P Vrancken *South Africa and the Law of the Sea* (2011) Chapter One Update[1]

Page 1, lines 4-5
The sentence should read:
The South African mainland coast is about 3 000 km long and about 30% of South Africa's population live within 60 km of the shore.

Page 1, footnote 1
Add the following:
If one includes the Prince Edward Islands, the coastline is approximately 3 924 km long (see Government of the Republic of South Africa *National Environmental Management of the Ocean White Paper* (2014) 11, published in GG 37692 of 29 May 2014). This means that the South African coastline is Africa's second longest after that of Madagascar (4 828 km) and the South African maritime borders constitute 43% of all the State's borders.

Page 1, footnote 3
The second sentence to read as follows:
See further B. McLean & J.I. Glazewski "Marine environments, oceans law and governance" in N.D. King, H.A. Strydom & F.P. Retief (eds) *Environmental Management in South Africa* (2018) 576–579.

Page 1, footnote 5
The content to read as follows:
See McLean & Glazewski (n. 3) 579–581.

Page 1, footnote 6
Add the following sentence:
See also the draft *South Africa's National Biodiversity Framework (2017-2022)*, published in GG 41996 of 26 October 2018 at 29–108.

Page 2, footnote 7
The first sentence to read as follows:
See J. Glazewski & L. Plit "Mineral and petroleum resources" in J. Glazewski (ed.) *Environmental Law in South Africa* (2017) 17-6.

Page 2, footnote 9
Add the following second sentence:
On ocean-related developments around Africa during the following two millennia, see P. Vrancken "Introduction" in P. Vrancken & M. Tsamenyi (eds) *The Law of the Sea – The African Union and its Member States* (2017) 2–4.

Page 2, footnote 12
The second sentence to read as follows:
A replica of the cross erected by Dias now stands at Kwaaihoek, a few kilometers east of Algoa Bay.

Page 2, line 21

[1] The research assistance of Ms Ntemesha Maseka is gratefully acknowledged.

Replace “Dutch” with “Dutchman”.

Page 2, line 22
After the full stop, insert footnote number 12A.

Page 2, line 23
After the full stop, insert footnote number 12B.

Page 2, footnote 12A
After footnote 12, insert the following footnote:
See J.B. Scott (ed) *Grotius “Mare Liberum” (1633)* (1916).

Page 2, footnote 12B
After footnote 12A, insert the following footnote:
See J. Howell (ed) *John Selden “Mare Clausum: The Right and Dominion of the Sea in Two Books”* (1663).

Page 3, footnote 24
The second sentence to read as follows:
It remained the main British naval base in the southern hemisphere until the apartheid policies led to the termination in 1975 of the 1955 Simonstown Agreement in terms of which “the United Kingdom agreed to transfer control of the [base] to South Africa on condition that its facilities would be made available to the United Kingdom in any war in which it (but not necessarily South Africa) was involved” [J. Dugard “Treaties” in J. Dugard, M. du Plessis, T. Maluwa & D. Tladi (eds) *Dugard’s International Law* (2018) 621].

Page 4, line 8
After the comma, insert footnote number 26A.

Page 4, line 10
After the full stop, insert footnote number 27A.

Page 4, line 23
Replace “conference was” with “conference, UNCLOS II, was”.

Page 4, footnote 26A
After footnote 26, insert the following footnote:
See H. Miller “The Hague Codification Conference” (1930) 24 AJIL 686–693.

Page 4, footnote 27
The second sentence to read as follows:
See J. Dugard “South Africa and international law: A historical introduction” in J. Dugard, M. du Plessis, T. Maluwa & D. Tladi (eds) *Dugard’s International Law* (2018) 21.

Page 4, footnote 27A
After footnote 27, insert the following footnote:
On the South African contribution to the first UN Conference on the Law of the Sea, see P. Vrancken “The international law of the sea in South Africa” in E. de Wet, H. Hestermeyer & R. Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (2015) 144–147.

Page 5, line 6
Replace “was excluded” with “withdrew”.

Page 5, footnote 35
Replace “(1982) 21 ILM 1245.” with “1833 UNTS 3, (1982) 21 ILM 1261. Adopted: 10 December 1982; EIF: 16 November 1994.”.

Page 5, footnote 36
Replace the first sentence with:
On the South African contribution to UNCLOS III, see Vrancken (n. 27A) 148–150.

Page 5, footnote 38
The text of the footnote to read as follows:
The declaration made on 5 December 1984 read: “Pursuant to the provisions of Article 310 of the Convention the South African Government declares that the signature of this Convention by South Africa in no way implies recognition by South Africa of the United Nations Council for Namibia or its competence to act on behalf of South West Africa/Namibia” ((1985) 4 LOSB 14). See further E. Franckx & M. Benatar “Article 305” in A. Proelss (ed) *United Nations Convention on the Law of the Sea – A Commentary* (2017) 1975–1976; F.M. Luyt “Signature and ratification: a brief note” (1985) 1 *Sea Changes* 114–119; M.H. Nordquist (ed) *United Nations Convention on the Law of the Sea 1982. A Commentary* (1989) II 197 n. 22. The ANC and the PAC were not entitled to sign as they are not listed in art 305 LOSC.

