

South Africa and the Law of the Sea

By

Patrick H.G. Vrancken

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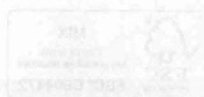
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To Derry

Foreword

The waves of both the Atlantic Ocean and the Indian Ocean break on South Africa's shores. Situated at the most southerly point of a major shipping route linking East and West, with a 3,000 km coastline surrounded by rich fishing waters, accommodating several major harbours, and with a significant navy and merchant fleet, South Africa is a maritime nation, the greatest maritime power in Africa. Until the discovery of diamonds and gold in the hinterland South Africa's history was largely focused on its coastline. Cape Town, Durban, Port Elizabeth and East London are major harbour cities. While gold mines led to the development of an industrial empire in the interior, the coastal cities have retained their political and economic importance.

It is small wonder that maritime matters have featured prominently in South African life and law. Maritime disputes dating back to the Dutch settlement have fueled a body of sophisticated shipping law. South Africa took an active part in the adoption of the four law of the sea conventions of 1958, at which time it still acted as host to the Royal Navy at its Simonstown Naval Base. In the 1970s South Africa's isolation resulting from its policy of apartheid led to the termination of the arrangement with the United Kingdom over the Simons-town Naval Base and South Africa's exclusion from the United Nations Law of the Sea Conference (UNCLOS III), which resulted in the Law of the Sea Convention (LOSC). Shortly after its return to the international community in 1994, South Africa ratified the 1982 Law of the Sea Convention and the 1994 Agreement on the Implementation of Part XI of the LOSC, and resumed its active participation in the development and implementation of the law of the sea. Today South Africa is a proud party to a host of multilateral conventions dealing with maritime security, navigation, preservation of marine resources and the protection of the marine environment.

There is a substantial case law on maritime matters and a burgeoning legal literature on the subject in law journals and treatises. For the past two decades much of the legal writing on the law of the sea has been penned by Patrick Vrancken himself. But until the appearance of the present work no one had attempted a comprehensive account of the law of the sea from a South African perspective. Patrick Vrancken has now remedied this with this monograph on *South Africa and the Law of the Sea*.

The success of *South Africa and the Law of the Sea* lies principally in the manner in which the author has managed to integrate international law and South African law. The law of the sea in an international sense is fully canvassed.

Obviously the 1982 Law of the Sea Convention occupies the prime place in this account but it is buttressed and supplemented by a host of specialized conventions and rules of customary international law. South African law is meticulously described and analyzed. The 1996 Constitution, legislation, both primary and subordinate, case law and the rules of the common law inherited from the Netherlands and England and moulded into the South African common law, all feature in the study. While the two legal orders retain their separate identities they are integrated into a legal order that might be described as the South African law of the sea, a blend of international conventions and customary law and South African statute law, case law and legal writings. It is a study that increases one's understanding of how a body of international law is incorporated, applied and interpreted in a domestic legal order. As the evolution of the two orders is examined the monograph also provides a comprehensive history of the law of the sea and of its adoption in South Africa.

I have earlier described *South Africa and the Law of the Sea* as a monograph. This is correct in the sense that it is a treatise written on a particular subject. But 'monograph' does not do justice to the encyclopedic nature of the work. No issue is left uncovered; the minutiae of South African legislation are examined. But this is all done without losing sight of the big picture – the legal order of the sea from a particular national perspective.

South Africa and the Law of the Sea is unquestionably the most comprehensive monograph on a branch of international law as it is applied in South Africa. It is thoroughly researched, well written and carefully presented. It will guide South African legal practitioners, policy-makers, legislators, teachers and students of law, environmentalists, historians and all those involved in the law of the sea. But it also has an appeal to non-South Africans interested in the law of the sea as it provides a full picture of how the law of the sea has developed in one country and how international-law rules shape national law. In this sense it is a unique study.

