Commerce Transactions With Electronic Signatures', 20 *Arab Law Quarterly* 2006, p. 240.

43 Egypt Law No. 15/2004 on E-signature and Establishment of the Information Technology Industry Development Authority (ITIDA).

merce, check cybercrime and protect personal data.<sup>44</sup> Kenya amended the Kenya Communications Act No 2 of 1998 to include new provisions providing a legal framework for ecommerce and outlawing several internet related vices.<sup>45</sup> Botswana has also enacted a law to check cybercrime,<sup>46</sup> while the Namibian Government produced a legislative bill in September 2020 titled, 'Use of Electronic Transactions and Communications Bill', which has been sent to parliament to pass into law.

A rather disappointing case worth mentioning is Nigeria, the most populous country in Africa, which has the highest percentage of internet users in the continent.<sup>47</sup> There is concern however that Nigeria currently does not have an adequate legal framework for facilitating ecommerce or checking the menace of cybercrime. Regarding ecommerce, there is currently a legislative bill in the federal parliament to address this legislative gap but considering Nigeria's participation in the UNCTAD Working Groups that produced the UNCTAD ecommerce laws noted above, an adequate legal framework for ecommerce should have already been in place by now.<sup>48</sup> Although Nigeria has enacted legislation aimed at tackling cybercrime,<sup>49</sup> efforts to check cybercrime in Nigeria have been hampered by the limited scope of the law,<sup>50</sup> as well as defects in the criminal procedure laws most of which are antiquated, such as the Evidence Act which does not clearly provide for the admissibility of computer printouts as evidence before Nigerian

44 Law No. 2008-08 on Electronic Transactions; Law No. 2008-12 on the Protection of Personal Data; Law No. 2008-11 on Cybercrime; Law No. 2008-10 on the Orientation Law on the Information Society. *See also* Draft Decree on Electronic Communications Made for the Implementation of Law No. 2008-08 of 25 January 2008 on Electronic Transactions; Draft Decree on the Implementation of Law No. 2008-12 of 25 January 2008 on the Protection of Personal Data; Draft decree on Electronic Commerce Made for the Implementation of Law No. 2008-08 of 25 January 2008 on electronic transactions; Draft Decree on the Electronic Certification Made for the Implementation of Law No. 2008-08 of 25 January 2008 on Electronic Transactions. *See also* A. Konte, 'ICT Initiatives & Research Capacity in Senegal', E-Challenges 2010 Conference & Exhibition, Warsaw 27-29 October 2010, available at <[www.ist-africa.org/home/files/ICTResearch\\_Senegal\\_IST-Africa.pdf](http://www.ist-africa.org/home/files/ICTResearch_Senegal_IST-Africa.pdf)>.

45 Kenya Communications (Amendment) Act 2008, p. 31, which amended the 1998 Act to include a new set of provisions regarding electronic transactions (Part VIA, pp. 83(B)-(Z) and 84(A)-(I)).

46 Botswana Cybercrime and Computer Related Crimes Act No. 22, 2007. Note the long title of this law: 'An Act to combat cybercrime and computer related crimes, to repress criminal activities perpetrated through computer systems and to facilitate the collection of electronic evidence.'

47 According to statistics, there were 43,982,200 internet users in Nigeria as of June 2010, representing 28.9 % of the Nigerian total population and 39.6 % of total internet users in Africa. Internet access increased by 21,891.1% within the 10 year period 2000 to 2010. *See* Internet World Stats, 'Internet Usage Statistics for Africa', available at <[www.internetworldstats.com/stats1.htm](http://www.internetworldstats.com/stats1.htm)>.

48 *See* HB. 239 - A Bill for an Act to Facilitate Electronic Transactions in Nigeria and for Related Matters 2009, sponsored by Hon. U. Nkem-Abonta.