Page 5, footnote 39
The text of the footnote to read as follows:
For a discussion of the contribution of African States, see T.O. Akintoba *African States and Contemporary International Law. A Case Study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone* (1996); V. Nmehielle & T. Pasipanodya “African Union” in P. Vrancken & M. Tsamenyi (eds) *The Law of the Sea – The African Union and its Member States* (2017) 36–62; N.S. Rembe *Africa and the International Law of the Sea: A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea* (1980).

Page 5, footnote 41
Add the following second sentence:
At the time of ratification, the South African Government withdrew the declaration made on behalf of South Africa upon signature of the Convention. It also indicated that it would, “at an appropriate time, make declarations provided for in Articles 287 and 298 of the Convention relating to the settlement of disputes” [DOALOS “Declarations and statements” (29 October 2013) available at <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#South Africa Upon ratification> (accessed on 7 January 2019)].

Page 6, line 11
Add the following:
Nevertheless, the Constitutional Court has confirmed that there is “no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into” South Africa’s domestic law.[42A]

Page 6, footnote 42A
After footnote 42, insert the following footnote:

Page 6, footnote 43
The text of the footnote to read as follows:
South Africa is not a party to the 1969 Vienna Convention on the Law of Treaties [1155 UNTS 331, (1969) 8 ILM 679; adopted: 23 May 1969; EIF: 27 January 1980] or the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations [(1986) 25 ILM 543; adopted: 21 March 1986; EIF: not yet].

Page 6, footnote 45
(a) *Insert the following at the beginning of the footnote:*
In *Glenister v President of the Republic of South Africa & Others* 2011 3 SA 347 CC, 2011 7 BCLR 651 CC (*Glenister II*) 89 [discussed in C. Gowar "The status of international treaties in the South African domestic legal system: Small steps towards harmony in light of *Glenister*? *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC)" (2011) 36 SAYIL 307–325], the minority judgment Court explained that "[t]he constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature". See also *Democratic Alliance v Minister of International Relations and Cooperation & Others* 2017 3 SA 212 GP, 2017 2 All SA 123 GP, 2017 1 SACR 623 GP 35 ["there is no question that the power to conduct international relations and to conclude treaties has been constitutionally conferred upon the national executive in terms of s 231(1)"], discussed in H.J. Lubbe "*Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP)" (2016) 41 SAYIL 242–253.
(b) Replace "Dugard (n. 27) 63" with "J. Dugard & A. Coutsoudis "The place of international law in South African municipal law" in J. Dugard, M. du Plessis, T. Maluwa & D. Tladi (eds) *Dugard's International Law* (2018) 87".

Page 7, lines 2–3
Replace "Minister of Water and Environmental Affairs" with "Minister responsible for environmental matters".

Page 7, footnote 46
(a) Replace "85(1)–(2)" with "85".
(b) *Add the following at the end of the footnote:*
See also G Ferreira and A Ferreira-Snyman "The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism" (2014) 17(4) *Potchefstroom Electronic Law Journal* 1471–1496.

Page 7, footnote 48
(a) Replace "Proc. 44 of 2009 [GG 32367 of 1 July 2009]" with "s. 1(1) NEMA".
(b) Replace "with "(a)" with "with: "(a)".
(c) *Add the following:*
In *Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 3 SA 30 CC, 2019 3 BCLR 329 CC at 89, the Constitutional Court stressed that

> [o]ur President is never at large to do whatever leaders of other nations consider to be in the best interests of our and their nations. She is always to be guided by the Constitution and the law. For she is the nation's constitutional messenger and may only do what would benefit us and project our country in a positive light. And we promise in the Preamble to our Constitution to "[b]uild a united and democratic South Africa able to take its rightful place as a sovereign State in the family of nations". The words "rightful place as a sovereign state" are quite telling.

This means that "[c]omity and sound diplomatic relations ought never to be a product of illegal or unconstitutional compromises that could, rightly or wrongly, be viewed as capitulating to the desires of others to exercise unchecked power to the potential prejudice of the rights of citizens" [at 90]. In other words,

> we are never to feel obliged to relinquish our sovereignty and rightful place in the family of nations at the altar of diplomacy, comity and the need for consensus. We thus have to relate with other sister countries with an unshakeable purpose of contributing to the realisation of a more just, equal, peaceful, human rights-oriented, truly democratic order and shared prosperity. This is especially so in a region that has a long and painful history of struggling for the attainment of these good governance, economic development, growth and stability-enhancing goals of universal application [at 91].

The Court confirmed that, once the national executive has signed an international instrument, "the constitutional role of the National Executive in relation to international agreements has fully played itself out and there is nothing left to be done in terms of section 231(1)" [at 29]. The Court explained that, "on the force of article 18" of the 1969 Vienna Convention on the Law of Treaties — a provision that is part of South African law on the basis of section 232 of the Constitution (see further par. 1.2.2 below) —, "serious consequences flow from a mere signing of an international agreement by a State" [at 41]. For that reason, it might not be necessary in a specific case to "wait for the whole section 231 process to be finalised before litigation is justifiable" [*ibid*.]. The Court also confirmed that "there was and still is no legal basis for the President to act contrary to the unvaried provisions of a binding Treaty" [at 48]. This means that "it is always open to the Executive to participate in negotiations provided, in doing so, they do not align us with decisions that are inimical to our constitutional dream" [at 76]. In other words, "[t]he President's power in terms of section 231(1) is permissibly exercisable only insofar as it is aimed at protecting, promoting, respecting and fulfilling the rights in the Bill of Rights" [at 78]. Finally, the Court pointed out that

> there is no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making processes as proposed. Desirable though it might be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement. It is always open to the Executive, whenever it deems it fitting to do so, to involve the public. But a failure to do so, however enriching to the decision making process it might otherwise have been, can never rise to the level of a failure to fulfil a constitutional obligation to consult the public [at 87].