John Dugard
Leiden
April 2011

Preface

South Africa has a long and proud maritime history. In a sense, South Africa has been shaped by the seas that surround it to the east, south and west. For the continent's inhabitants who, over centuries, made their way from the north across the African hills and plains, South Africa was the end of the road. For peoples outside, South Africa was the long eluding door to the alluring world of the exotic ocean that lies around its forbidding capes. Indeed, during the period when outsiders controlled its destiny, South Africa was primarily a stop-over, not a destination. Nevertheless, the substantial traffic along the South African shores gave rise to a vast body of shipping cases which built a highly regarded maritime-law tradition. When ultimately South Africa came of its own, its economy was centred on minerals lying in the depths of the highlands hundreds of kilometres from the coast, while its political life was poisoned by racial discrimination that alienated its government and legal system from its own people, the rest of the continent and the rest of the world.

Under those circumstances, it comes as no surprise that marine law has for long lagged behind maritime law in South Africa. The turning point was the establishment of the first marine-law chair in the 1980s, no doubt as a result of the sea change during UNCLOS III. It would however take another decade for the other cataclysmic events of the early 1990s to start the long and arduous process which will make it possible, as the Preamble to the South African Constitution proclaims, to

[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

[i]mprove the quality of life of all citizens and free the potential of each person; and

[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

This is no small task, made even bigger by the sheer multitude of challenges faced, the frustration of a population deprived for far too long of its dignity, financial and infrastructure constraints as well as human capacity starved by decades of deliberate measures aimed at depriving the great majority of the population of the opportunity to develop to its full potential.

Despite such an environment, a vast range of steps have been taken since 1994 to bring South Africa up to speed, both at the international and domestic

levels, with the latest marine-law developments. After more than fifteen years, the body of substantive law and academic writing is now substantial but still not systematised in a single work. Such a state of affairs creates developmental hurdles with regard to research, training, implementation, compliance and enforcement.

In an attempt to contribute in an inevitably limited way to South Africa meeting its development goals, this work begins by laying out the historical and constitutional background of South Africa's marine law. Before embarking on a journey further and further away from the coast, the work then provides an overview of the legal regime of the South African islands as well as the legal instruments governing South Africa's involvement in Antarctica. Following an assessment of the conformity of the South African baselines with international law, the work discusses the legal regime of the South African internal waters, territorial sea, contiguous zone, maritime cultural zone, EEZ and continental shelf. The work then outlines the position with regard to the delimitation between South Africa's maritime zones and those of its three neighbours: France, Mozambique and Namibia, before discussing some of the areas in which the tentacles of South African law extend into the high seas, as well as the extent of South Africa's involvement in the international seabed area.

In contrast, the second part of the work follows functional lines and discusses, with regard to navigation and the exploitation of marine resources, the international-law instruments to which South Africa is a party as well as the relevant South African law provisions. The work then deals with the complex position of the landlocked States which constitute the majority of States in southern Africa. Finally, the work focuses on the protection of the marine environment and the legal steps taken to strengthen South Africa's maritime security. The law is as it stood at the end of December 2010.

It is clearly impossible at this stage of development of South African marine law for a single monograph to discuss exhaustively what are often multi-faceted and highly technical issues. For instance, marine scientific research, the settlement of disputes and the legal regime of the airspace above the sea are not discussed in their own right. The goal is rather to bring together as many threads as possible among the now rich South African marine-law tapestry in order to contextualise the main issues, raise awareness, facilitate implementation and lay the groundwork for further research in the field. Another goal is to contribute to the growing body of research on the incorporation of the law of the sea into domestic legal systems, by affording a glimpse at the degree of sophistication of South African marine law together with the African legal environment within which South Africa operates. This work will have reached that goal, on the one hand, if it increases interest in marine-law developments not only in South Africa, but the rest of the continent and, on the other hand, if it stimulates the

development of indigenous scholarship in the field both in South Africa and in other African countries.