49 Advance Fee Fraud and other Fraud Related Offences Act 2006.

50 *See* N. Ribadu, 'Cybercrime and Commercial Fraud: A Nigerian Perspective', Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL, Vienna 2007, available at <[www.uncitral.org/pdf/english/congress/Ribadu\\_lbrahim.pdf](http://www.uncitral.org/pdf/english/congress/Ribadu_lbrahim.pdf)>.



courts.<sup>51</sup> There is currently a legislative bill before the Nigerian federal parliament seeking to address this lacuna and pave way for the unfettered admissibility of electronic records.<sup>52</sup>

Given the potential for ecommerce to facilitate greater intra-Africa business interactions,<sup>53</sup> it is important to consider some regional legal developments on ecommerce and cybercrime. Some regional economic/political groups in Africa have on-going projects to create a harmonised legal framework for electronic commerce and tackle cybercrime amongst their constituent states, including the Economic Community of West African States (ECOWAS), the South African

- 51 Supreme Court of Nigeria, *Anyabosi v. R T Briscoe Nigeria Ltd* [1987], 3 *Nigeria Weekly Law Reports*, p. 84, part 59 is in conflict with the Court of Appeal decision, Court of Appeal of Nigeria, *Nuba Commercial Farms Ltd v. NAL Merchant Bank Ltd & anor* [2001], 16 *NWLR* 510, part 740 on this issue. While the Supreme Court viewed computer printouts as admissible albeit as secondary evidence, the Court of Appeal was of the view that the Evidence Act, p. 97, only provides for the admissibility of evidence in 'book' form, and accordingly, held that computer printouts were inadmissible. Although the Court of Appeal decision is later in time than the Supreme Court decision, based on the doctrine of *stare decisis*, the Court of Appeal ought to have followed the earlier binding precedent established by the Supreme Court on the issue. See also T. Akomolede, 'Contemporary Legal Issues in Electronic Commerce in Nigeria', 11 *Potchefstroom Electronic Law Journal* 2008, pp. 12 and 13; G. Bamodu, 'Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and the Judiciary', 2 *JILT* 2004, available at <[www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\\_2/bamodu/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_2/bamodu/)>; E. Ijioma, 'Nigeria lacks legal framework to tackle cybercrime', *Punch on the Web*, 1 December 2010, available at <[www.punchng.com/](http://www.punchng.com/)>.
- 52 See SB. 291 A Bill for an Act to Amend the Evidence Act, Cap. E14 Laws of the Federation of Nigeria, 2004, sponsored by Senator S. Akinyede. Note the Explanatory Memorandum to the Bill: "This Act seeks to amend the Evidence Act, Cap. E14 Laws of the Federation of Nigeria 2004 in order to update it and bring it in line with the reality of the advancement in the area of electronic and computer technology." See also M. Chawki, 'Nigeria Tackles Advance Free Fraud', 1 *JILT* 2009, p. 1, available at <[http://go.warwick.ac.uk/jilt/2009\\_1/chawki](http://go.warwick.ac.uk/jilt/2009_1/chawki)>.
- 53 The Economic Commission for Africa, 'The Development of an E-Commerce Legal Framework for ECOWAS', Report May 2005, available at <[www.uneca.org/disd/events/2006/ecowas-uemoa/content/The%20Development%20of%20an%20E-Commerce%20Legal%20Framework%20for%20ECOWAS%20-%20EN.pdf](http://www.uneca.org/disd/events/2006/ecowas-uemoa/content/The%20Development%20of%20an%20E-Commerce%20Legal%20Framework%20for%20ECOWAS%20-%20EN.pdf)>: "E-commerce has potential to drive regional trade and integration and improve global competitiveness within the ECOWAS region. However, to reap these benefits member states will have to, among other things, implement policies that extend the underlying ICT infrastructure and ensure broad network access."

Development Community (SADC)<sup>54</sup> and the East African Community (EAC).<sup>55</sup> It is pertinent to also look at the harmonization efforts of the Organisation for the Harmonisation of Business Law in Africa (OHADA), which has undertaken significant work with a view to harmonizing the business laws applicable in the member states of the OHADA Treaty.<sup>56</sup> This has led to the development of 8 Uniform Acts focusing on different aspects of business law,<sup>57</sup> and some other laws are still in the drafting process. One of the new draft laws is the OHADA Uniform Act on Contract Law.<sup>58</sup> This law was prepared by Professor Marcel Fontaine, a member of the UNIDROIT Working Group for the preparation of the UNIDROIT Principles, premised on a request for assistance made by the OHADA Council of Ministers to UNIDROIT. The UNIDROIT Secretariat sent the preliminary draft of the Act to the OHADA Secretariat in February 2005, together with an Explanatory Note also prepared by Professor Fontaine.<sup>59</sup> A perusal of this draft law however

54 See SADC Declaration on Information and Communications Technology (ICT), 14 August 2001, p. 2(d): "We shall undertake to work together to remove barriers of electronic commerce in our SADC countries as a means to opening opportunities and benefits such as increased access to markets, opportunities to create economic value and cultural assets, reduced administrative costs, and improvement of public services. There is a need to adopt and adapt technologies that enable e-commerce capability to avoid increasing exclusion from the global economy." See also that the SADC developed a 'Model Law on Electronic Transactions and Data Protection' in November 2003.