Page 7, footnote 49

Add the following:

In *Earthlife Africa Johannesburg & Another v Minister of Energy & Others* 2017 5 SA 227 WCC, 2017 3 All SA 187 WCC 114, the Western Cape High Court confirmed that

> [l]imiting those international agreements which may be tabled under sec 231(3) to a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament would give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and participatory democracy [italics omitted].

Page 7, footnote 51

Add the following:

In *Earthlife Africa* (n. 49) 103, the Court pointed out that, "should an international agreement be tabled incorrectly under sec 231(3) rather than sec 231(2) the review of any such decision can be seen as upholding rather than undermining the separation of powers". The Court also explained that "a review of the lawfulness and rationality of the exercise of [the powers under sec 231(2) or (3)] may well require a court to consider the content of the relevant international agreement" [at 104], taking into account that "sec 231 and, in particular, the interplay between sec 231(2) and 231(3), must be interpreted in order to give best effect to fundamental constitutional values and so as to be consistent with the constitutional scheme and structure" [at 114, footnote omitted]. The Court added that,

> where the national executive utilizes sec 231(3) to render the Republic bound under an international agreement, its exercise of the power is subject to the requirement that it makes such agreement public and tables it before Parliament within a reasonable time. In this sense it is a composite requirement, the power not being properly exercised unless the agreement is tabled before Parliament within a reasonable time [at 127].

Page 8, line 2

Replace "Minister of Water and Environmental Affairs" with "Minister responsible for environmental matters".

Page 8, footnote 53

Add the following:

In *Glenister II* (n. 45), the minority judgment explained that "[t]he approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement" and "constitutes an undertaking at the international level, as between South Africa and other states, to take steps to comply with the substance of the agreement" [at 91]. "[F]ailure to observe the provisions of th[e] agreement may result in South Africa incurring responsibility towards other" States parties [at 92]. The judgment stressed that

> the ratification of an international agreement by a resolution of Parliament [must not] be dismissed 'as a merely platitudinous or ineffectual act.' The ratification of an international agreement by Parliament is a positive statement by Parliament to the signatories of that agreement that Parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement [at 96].

The majority judgment cautioned that, although "the main force of section 231(2) is directed at the Republic's legal obligations under international law" [at 181], "that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved 'binds the Republic'. That important fact … has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights" [at 182]. "In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights" [at 189] and "implicitly

demands that the steps the state takes must be reasonable" [at 194]. The judgment contends that "[t]his is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions" (at 195). See also *Government of the Republic of Zimbabwe v Fick & Others* 2013 5 SA 325 CC, 2013 10 BCLR 1103 CC 28–31 [discussed in M. Swart "Extending the life of the SADC Tribunal *Government of the Republic of Zimbabwe v Fick & Others* 2013 5 SA 325 (CC)" (2013) 38 SAYIL 253–262; see also M. du Plessis & M. Forere "Enforcing the SADC Tribunal's decisions in South Africa: Immunity *Government of Zimbabwe v Fick, Etheredge, Campbell and the President of South Africa* South Gauteng High Court Case no 77881/2009" (2010) 35 SAYIL 266–269]; *Earthlife Africa* (n. 49) 103 ["the conclusion and tabling of an international agreement before Parliament in terms of … sec 231(2) … of the Constitution is an exercise of public power and the Constitutional Court has made clear that all such exercises of public power are justiciable in that they must be lawful and rational"]. In *Democratic Alliance* (n. 45), the High Court explained that

> [a] notice of withdrawal, on a proper construction of s 231, is the equivalent of ratification, which requires prior parliamentary approval in terms of s 231(2). … [T]he act of signing a treaty and the act of delivering a notice of withdrawal are different in their effect. The former has no direct legal consequences, while by contrast, the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations … [at 47].

The Court added that,

> in international law, a notice of withdrawal from an international agreement does not require parliamentary approval. However the question of which between the national executive and parliament has to decide on withdrawal must be settled according to domestic law. It is a domestic issue in which international law does not and cannot prescribe [at 50, footnote omitted].

The Court concluded that,

> on a proper construction of s 231, … parliament retains the power to determine whether to remain bound to an international treaty. This is necessary to give expression to the clear separation of powers between the national executive and the legislature embodied in the section. If it is parliament which determines whether an international agreement binds the country, it is constitutionally untenable that the national executive can unilaterally terminate such an agreement [at 51].

In *Law Society of South Africa* (n. 48) 43, the Constitutional Court stressed that "[a]ny reference to the President being bound by an undomesticated treaty must be understood as a reference to the binding effect of that instrument on her merely as a representative of the State. In other words, it is the State alone that is itself bound by that undomesticated legal instrument".