Academic life in a so-called developing State has both advantages and disadvantages, which are combined in a unique way in a State like South Africa. Making the most of the former and overcoming the latter would have been impossible without funding from the South African National Research Foundation, the financial and material assistance of the research support structures at the Nelson Mandela Metropolitan University as well as the managerial commitment of Prof Vivienne Lawack-Davids, the Dean of the NMMU Faculty of Law, and the support of my colleagues. Among the many other individuals who provided invaluable assistance, I must single out in South Africa: Prof Derry Devine, emeritus professor in the Faculty of Law at the University of Cape Town; Mrs Rika van der Walt at the Treaty Section of the South African Department of International Relations and Cooperation; Mrs Dawn Prinsloo, the NMMU Law Librarian; Mrs Luyolo Ngabase and her colleagues at the NMMU Interlibrary Loan Office; Mrs Erina Strydom, the secretary of the NMMU Department of Public Law; as well as Ms Andriza Liebenberg and Ms Tina Terblanche, my research assistants. I am also indebted to Ms Marie Sheldon and her colleagues at Brill International Publishers for their utmost professionalism. Finally, I am by far the most indebted to my spouse, Maria, and my two daughters, Ashley and Candysse, for their countless sacrifices as well as their unremitting love and support.

Patrick H.G. Vrancken
Nelson Mandela Bay
April 2011

Acknowledgments

Section 1.3 of chapter 1 of this monograph is a slightly amended version of the following journal contribution: P. Vrancken “The marine component of the South African territory” (2010) 127 *South African Law Journal* 207–223. The publishers have given their permission for the use of this contribution.

Chapter 3 of this monograph is an updated version of the following journal contribution: P. Vrancken “The South African baseline” (2002) 27 *South African Yearbook of International Law* 158–170. The publishers have given their permission for the use of this contribution.

Section 7.3.1 of chapter 7 of this monograph includes portions of the following journal contribution: P. Vrancken “How foreign is the EEZ? *De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service* 2002 5 SA 136 SCA” (2002) 27 *South African Yearbook of International Law* 305–310. The publishers have given their permission for the use of this material.

Section 14.3.8 of chapter 14 of this monograph includes portions of the following journal contribution: P. Vrancken & S. Hoorntje “The contribution of the Defence Act to the fight against piracy” (2010) 31 *Obiter* 428–433. The publishers have given their permission for the use of this material.

Abbreviations

1961 Constitution	Constitution of the Republic of South Africa Act, 1961 (Act 32 of 1961)
1993 Constitution	Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)
AC	1981 Abidjan Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region
ACAP	2001 Agreement on the Conservation of Albatrosses and Petrels
ACEP	1981 Protocol to the 1981 Abidjan Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region Concerning Cooperation in Combating Pollution in Cases of Emergency
ACFIM	2008 Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mozambique on Cooperation in Respect of Fisheries and Integrated Marine and Coastal Management and Development
AEC	African Economic Community
AECT	1991 Treaty Establishing the African Economic Community
AFSC	2001 International Convention on the Control of Harmful Anti-Fouling Systems on Ships
AIA	Annex of the 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AJRA	Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983)
ALEE	Annex VI to the 1991 Protocol on Environmental Protection to the 1959 Antarctic Treaty on Liability Arising from Environmental Emergencies
AMP	2003 African Mining Partnership
AMTC	2009 African Maritime Transport Charter
APUR	Bedding, Towel, Mess Utensils and Other Articles for Personal Use Regulations, 1961