55 The 15 ECOWAS Member States are Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea-Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone, Togo, Guinea (currently suspended), Niger (currently suspended) and Cote d'Ivoire (currently suspended). The fifteen SADC Member States are Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The 5 EAC Member states are Burundi, Kenya, Uganda, United Republic of Tanzania, and Rwanda. See Economic Community of West African States / The Economic Commission for Africa, 'The Development of an E-Commerce Legal Framework for ECOWAS', Report May 2005, available at <[www.uneca.org/disd/events/2006/ecowas-uemoa/content/The%20Development%20of%20an%20E-Commerce%20Legal%20Framework%20for%20ECOWAS%20-%20EN.pdf](http://www.uneca.org/disd/events/2006/ecowas-uemoa/content/The%20Development%20of%20an%20E-Commerce%20Legal%20Framework%20for%20ECOWAS%20-%20EN.pdf)>; East African Community Secretariat, Report of the 2nd EAC Regional Taskforce Meeting on Cyber Laws, Kampala, 23-25 June 2008, available at <[http://r0.unctad.org/ecommerce/event\\_docs/kampala\\_eac\\_2008\\_report.pdf](http://r0.unctad.org/ecommerce/event_docs/kampala_eac_2008_report.pdf)>; A. Vere, 'Legal and Regulatory Frameworks for the Knowledge Economy': Concept Paper Economic Commission For Africa, 26 March 2009, E/ECA/CODIST/1/15.

56 The Treaty on the Harmonisation of Business Law in Africa 1993 (as amended by the Treaty of Quebec 2008). There are currently 16 member states of OHADA, namely Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. The Democratic Republic of Congo is in the process of acceding to the OHADA Treaty.

57 Uniform Act on General Commercial Law 1997; Uniform Act on Commercial Companies and Economic Interest Groups 1997; Uniform Act on Organising Securities 1997; Uniform Act on Simplified Recovery Procedures and Measures of execution 1998; Uniform Act on Organizing Collective Proceedings for Wiping off Debts 1998; Uniform Act on Arbitration Law within the Framework of the OHADA Treaty 2000; Uniform Act on Organizing and Harmonizing Company Accounting Systems 2000; Uniform Act on Contracts for the Carriage of Goods by Road 2003.

58 See M. Fontaine, 'OHADA Uniform Act on Contract Law: Preliminary Draft', available at <[www.unidroit.org/english/legalcooperation/OHADA%20act-e.pdf](http://www.unidroit.org/english/legalcooperation/OHADA%20act-e.pdf)>.

59 UNIDROIT, 'Preparation by UNIDROIT of a draft OHADA Uniform Act on Contract Law', available at <[www.unidroit.org/english/legalcooperation/ohada.htm](http://www.unidroit.org/english/legalcooperation/ohada.htm)>.

shows that it may be inadequate to support ecommerce transactions in the OHADA Member states. In the first place, the word 'electronic' does not appear in it at all. Looking further through the draft law, the definition of 'writing' in Article 1/10 which is identical to Article 1.11 of the UNIDROIT Principles of International Commercial Contracts 2004 could possibly accommodate electronic documents. According to the provision, "writing' means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form".<sup>60</sup>

Nevertheless, given the fact that the drafting of this law was undertaken under the auspices of UNIDROIT, the provisions regarding electronic transactions could have been very explicit, just like in the UNIDROIT Principles. As earlier noted, the UNIDROIT Principles 2004 contain a number of ecommerce compliant provisions further supported by Comments and Illustrations to avoid any ambiguity.<sup>61</sup> Indeed, in the explanatory notes to the OHADA Uniform Act on Contract Law, Professor Fontaine noted the need for OHADA legal provisions to factor in ecommerce stating that,