Page 8, footnote 55

Add the following after the fourth full stop:

In *Azanian Peoples Organization (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 4 SA 671 CC, 1996 8 BCLR 1015 CC 26, the Constitutional Court confirmed that "[i]nternational conventions do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment". In *Glenister II* (n. 45), after

reiterating that "[a]n international agreement that has not been incorporated in our law cannot be a source of rights and obligations" [at 92], the minority judgment explained that "the legislative act which incorporates the international agreement into domestic law has the effect of transforming an international obligation that binds the sovereign at the international level into domestic legislation that binds the state and citizens as a matter of domestic law" [at 94]. The judgment added that

> [i]t is implicit, if not explicit, from the scheme of section 231, that an international agreement that becomes law in our country enjoys the same status as any other legislation. This is so because it is enacted into law by national legislation, and can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates its intent that the enacting legislation should have such status. On certain occasions, Parliament has done this by providing that, in the event of a conflict between the international convention that has been incorporated and ordinary domestic law, the international agreement would prevail [at 100, footnotes omitted].

The judgment indicated that

> two consequences flow from this. Firstly, insofar as provisions in the international agreement give rise to rights and obligations under domestic law, these rights and obligations flow from, and are limited by, the extent to which the domestic legislation incorporating the agreement includes those provisions. Secondly, … [t]he incorporation of an international agreement does not transform the rights and obligations embodied in the international agreement into constitutional rights and obligations. It only transforms them into statutory rights and obligations that are enforceable in our law under the national legislation incorporating the agreement [at 102].

The judgment also pointed out that, "if there is a conflict between an international agreement that has been incorporated into our law and another piece of legislation, that conflict must be resolved by the application of the principles relating to statutory interpretation and superseding of legislation" [at 101]. See further the majority judgment as quoted in n. 53.

Page 8, footnote 58

(a) Replace "Minister of Water and Environmental Affairs" with "Minister responsible for environmental matters".
(b) Replace "following (a)" with "following: (a)".
(c) Replace "s. 26 NEMA" with "s. 2(4)(n) and 26 NEMA".
(d) Replace "*Quagliani* (n. 46) 42–48" with "*Quagliani* (n. 46) 42–48 and *WWF South Africa v Minister of Agriculture, Forestry and Fisheries & Others* 2018 4 All SA 889 WCC, 2019 2 SA 403 WCC 13 and 119".
(e) *Add the following:*
Dugard & Coutsoudis (n. 45) 99 explain that "[a] treaty enacted into law by national legislation in accordance with s 231(4) of the Constitution will enjoy the status accorded to it by the act of incorporation: a treaty enacted into law by Act of Parliament will be treated as an Act of Parliament, whereas a treaty enacted into law by subordinate legislation will be treated as subordinate legislation".

Page 9, footnote 59

Replace the second sentence with:
Dugard & Coutsoudis (n. 45) 99 state that it is likely that "a self-executing treaty will take priority over delegated legislation, in the event of a conflict".

Page 9, footnote 60

Add the following:

In *Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre & Others* 2016 3 SA 317 SCA, 2016 2 All SA 365 SCA, 2016 4 BCLR 487 SCA, the Supreme Court of Appeal explained that this provision "constitutionalised what was in any event the legal position. *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 1 SA 234 C at 238C–F" [at 53 n. 26].

Page 9, footnote 61

(a) Replace "Dugard (n. 27) 56 and 70–79" with "Dugard & Coutsoudis (n. 45) 67 and 100–123".

(b) *Add the following:*

In *Southern African Litigation Centre* (n. 60) 53, the Supreme Court of Appeal confirmed that "customary international law is to be read in the light of legislation under which South Africa has enacted international agreements into law".

Page 9, footnote 63

Add the following at the end of the footnote:

In *Democratic Alliance v Minister of International Relations and Co-operation and Others; Engels and Another v Minister of International Relations and Co-operation and Another* 2018 4 All SA 131 GP, 2018 6 SA 109 GP, 2018 2 SACR 654 GP 16, the North Gauteng High Court observed that, "for [a] rule or practice to achieve the status of a legal obligation it has to be firstly, a settled practice (*usus*) that is widespread and extensive and be recognised by a majority of states and, secondly, the action must occur out of a sense of legal obligation, i.e. it has to be carried out as a binding *opinio juris*. Both elements have to be present" (footnotes omitted). See further the draft conclusions on identification of customary international law adopted by the ILC and appearing in its 2018 Report to the UNGA (UN Doc. A/73/10 (2018) 119–156). See also *S v Basson* 2005 12 BCLR 1192 CC, 2007 3 SA 582 CC 174 [where the Constitutional Court relied on a statement of the ICJ that fundamental rules of international humanitarian law "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law"]; *Koyabe and Others v Minister of Home Affairs and Others* 2009 12 BCLR 1192 CC, 2010 4 SA 327 CC n. 39 [where the Constitutional Court relied on a statement of the ICJ that "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law"]; *Law Society of South Africa* (n. 48) 38 [where the Constitutional Court recalled that "[n]ot only have we officially accepted that the main provisions of the Vienna Convention are part of customary international law, but Professor Greenwood's authoritative article, which was published by the United Nations, and the ICJ decisions also confirm that the major provisions of the Vienna Convention like articles on interpretation doctrines and the good faith doctrine [in article 18] amount to a codification of customary international law"].