art.	article(s)
ASR	African Security Review
AT	1959 Antarctic Treaty
ATA	Antarctic Treaties Act, 1996 (Act 60 of 1996)
ATR	Antarctic Treaties Regulations, 1997
AU	African Union
AUCA	2000 Constitutive Act of the African Union
BBWW	boat based whale and dolphin watching
BC	1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal
BCEA	Basic Conditions of Employment Act, 1997 (Act 75 of 1997)
BCH Code	International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk
BCHR	Marine Pollution (BCH Code) Regulations, 1998
BEEA	Broad-Based Black Economic Empowerment Act, 2003 (Act 53 of 2003)
BTWC	1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction
BWMC	2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments
CACA	National Conventional Arms Control Act, 2002 (Act 41 of 2002)
CACR	National Conventional Arms Control Regulations, 2004
CAMLRC	1980 Convention on the Conservation of Antarctic Marine Living Resources
CAR	Crew Accommodation Regulations, 1961
CATC	1966 International Convention for the Conservation of Atlantic Tunas
CBD	1992 Convention on Biological Diversity
CC	Constitutional Court of South Africa
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCAS	1972 Convention for the Conservation of Antarctic Seals
CCLA	Marine Pollution (Control and Civil Liability) Act, 1981 (Act 6 of 1981)
CCLR	Regulations Relating to the Prevention and Combating of Pollution of the Sea by Oil, 1984
CCR	Merchant Shipping (Carriage of Cargoes) Regulations, 2004
CCRS	1986 UN Convention on Conditions for Registration of Ships
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CDP	2005 AU Non-Aggression and Common Defence Pact

CDSR	Merchant Shipping (Collision and Distress Signals) Regulations, 2005
CEA	Customs and Excise Act, 1964 (Act 91 of 1964)
CER	Customs and Excise Rules
CGA	Counterfeit Goods Act, 1997 (Act 37 of 1997)
CGSA	Carriage of Goods by Sea Act, 1986 (Act 1 of 1986)
ch.	chapter(s)
CIA	Cultural Institutions Act, 1998 (Act 119 of 1998)
CILSA	Comparative and International Law Journal of Southern Africa
CITES	1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora
CLC 1969	1969 International Convention on Civil Liability for Oil Pollution Damage
CLC 1992	1969 International Convention on Civil Liability for Oil Pollution Damage as amended by its 1992 Protocol
CLCS	Commission on the Limits of the Continental Shelf
CMS	1979 Convention on the Conservation of Migratory Species of Wild Animals
CNHC	1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage
CNPR	Merchant Shipping (Carriage of Charts and Nautical Publications) Regulations, 2002
COFI	FAO Committee on Fisheries
COIDA	Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993)
COLREG	1972 Convention on the International Regulations for Preventing Collisions at Sea
COREP	Regional Fisheries Committee for the Gulf of Guinea
CPA	Criminal Procedure Act, 1977 (Act 51 of 1977)
CPP	2009 Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships
CPS	1971 Convention on Psychotropic Substances
CR	Construction Regulations, 1968
CRSA	Constitution of the Republic of South Africa, 1996
CRTA	Cross-Border Road Transport Act, 1998 (Act 4 of 1998)
CRW	2007 Nairobi International Convention on the Removal of Wrecks
CS	1989 International Convention on Salvage
CSC	1958 Geneva Convention on the Continental Shelf
CTBT	1996 Comprehensive Nuclear-Test-Ban Treaty
CUCH	2001 Convention on the Protection of the Underwater Cultural Heritage

CWCA	Constitution of the Western Cape Act, 1998 (Act 1 of 1998)
DA	Defence Act, 2002 (Act 42 of 2002)
DCC	2009 Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden
DDTA	Drug and Drug Trafficking Act, 1992 (Act 140 of 1992)
DGR	Merchant Shipping (Dangerous Goods) Regulations, 1997
DG:T	Director-General: Transport
dir.	directive(s)
DIRCO	Department of International Relations and Cooperation
DMPA	Schedule to the 2000 Declaration of Areas as Marine Protected Areas
DPSC	1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
DSC	Inter-State Defence and Security Committee
DSP	2004 Common African Defence and Security Policy
EA	Extradition Act, 1962 (Act 67 of 1962)
ECA	Environment Conservation Act, 1989 (Act 73 of 1989)
EEA	Employment Equity Act, 1998 (Act 55 of 1998)
EEZ	exclusive economic zone
ENWT	1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof
EPIRB	emergency position-indicating radio beacon
EPIRBR	Merchant Shipping (EPIRB Registration) Regulations, 2002
ExA	Explosives Act, 1956 (Act 26 of 1956)
FAO	Food and Agriculture Organisation
FCCC	1992 UN Framework Convention on Climate Change
FICA	Financial Intelligence Centre Act, 2001 (Act 38 of 2001)
FPA	Fish Protection Act, 1893 (Act 15 of 1893)
FSIA	Foreign States Immunities Act, 1981 (Act 87 of 1981)
GG	South African Government Gazette
GGE	Extraordinary South African Government Gazette
GLAA	General Law Third Amendment Act, 1993 (Act 129 of 1993)
GMDSS	Global Maritime Distress and Safety System
GN	Government Notice
GSR	Reception Facilities for Garbage from Ships Regulations, 1992
HSC	1958 Geneva Convention on the High Seas
HSCA	1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