The future Uniform Act on Proof will no doubt take account of new means of communication and new ways of concluding contracts, such as electronic commerce. In preparing the UNIDROIT *Principles* 2004, on which much of the preliminary draft is based, the drafters were at pains to ensure that its provisions were compatible with these new techniques. ... Particular atten-

60 See also the definition of 'written' in the earlier Art. 209 Uniform Act on General Commercial Law 1997: "Within the scope of this Book, the word 'written' shall mean any communication using a written medium, including the telegram, telex or telefax." Note further, M. Fontaine, 'OHADA Uniform Act on Contract Law: Explanatory Notes to the Preliminary Draft', available at <[www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf](http://www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf)> para. 59: "[...] Another provision of the Uniform Act relating to general commercial law that stands in need of review is Art. 209, which gives a rather archaic definition of the word 'writing', mentioning telex and telegram, with a daring reference to telefax. This wording will clearly have to give way to the far more modern definition contained in Art. 1/10 of the preliminary draft."

61 International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT Principles, vii: "it was decided to consider whether and, if so, to what extent the 1994 edition of the UNIDROIT Principles required additions or amendments to adapt it to the increasingly important practice of electronic contracting. Eventually, only a few changes were made to this effect to the black letter rules (see Art. 1.2, Art. 2.8(1) (now 2.1.8), Art. 2.18 (now 2.1.18)), while more changes were made to the comments and illustrations (see Comment 1 to Art. 1.2, Comments 1 and 4 to Art. 1.9 (now 1.10) and Illustrations, Comment 3 to Art. 2.1 (now 2.1.1) and Illustration, Comment to Art. 2.7 (now 2.1.7) and Illustration, Comment to Art. 2.8 (now 2.1.8)."

See also Comment 4 to Art. 1.11 UNIDROIT Principles. See further, M.J. Bonell, 'UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law', *U. L. Rev.* 2004, pp. 5 and 19.

tion will have to be paid, for example, to the definition of the term “writing.”<sup>62</sup>

In my view however, even if the future Uniform Act on Proof will provide for ecommerce, there is no harm in adequately providing for it in the draft Uniform Act on Contract Law.<sup>63</sup>

#### **E. Possible Constraints to the Widespread Adoption and Utilization of E-commerce in Africa**

Even if African countries can successfully enact laws to regulate ecommerce, or adopt model laws already formulated by various harmonizing institutions and organizations, it remains to be considered whether these laws will actually facilitate the growth of ecommerce transactions in Africa or will merely decorate the statute books without having tangible impact on commercial transactions. Essentially, while law reform is very desirable, other potential hindrances to the full

62 See M. Fontaine, ‘OHADA Uniform Act on Contract Law: Explanatory Notes to the Preliminary Draft’, para. 68, available at <[www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf](http://www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf)>. In another place where Professor Fontaine commented on the OHADA Act, he noted that: “the first edition of the UNIDROIT Principles, published in 1994, dealt with the main chapters of contract law: formation, interpretation, content, performance, non-performance. The second edition, published in 2004, includes some new ideas, in particular agency, assignment of rights, obligations and contracts, set-off, and limitation periods. The draft Uniform OHADA Act will incorporate all these new innovations”, M. Fontaine, ‘The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts’, *U. L. Rev.* 2004, p. 583. With respect, not mentioning electronic contracting here as one of the ‘innovations’ that ought to be incorporated into the draft Uniform OHADA Act was a significant omission.

63 Commenting on the desirability or otherwise of formalism in contract law provisions, Professor Fontaine noted the widespread illiteracy in the OHADA member states. However even this should not preclude the inclusion of ecommerce provisions in the Uniform Act on Contract Law given the evolving nature of African states and the need to make provisions that can last a long time before the need to review them. In any case, electronic means of contracting could just be one option amongst many and those that wish to transact business by other means could still do so. See M. Fontaine, ‘The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts’, *U. L. Rev.* 2004, pp. 573, 578 and 579-580; M. Fontaine, ‘OHADA Uniform Act on Contract Law: Explanatory Notes to the Preliminary Draft’, available at <[www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf](http://www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf)> paras. 28-36 and 68.

adoption and utilization of ecommerce in various African countries should be tackled decisively.<sup>64</sup>

Three of these potential hindrances will be considered here namely, the infra-structural constraints to ecommerce in Africa, secondly, the adequacy of computer knowledge and expertise within the continent and thirdly, the availability