Page 9, footnote 64

(a) Replace "Dugard (n. 27) 58" with "Dugard & Coutsoudis (n. 45) 70".

(b) *Add the following:*

A. Coutsoudis & M. du Plessis "We are all international lawyers now: The Constitution's international-law trifecta comes of age" (2019) 136 SALJ 433–462 at 446.

Page 10, last line
Replace “2009” with “2010”.

Page 10, footnote 65
Replace “40–62” with “40–62; A Roach “Today’s customary international law of the sea” (2014) 45 ODIL 239–259”.

Page 10, footnote 67
(a) Replace “2158 UNTS 3” with “2158 UNTS 3, (2005) 13 AJICL 25. Adopted: 11 July 2000; EIF: 26 May 2001”.
(b) *Add the following*:
On the contribution of the AU to the development of the law of the sea, see Nmehielle & Pasipanodya (n. 39) 36–62; P. Vrancken “The African perspective on global ocean governance” in D. Attard (ed.) *The IMLI Treatise on Global Ocean Governance* (2018) I 218–221.

Page 10, footnote 68
Replace “Article 61(1) AECT” with “Article 61(1) AECT [(1991) 30 ILM 1241, (1993) 1 AYIL 227; adopted: 3 June 1991; EIF: 12 May 1994]”.

Page 10, footnote 71
The text of the footnote is replaced as follows:
(2016) 1 *Journal of Ocean Law and Governance in Africa* 180. Adopted: 26 July 2010; EIF: not yet. South Africa ratified the AMTC on 8 June 2016.

Page 11, line 23
After footnote number 77, insert the following:
In 2014, the AU Assembly of Heads of State and Government adopted the 2050 Africa’s Integrated Maritime Strategy (AIMS),[77A] which must be read together with Agenda 2063,[77B] a broader strategic framework for the socio-economic transformation of the continent over the next half century. Two years later, those policy documents were given more concrete legal contents in the Lomé Charter on Maritime Security and Safety and Development in Africa.[77C] The African ocean governance framework laid down by those instruments is based on four premises. First, the African maritime domain (AMD) is critical to the survival and sustainable development of the continent.[77D] Nevertheless, secondly, the capacity of African States to make the most of the AMD is very limited overall.[77E] Thirdly, that limited capacity has contributed to, and is being perpetuated by, unacceptable levels of maritime insecurity.[77F] Finally, the steps taken to address maritime insecurity must be part of an integrated strategy including all the other aspects of a healthy AMD.[77G] South Africa is

> grappling with the interfaces and relative status of the [Lomé Charter] and the [AMTC]. Whereas the [AMTC] could be generally regarded to focus on the development of African maritime transport, and incidentally on safety, security and environmental issues, the Lomé Charter could be seen to do the opposite, namely to focus on maritime safety and security, with developmental and environmental issues incidental thereto also receiving attention.[77H]

Page 11, footnote 77A
After footnote 77, insert the following footnote:
(2016) 1 *Journal of Ocean Law and Governance in Africa* 202. On this document, see, for instance, E. Egede “Institutional gaps in the 2050 Africa’s Integrated Maritime Strategy” (2016) 1 *Journal of Ocean Law and Governance in Africa* 1–27; Nmehielle & Pasipanodya

(n. 39) 52–55; P. Vrancken “Africa’s Integrated Maritime Strategy and the law of the sea” (2016) 41 SAYIL 97–125.

Page 11, footnote 77B
After footnote 77A, insert the following footnote:
Available at <https://au.int/en/documents/20141012/key-documents-agenda2063> [accessed on 7 January 2019].

Page 11, footnote 77C
After footnote 77B, insert the following footnote:
(2017) 2 *Journal of Ocean Law and Governance in Africa* 90. Adopted: 15 October 2016; EIF: not yet. See, for instance, Nmehielle & Pasipanodya (n. 39) 55–58; Vrancken (n. 67) 222–231; T. Walker “The future anchorage for enhanced African maritime governance?” (2017) 2 *Journal of Ocean Law and Governance in Africa* 75–80. The Charter “was not signed by South Africa for reasons related to its shortcomings on key definitions and the prescriptive nature of the instrument that is not suitable for states such as South Africa with developed and operational maritime structures and instruments at domestic level” [S de Wet “Highlights from the Office of the Chief State Law Advisor (International Law)” (2017) 42 SAYIL 324].

Page 11, footnote 77D
After footnote 77C, insert the following footnote:
See, for instance, para. 8 of AIMS.

Page 11, footnote 77E
After footnote 77D, insert the following footnote:
See, for instance, para. 11–12 of AIMS.

Page 11, footnote 77F
After footnote 77E, insert the following footnote:
See, for instance, para. 16 of AIMS.

Page 11, footnote 77G
After footnote 77F, insert the following footnote:
See S. Stead, K. Chitiyo, J. Potgieter & G. Till *Maritime Development in Africa* (2010) 7.

Page 11, footnote 77H
After footnote 77G, insert the following footnote:
De Wet (n. 77C) 324.