64 The African Development Forum, a development initiative spearheaded by the Economic Commission for Africa has identified seven key obstacles to the full utilization of ecommerce in Africa. See Economic Commission for Africa, 'The African Development Forum 99 Post ADF Summit: Electronic Commerce in Africa', 7 August 2001, (E/ECA/D/ISD/CODI.2/23), available at <[www.uneca.org/codi/Documents/PDF/doc23en.pdf](http://www.uneca.org/codi/Documents/PDF/doc23en.pdf)>; P. Esselaar & J. Miller, 'Towards Electronic Commerce in Africa: A Perspective from Three Country Studies', 2(1) *The Southern African Journal of Information and Communication* 2002, available at <<http://link.wits.ac.za/journal/j0201-me.html>>; S. Fanawopo, 'Inadequate! [...] Nigeria's Telecommunication Infrastructure Hampers E-payment Delivery', *Daily Sun*, 26 September 2007, available at <[www.sunnewsonline.com/webpages/features/suntech/2007/sept/26/suntech-26-09-2007-001.htm](http://www.sunnewsonline.com/webpages/features/suntech/2007/sept/26/suntech-26-09-2007-001.htm)>.

of expert ecommerce legal advice within Africa.<sup>65</sup> Regarding the first issue, many African countries currently face severe infrastructural deficiencies that may inhibit their ability to promote ecommerce within their jurisdictions.<sup>66</sup> According to statistics, in about three quarters of African countries, less than 10% of the population make use of the internet.<sup>67</sup> Bridging this gap would require massive investment in computerization by both the public and private sectors, expanding broadband internet connectivity and expanding electricity access in Africa. Regarding electricity, only 30.5% of the Sub-Saharan Africa population had elec-

65 See P. Buckley & S. Montes, 'The Promise and Challenge of E-Commerce', 1 *Georgetown Journal of International Affairs* 2000, p. 29: "Access to the enabling technologies is a necessary precondition for the diffusion of e-commerce. Such access is limited in many countries by either inadequate communications infrastructure, by relatively high user costs, or both. It is difficult to talk about the benefits of e-commerce in places where there may be, at best, a single telephone for an entire village. In places where communications infrastructure is available, the cost of computers and other technologies needed for e-commerce may be a barrier. Even in countries with an extensive communications infrastructure and ready access to capital for investment in computers, the spread of e-commerce may slow down because of the cost of access to infrastructure [...] Access to appropriately trained human capital is also a necessary condition for the adoption of e-commerce. Unfortunately, worldwide demand for these workers easily outstrips available supply. While this labor imbalance has the potential to limit the evolution of the digital economies of developed nations, it has even more serious implications for less developed countries. The higher salaries and greater opportunity to work on cutting-edge projects in industrialized countries make it difficult for the developing world to keep their limited pool of technology workers at home. Many regulatory and legal issues, however, stand to be resolved before the benefits of e-commerce can be realized on a global level. Many businesses and consumers are wary of conducting extensive business over the internet due to the lack of a predictable legal environment governing transactions. This is particularly true in business-to-consumer transactions (where typically there is no written contract) and for international commercial activity where e-commerce accentuates existing issues related to cross-border trade or e-commerce, such as the enforcement of contracts and legal dispute resolution."; P. Bhatnagar, 'Telecom Reforms In Developing Countries And The Outlook For Electronic Commerce', 2 *Journal of International Economic Law* 1999, pp. 695 and 696: "Two factors that are cited as being of great importance for the successful adoption of e-commerce are cheap information technology (IT) equipment and cheap telecommunication services. Indeed, the most basic requirement of e-commerce is a personal computer with access to the internet. The supply of internet services, in turn, requires access to telecom networks. In liberalized competitive markets such as the US the ever declining prices of basic IT equipment and the low prices of telecom services have facilitated a widespread use of the internet and a growing practice of doing business electronically. Cheap telecommunication services and cheap computer and telecom equipment therefore seem to be very important for the growth of e-commerce. This would appear to be especially true for those in developing countries who want to take advantage of the opportunities e-commerce offers. For them, high prices of IT equipment and telephone services can only add to existing handicaps such as lack of computer literacy, inadequate English language skills and irregular electricity supply"; O. Bangudu, 'E-commerce will expand Africa's trade horizon', *Next*, 4 November 2010, available at <[http://234next.com/csp/cms/sites/Next/Money/Business/5638073-147/e-commerce\\_will\\_expand\\_africas\\_trade\\_horizon.csp](http://234next.com/csp/cms/sites/Next/Money/Business/5638073-147/e-commerce_will_expand_africas_trade_horizon.csp)>.