Page 11, footnote 79
Add the following:
See further *Fick* (n. 53) 5. At 6–7, the Court explained that

> [t]he purpose for the establishment of SADC was to achieve certain regional developmental goals. Some of the key objectives are set out in the Preamble to the Treaty as: a collective realisation of the progress and well-being of the peoples of Southern Africa; promotion of the integration of the national economies of Member States; the need to mobilise international resources and secure international understanding, support and cooperation; and, more importantly, “the need to involve the peoples of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law”. Member States bound themselves in terms of

article 4(c) of the Treaty to act in accordance with the human rights, democratic and rule of law principles.
They undertook to adopt measures to promote the achievement of the objectives of SADC and to "refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty" [art. 6(1) of the Treaty]. Added to this was the responsibility to take all the necessary steps to accord the Treaty the force of national law [art. 6(5)] and a commitment to "cooperate with and assist institutions of SADC in the performance of their duties" [art. 6(6)]. One of those institutions to be cooperated with and assisted was the Tribunal [art. 9(1)(f)].

In *Law Society of South Africa* (n. 48) 50, the Constitutional Court explained that

> [w]e signed and ratified the Treaty not merely as a consequence or "misfortune" of the imperatives of geo-political location. It was a thoughtful and appropriate decision to take for the good of our people, our democracy, the image of the SADC region and, by extension, of Africa. This is so because the provisions of the Treaty, its institutions and set agenda accord with our progressive constitutional vision.

Page 12, lines 10-11
Replace "either (i)" with "either: (1)".

Page 12, footnote 83
The first sentence is amended as follows:
South Africa ratified the 1967 Convention on the International Hydrographic Organisation [751 UNTS 43; adopted: 3 May 1967; EIF: 22 September 1970] in 1968.

Page 12, footnote 84
Replace "art. 387 of the 1919 Paris Peace Treaty" with "art. 387 of the Treaty of Peace between the Allied and Associated Powers and Germany [225 *Consolidated Treaty Series* 189, (1919) 13 AJIL Suppl. 151; adopted: 28 June 1919; EIF: 10 January 1920]".

Page 12, footnote 85
Replace "1948 Convention on the International Maritime Organisation" with "1948 Convention on the International Maritime Organisation [289 UNTS 48; adopted: 6 March 1948; EIF: 17 March 1958]".

Page 12, footnote 87
Add the following:
See, for instance, *Law Society of South Africa* (n. 48) 5 ["[o]ur Constitution … insists that [courts] not only give a reasonable interpretation to legislation but also that the interpretation accords with international law"]; *Ruta v Minister of Home Affairs* 2019 2 SA 329 CC, 2019 3 BCLR 383 CC [with regard to refugee matters]. See further N. Botha 'Justice Sachs and the interpretation of international law by the Constitutional Court: Equity or expediency?' (2010) 25 SAPL 235–250; L. du Plessis "Interpretation" in S. Woolman, M. Bishop & J. Brickhill (eds) *Constitutional Law of South Africa* vol 2 2 ed (2013) 32-176; D. Tladi 'Interpretation of treaties in an international law-friendly framework: The case of South Africa' in H. P. Aust & G. Nolte (eds) *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016) 135–152; D. Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 310–338; D. Tladi "The interpretation and identification of international law in South African courts" (2018) 135 SALJ 708–736.

Page 12, footnote 88

The footnote to read as follows:
See, however, Coutsoudis & du Plessis (n. 64) 441–442, who caution that "to insist on an interpretation which prioritises a non-binding international-law norm over South African legislation may be going too far. That would not mean that the courts would be excused from considering the non-binding international law. It would always be open to the courts, when trying to determine what is the binding international-law position (whether in a treaty or custom), to have regard to soft law (non-binding resolution and reports), the decisions of international tribunals and bodies, and international treaties that are not binding on South Africa. But it would mean that the courts would be slow in discharging their s 233 interpretative obligations to privilege a non-binding rule of international law alone over a statute passed by Parliament" (footnote omitted). In *Glenister II* (n. 45), the Constitutional Court warned, after confirming that "[o]ur Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law" (at 97), that "treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic" (at 98). See also *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Another* 2015 1 SA 315 CC, 2015 1 SACR 255 CC, 2014 12 BCLR 1428 CC 23 ["legislation must be interpreted purposively in accordance with international law" (footnotes omitted)].

Page 13, last line

(a) *Add the following sentence to the paragraph:*
The approach is also confirmed by various provisions of ordinary legislation.[96A]

(b) *Add the following section:*
1.2.5. *Rule of law*

The values on which the Republic of South Africa is founded include the rule of law,[96B] of which the principle of legality is a part.[96C] The principle means that all exercises of public power, including those performed in the conduct of the State's international relations, are subject to the Constitution and justiciable.[96D] For that reason, all those exercises must comply with the rationality requirement (ie they must be rational at the procedural and substantive levels)[96E] and the legality requirement (ie they must have a legal basis and fall within the ambit of the powers given)[96F]. When an exercise of public power does not meet those requirements, a court has no choice but to declare that exercise invalid.[96G]

The Constitution stresses explicitly, in the case of the security services (ie the SANDF, the SAPS and the intelligence services),[96H] that they "must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic".[96I] In other words, there has been no doubt since 1997 that the South African security services are not only subject to the rule of South African law, but also to the rule of international law.[96J] The Constitutional Court confirmed in 2018 that this is also the case for "[a]ll presidential or executive powers".[96K]

Page 13, footnote 90
Add the following:
See also du Plessis (n. 87) 32–182.