66 Economic Commission for Africa, 'Workshop on Legal and Regulatory Framework for the Knowledge Economy', Addis Ababa, 28 April 2009, (E/ECA/CODIST/1), available at <[www.uneca.org/codist/codist1/lrf/content/CODIST-1-LRF-Full\\_Report-en.pdf](http://www.uneca.org/codist/codist1/lrf/content/CODIST-1-LRF-Full_Report-en.pdf)>.

67 Internet World Stats, available at <<http://www.internetworldstats.com/stats.htm>>.

tricity access as of 2009.<sup>68</sup> This dismal figure would need to massively increase if ecommerce is to become a key mode of entering into international commercial transactions in Africa.<sup>69</sup> Another facet of the infrastructural inadequacies which could particularly impact on intra-Africa trade is the poor transport links within the continent. This means that goods ordered online could be too difficult or too expensive to deliver.<sup>70</sup>

68 International Energy Agency, 'Access to Electricity', available at <[www.worldenergyoutlook.com/electricity.asp](http://www.worldenergyoutlook.com/electricity.asp)>.

69 United Nations Development Programme (UNDP), *Aid For Trade And Human Development: 'A Guide to Conducting Aid for Trade Needs Assessment Exercises'*, 2008, p. 59: "The presence and quality of infrastructure networks make an important contribution to the business environment. The poorest countries, in particular, face problems in taking advantage of new trading opportunities because of infrastructure-related supply-side constraints. It is estimated that Africa alone requires \$52.2 billion in public and private investment in order to overcome the worst infrastructural bottlenecks."; M. van der Merwe, 'Cybercontracts: Streamlining the requirements for setting them up', 6 *Juta's Business Law* 1998, p. 138: "Countries that do not take the time now to create appropriate infrastructures to support the Internet will find their economies plummeting in a matter of years; countries that embrace the Internet will reap the benefits. These infrastructures include telecommunications and education (and even legislation). This warning comes from John Chambers, the president of Cisco Systems Inc, a company whose revenue exceeds \$3.2 billion in e-commerce and which expects an income of between \$15 billion and \$20 billion by the year 2000. Chambers compared the Internet revolution with the Industrial Revolution: the Internet version brings people and information together in global or virtual communities, whilst the industrial version brought people and machines together in factories. Countries that do not train their young people in the intricacies of the Internet will experience an economic backlash resembling that experienced by the countries which were reluctant to take on new technologies in the nineteenth century."

70 United Nations Conference on Trade and Development (UNCTAD), *Economic Development in Africa Report 2008: 'Export Performance Following Trade Liberalization: Some Patterns and Policy Perspectives'*, United Nations, New York 2008, p. 27: "the infrastructure for intra-African trade is often poor, which leads to high transaction costs." *See also* p. 87: "Encouraging cross-border trade infrastructure. It is unlikely that the manufacturing sector in Africa will grow to a competitive level if it is limited to small domestic markets. The smallness of individual African markets and the difficulty for most firms to access the markets of industrialized countries suggest that in the short and medium term, the expansion of intra-African trade could offer the opportunity to widen markets outside national boundaries. In so doing, some key infrastructure projects could be executed at the regional level, taking into account regional economic complementarities. The NEPAD initiative on regional infrastructure could provide the basis for such cooperation. The African Development Bank has been identified as the leading institution in the mobilization of resources for infrastructure development, while NEPAD's Medium- to Long-Term Strategic Framework (MLTSF) spells out the key modalities for the development of regional infrastructure in Africa". United Nations Conference on Trade and Development (UNCTAD), *Economic Development in Africa Report 2009: 'Strengthening Regional Economic Integration for Africa's Development'*, United Nations, New York 2009, p. 15: "There remain economic and institutional challenges to furthering intraregional trade in Africa. The economic obstacles include the high dependence of most member countries on export of primary commodities, the strict rules of origin emanating from trade liberalization schemes and the poor quality of infrastructure (ECA, 2008). Institutional challenges include bureaucratic and physical hindrances, such as road charges, transit fees and administrative delays at borders and ports. These hindrances raise transport costs and render deliveries unreliable."