Page 13, footnote 91
Add the following:

See, for instance, *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 4 SA 618 CC, 2010 5 BCLR 457 CC 43, with regard to "domestic legislation governing the duration of antidumping duties".

Page 13, footnote 92
Replace "45–64" with "45–64; Coutsoudis & du Plessis (n. 88) 436–440".

Page 13, footnote 94
Replace "Dugard (n. 27) 67–69" with "Dugard & Coutsoudis (n. 45) 94–99".

Page 13, footnote 95
Replace "Dugard (n. 27) 64" with "Dugard & Coutsoudis (n. 45) 88".

Page 13, footnote 96
Add the following:
With regard to s. 199(5) CRSA, see n. 96I and n. 96J below. See further Coutsoudis & du Plessis (n. 88) 440–441.

Page 13, footnote 96A
After footnote 96, insert the following footnote:
See, for instance, s. 2(1) MLRA ["[t]he Minister and any organ of state shall in exercising any power under this Act, have regard to … any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law"]. See further *WWF South Africa* (n. 58) 14, 84 and 119.

Page 13, footnote 96B
After footnote 96A, insert the following footnote:
Section 1(c) CRSA.

Page 13, footnote 96C
After footnote 96B, insert the following footnote:
See *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 3 SA 293 CC, 2010 2 SACR 101 CC, 2010 5 BCLR 391 CC 49.

Page 13, footnote 96D
After footnote 96C, insert the following footnote:
See *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 CC, 2000 3 BCLR 241 CC 40; *Law Society of South Africa* (n. 48) 3.

Page 13, footnote 96E
After footnote 96D, insert the following footnote:
See *Albutt* (n. 96C) 51 ["the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved"]; *Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 CC, 2014 8 BCLR 930 CC 69 ["[f]or an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given"].

Page 13, footnote 96F
After footnote 96E, insert the following footnote:

See *Mansingh v General Council of the Bar and Others* 2014 2 SA 26 CC, 2014 1 BCLR 85 CC 25.

Page 13, footnote 96G
After footnote 96F, insert the following footnote:
Section 172(1)(a) CRSA.

Page 13, footnote 96H
After footnote 96G, insert the following footnote:
Section 199(1) CRSA.

Page 13, footnote 96I
After footnote 96H, insert the following footnote:
Section 199(5) CRSA.

Page 13, footnote 96J
After footnote 96I, insert the following footnote:
The courts have not had an opportunity yet to pronounce on whether s. 199(5) applies in a case where the security forces are acting outside the South African territory. See Coutsoudis & du Plessis (n. 64) 450, who assume that, "wherever the exercise of powers in violation of international law occurs (whether domestically or abroad), that will be a justiciable violation of s 199(5)".

Page 13, footnote 96K
After footnote 96J, insert the following footnote:
Law Society of South Africa (n. 48) 3. See further Coutsoudis & du Plessis (n. 64) 451–460.

Page 14, line 13
Replace "1995" with "1996".

Page 14, line 14
After the closing bracket, insert footnote number 99A.

Page 14, footnote 99A
After footnote 99, insert the following footnote:
(1996) 35 ILM 698, (1996) 4 *African Yearbook of International Law* 439. Adopted: 11 April 1996; EIF: 15 July 2009.

Page 15, footnote 112
Replace "Dugard (n. 27) 358" with "J. Dugard & D. Tladi "Law of the sea" in J. Dugard, M. du Plessis, T. Maluwa & D. Tladi (eds) *Dugard's International Law* (2018) 545".

Page 18, line 25
Replace "Metropolitan Municipality, the Cacadu District Municipality" with "Bay Municipality, the Sarah Baartman District Municipality".

Page 18, line 26
Replace "Municipality, the OR" with "Municipality, the Buffalo City Metropolitan Municipality, the OR".

Page 18, line 27
Replace "Umkhanyakude" with "uMkhanyakude".

Page 18, footnote 130

Replace “I.M. Rautenbach & E.F.J. Malherbe *Constitutional Law* (2009) 70” with “I.M. Rautenbach *Rautenbach–Malherbe Constitutional Law* (2013) 48”.

Page 19, footnote 133

(a) *Insert the following after the first sentence:*
See also PN 20 of 2011 in Eastern Cape PG 2565 of 16 May 2011, GN 459 of 2011 in GG 34445 of 12 July 2011 and PN 42 of 2014 in Eastern Cape PG 3252 of 22 August 2014.

(b) Replace “4.3(b)” with “1.4.3(b)”.

Page 26, line 4

After the full stop, insert footnote number 189A.

Page 26, footnote 189A

After footnote 189, insert the following footnote:
The narrow approach also appears to have been followed by the drafters of the Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013). Section 2(1) of the Act provides that the latter “applies to the entire area of the Republic” while the term “land” is defined in s. 1(1) as “any erf, agricultural holding or farm portion” and there is no indication in the Act that it applies at sea.

Page 32, line 16

Replace “appears” with “appeared”.

Page 32, line 18

Replace “which will in due course repeal the SSA to the extent that the latter has” with “which repealed the SSA in 2016 to the extent that the latter had”.

Page 32, footnote 236

The second sentence is replaced as follows:
See Proc. 5 of 2016 [GG 39657 of 5 February 2016].

Page 32, footnote 237

Add the following sentence:
Section 11 is among the few provisions that did not come into effect when most of the provisions of NEMICMA came into effect on 1 December 2009 [Proc. R84 of 2009 in GG 32765 of 1 December 2009].

Page 32, footnote 238

Replace “7(a)” with “7(1)(a)”.

Page 32, line 22

Replace “*i.e*” with “meaning initially”.

Page 32, line 23

Replace “They do not include” with “They did not until 2015 include”.

Page 32, footnote 240

Replace the text of the footnote with the following:
The definition of the term “coastal waters” was amended by s. 1(l) of the National Environmental Management: Integrated Coastal Management Amendment Act, 2014 (Act 36 of 2014), to include also the exclusive economic zone and the continental shelf.

Page 34, lines 13–14
Replace “Department of Water and Environmental Affairs” with “Department of Environmental Affairs”.

Page 34, last line
Replace “are “(a)” with “are: “(a)”.

Page 34, footnote 242
Replace “Rautenbach & Malherbe (n. 130) 72” with “Rautenbach (n. 130) 49”.

Page 34, footnote 246
Add the following sentence:
SAMSAA was not amended since then.

Page 35, line 11
Replace “so “(a)” with “so: “(a)”.

Page 35, line 13
Replace “includes “(a)” with “includes: “(a)”.

Page 39, footnote 290
Replace “Dugard (n. 27) 360” with “Dugard & Tladi (n. 112) 546–547”. Replace also “Rautenbach & Malherbe (n. 130) 262” with “Rautenbach (n. 130) 195”.

Page 41, line 1
Replace “includes (i)” with “includes: (i)”.

Page 42, footnote 316
Replace “110” with “110(1)”.

Page 42, footnote 317
Add the following:
On jurisdiction in the internal waters, see par. 4.6 below. On jurisdiction in the territorial sea, see par. 5.3 below.

Page 43, lines 9–10
Replace “Mandela Metropolitan Municipality and the eThekwini” with “Mandela Bay Municipality, the Buffalo City Metropolitan Municipality and the eThekwini”.

Page 43, lines 15–16
Replace “the Cacadu District Municipality” with “the Sarah Baartman District Municipality”.

Page 43, line 19
Delete “Buffalo City Municipality, the”.

Page 43, line 25
Replace “Umkhanyakude” with “uMkhanyakude”.

Page 44, line 4
Replace “provincial” with “local”.

Page 44, footnote 324
Add the following:

That authority may not be usurped by the relevant province [see *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* 2010 6 SA 182 CC, 2010 9 BCLR 859 CC 59; *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd & Others* 2014 1 SA 521 CC, 2014 2 BCLR 182 CC 46; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council & Others* 2014 4 SA 437 CC, 2014 5 BCLR 591 CC 19; *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal & Others* 2016 3 SA 160 CC, 2016 4 BCLR 469 CC 26].

Page 44, footnote 331
Replace "if (a)" with "if: (a)".

Page 46, footnote 344
(a) Replace "100,000 [s 29(1)(g) MCA read with GN R1411 of 1998 in GG 19435 of 30 October 1998]" with "200,000 [s 29(1)(g) MCA read with GN R217 of 2014 in GG 37477 of 27 March 2014]".
(b) Replace "(2009) 38A–77" with "(2016) 118–119".

Page 47, footnote 354
Add the following:
See further P. Vrancken & F. Marx "Birth, marriage and death at sea in South African law" (2015) 40 SAYIL 58–102.

Page 47, footnote 355
Insert the following after the first sentence:
See, for instance, *Minister of Police & Others v Premier of the Western Cape & Others* 2014 1 SA 1 CC, 2013 12 BCLR 1365 CC 58–64.

Page 47, footnote 357
Delete the footnote.

Page 49, footnote 372
Replace "2005 4 SA 235 CC 38 and 44." with "*Ibid.*, 38 and 44. In *S v Okah* 2018 4 BCLR 456 CC, 2018 1 SACR 492 CC 43, the Constitutional Court reiterated that, "[w]hile it is true that territoriality has been the traditional basis on which courts establish jurisdiction, international and South African jurisprudence recognise other methods of asserting jurisdiction. Comity concerns fall away in cases where there is no infringement on the sovereignty of another state. This is particularly true when the crimes over which a court asserts jurisdiction have an international dimension [footnotes omitted].".

Page 49, line 9
Delete the words "to its nationals".

Page 49, lines 19–20
Replace "either functional jurisdiction or flag State jurisdiction" with "other forms of jurisdiction, such as functional jurisdiction, flag State jurisdiction and personal jurisdiction".

Page 49, line 25
After the full stop, insert footnote number 374A.

Page 49, footnote 374
Add the following:

Another example is section 15(1) of the TRAA [see *Okah* (n. 372) 43].

Page 49, footnote 374A
After footnote 374, insert the following footnote:
See further par. 7.2.2 below.

Page 50, line 2
Add the following:
An example of extraterritorial legislative jurisdiction on a personal basis is section 26(1) of the CACA, mentioned above.

Page 50, line 21
Replace “to (i)” with “to: (i)”.

Page 50, footnote 378
Add the following:
See also *Southern African Litigation Centre* (n. 60) 29 [“[t]he exercise of enforcement jurisdiction is confined to the territory of the state seeking to invoke it”].