Setting up and adequately funding key institutions for checking the vice of cybercrime will require significant budgetary commitments which many African countries may not be able to afford in view of other pressing issues they are facing.<sup>71</sup>

On the issue of the adequacy of computer knowledge and expertise within the continent, the concern here is two-fold – do those that intend to transact business online have sufficiently understanding of computers and the internet in order to make effective transactions, and is there sufficient information technology expertise in the continent to support ecommerce? Teachers are needed to train future generations of computer users; when computers malfunction, they may need to be repaired and sometimes reprogrammed; computer experts are needed to work in relevant public agencies that oversee electronic transactions; and private companies need advice on how to ensure the integrity of their IT networks to prevent cybercrime, and those that transact business online need to know the dangers and risks associated with ecommerce.<sup>72</sup> Addressing these issues would entail significantly increasing the knowledge base for computer technology and ecommerce transactions, which in turn needs massive investment by the public and private sectors in computer training. In some instances it may require reexamining school curricula to ensure that a certain basic understanding of, and familiarity with information and communication technology is acquired in primary/secondary school, while those that are no longer in school can undergo specialized professional training.

Regarding the availability of expert ecommerce legal advice within Africa, the key issue here is whether lawyers in Africa have sufficient knowledge and understanding of ecommerce law and related issues like cybercrime to adequately advise their clients on the legal aspects of its utilization in their business transactions. By extension, judges and arbitrators in Africa ought to also have some knowledge of

71 See F. Cassim, 'Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: A Comparative Study', 12 *Potchefstroom Electronic Law Journal* 2009, p. 65: "African countries have been criticised for dealing inadequately with cybercrime as their law enforcement agencies are inadequately equipped in terms of personnel, intelligence and infrastructure, and the private sector is also lagging behind in curbing cybercrime. African countries are pre-occupied with attending to pressing issues such as poverty, the Aids crisis, the fuel crisis, political instability, ethnic instability and traditional crimes such as murder, rape and theft, with the result that the fight against cybercrime is lagging behind."

72 See F. Cassim, 'Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: A Comparative Study', 12 *Potchefstroom Electronic Law Journal* 2009, p. 66.



this area of law before they can effectively decide cases that come before them.<sup>73</sup> This in turn raises questions about the extent to which courses such as computer law, information technology law and intellectual property law are part of the curriculum in African universities whether lawyers undergo their legal training.<sup>74</sup> A key concern here is the dire state of many law faculties in Africa in terms of adequate facilities for training future lawyers. It has been noted that:

... law schools lack adequate learning resources, such as well-stocked libraries, electronic information retrieval databases, information and communications technology, and computers ... Computer-assisted, student-directed learning and retrieval systems are virtually unavailable in most African law schools and law faculties ... This state of affairs is an anomaly in the present global, information-based society and economy. ... The lack of electronic data – both in legal and other fields – is not the only information technology limitation in African law faculties and law schools. Some of these institutions do not even have a single computer for the general law student body to use. ... Others have started introducing the use of computers, a phenomenon that was hitherto, in the very recent past, unavailable in many African law faculties and law schools.<sup>75</sup>

It may be difficult for African lawyers that trained without proper access to computers and information and communications technology to grasp the legal issues related to e-commerce as they may view the issues in a very abstract rather than practical way. They may also not be well positioned to contribute to the e-commerce law reform process in their countries. Accordingly, adequate equipping of law faculties ought to be a top priority in African countries that seek to train law-

73 Economic Commission for Africa, 'Workshop on Legal and Regulatory Framework for the Knowledge Economy', Addis Ababa, 28 April 2009, (E/ECA/CODIST/1), available at: <[www.uneca.org/codist/codist1/lrf/content/CODIST-1-LRF-Full\\_Report-en.pdf](http://www.uneca.org/codist/codist1/lrf/content/CODIST-1-LRF-Full_Report-en.pdf)> p. 15: "Capacity building of e-commerce institutions and human capital: In general only a small percentage of lawyers in Africa are familiar with cyber legislation. This is also true of the judiciary, staff in ministries and civil servant in relevant departments. It is important to introduce a sustained training programme suited to the needs of this category of professionals. This calls for a radical transformation in the education and training systems, science and technology policies and development strategies. Extensive technical and managerial capacity-building programs are particularly important in view of the need to formulate and implement policies, standards and develop a proactively supporting legal and regulatory environment. ECA may consider funding, or partnering donor agencies to fund continuing legal education modules on e-commerce in various African universities or other ICT centre of learning. These capacity building initiatives would guarantee the future of e-commerce in Africa"; M. van der Merwe, 'Cybercontracts: Streamlining the requirements for setting them up', 6 *Juta's Business Law* 1998, pp. 138 and 139; F. Cassim, 'Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: A Comparative Study', 12 *Potchefstroom Electronic Law Journal* 2009, p. 68.

74 See generally D. Van Der Merwe, 'Knowledge is the Key to Riches. Is the Law (or Anything Else) Protecting it Adequately?', 11 *Potchefstroom Electronic Law Journal* 2008, p. 1.

75 See S.O. Manteaw, 'Legal Education in Africa: What Type of Lawyer Does Africa Need', 39 *McGeorge L. Rev.* 2008, pp. 903, 932 and 946. See also p. 958.

yers that will contribute to the stabilization of the legal framework for e-commerce in their jurisdictions.

## F. Conclusion

Ecommerce offers hope to many Africans as a means of creating new business opportunities in the virtual marketplace and holds immense benefits for consumers, businesspeople and governments. It could be a key factor in significantly boosting economic growth and development in Africa and fully integrating African economies into the global market. It is commendable that some African countries have taken steps to enact laws to give confidence to those that enter into online business transactions from their jurisdictions, however, the fact that up to three quarters of African countries have not yet enacted relevant legislations or adopted any of the laws prepared by UNCITRAL leaves much to be desired. It is noteworthy that many African countries participated in the UNCITRAL Working Groups that drafted the Model Laws of 1996 and 2001, the 2005 Convention and subject-specific laws like the Rotterdam Rules 2008,<sup>76</sup> and yet they have been very lethargic about acceding to them. While it is commendable that a number of regional organizations within Africa are in the process of creating harmonised legal instruments for promoting ecommerce and guarding against cybercrime, they ought to speed up their work as it is almost getting late in the day. It should be kept in mind that other regional organizations like the European Union have had these provisions for about a decade.<sup>77</sup>

The national and regional efforts to create or adopt ecommerce legal provisions in Africa do not dispense with the need to ratify the Convention on the Use of Electronic Communications in International Contracts which seeks to provide a truly international legal platform for cross border ecommerce transactions.<sup>78</sup> The full benefits of ecommerce can only be realized if some harmony can be achieved in the rules regulating ecommerce and checking cybercrime. Regarding the latter, the

76 UNCITRAL, 'Travaux préparatoires – 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment with additional Art. 5bis as adopted in 1998', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_travaux.html)>; UNCITRAL, 'Travaux préparatoires – 2001 UNCITRAL Model Law on Electronic Signatures', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_travaux.html)>; UNCITRAL, 'Travaux préparatoires – 2005 United Nations Convention on the Use of Electronic Communications in International Contracts', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention-travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention-travaux.html)>; UNCITRAL, 'Travaux préparatoires – 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the Rotterdam Rules', available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/rotterdam\\_travaux.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_travaux.html)>.

77 The European Union (EU), Electronic Commerce Directive 2000/31/EC was adopted by the European Parliament and Council of Europe in June 2000 while the Council of Europe ('Budapest') Convention on Cybercrime was adopted in 2001 (ETS No 185).

78 See J. Coetzee, 'The Convention on the Use of Electronic Communications in International Contracts: Creating An International Legal Framework for Electronic Contracting', 18 *South African Mercantile Law Journal* 2006, p. 245.

Council of Europe ('Budapest') Convention on Cybercrime 2001 has received wide commendation since it was adopted. Within Africa, only South Africa has signed it so far, but other African countries could consider signing as well due the inherent benefits of having one set of rules protecting those that trade in a virtual market in order to prevent cyber criminals from taking advantage of differences in national rules.

Finally, the challenge of upgrading the physical infrastructure for information and communication technology necessary for ecommerce and adequately investing in human resources for the ecommerce era is no doubt a daunting one. However the focus should be on the future benefits rather than exclusively in the immediate cost. Accordingly, I will end with a question – Where will Africa be in 100 years time if it does not fully participate in ecommerce?