HWAC	1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa
IA	Immigration Act, 2002 (Act 13 of 2002)
IABC	2007 Interim Agreement on the Establishment of the Benguela Current Commission
IBC Code	International Bulk Chemical Code
IBCR	Merchant Shipping/Marine Pollution (IBC Code) Regulations, 1998
IC	1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties
ICASA	Independent Communications Authority of South Africa
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICP	1973 Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil
IFC 1971	1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage
IFC 1992	1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage as amended by its 1992 Protocol
IGC Code	International Gas Carrier Code
IGCR	Merchant Shipping (IGC Code) Regulations, 1998
IHO	International Hydrographic Organisation
IHR	International Health Regulations
IHRA	International Health Regulations Act, 1974 (Act 28 of 1974)
IJMCL	International Journal of Marine and Coastal Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILO C188	2007 Work in Fishing Convention
ILR	International Law Reports
IMDG Code	International Maritime Dangerous Goods Code
IMO	International Maritime Organisation
INF	Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes
INF Code	International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships

INFR	Merchant Shipping (INF Code) Regulations, 2003
INMARSAT	International Maritime Satellite Organisation
IntA	Intimidation Act, 1982 (Act 72 of 1982)
IOCIS	Indian Ocean Computerised Information System
IOFC	Indian Ocean Fisheries Commission
IOMOU	1998 Memorandum of Understanding on Port State Control for the Indian Ocean
IOTA	1993 Agreement for the Establishment of the Indian Ocean Tuna Commission
IOTC	Indian Ocean Tuna Commission
IR	Immigration Regulations, 2004
IRFA	Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005)
ISBA	International Seabed Authority
ISM Code	International Safety Management Code
ISPS Code	International Code for the Security of Ships and of Port Facilities
ISSC	international ship security certificate
ITAA	International Trade Administration Act, 2002 (Act 71 of 2002)
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature
IWC	International Whaling Commission
JMLC	Journal of Maritime Law and Commerce
KPER	Regulations for the Proper Administration of the Knysna Protected Environment, 2009
LBSP	2010 Protocol to the 1985 Amended Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, for the Protection of the Marine and Coastal Environment of the Western Indian Ocean from Land-Based Sources and Activities
LC	1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters
LCP	1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters
LER	Life-Saving Equipment Regulations, 1968
LGSA	Local Government: Municipal Structures Act, 1998 (Act 117 of 1998)
LLC	1966 International Convention on Load Lines
LLR	Load Line Regulations, 1968
LNTS	League of Nations Treaty Series
LOSB	Law of the Sea Bulletin
LOSC	1982 UN Convention on the Law of the Sea
LRA	Labour Relations Act, 1995 (Act 66 of 1995)

LRIT	long-range identification and tracking of ships
LRITR	Merchant Shipping Long-Range Identification and Tracking of Ships Regulations, 2009
LTBT	1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water
MARPOL	1973 International Convention for the Prevention of Pollution from Ships as amended by its 1978 Protocol
MASAR	2007 Multilateral Agreement on Coordination of Maritime Search and Rescue Services between the Comoros, Madagascar, Mozambique, Namibia and South Africa
MCA	Magistrates' Courts Act, 1944 (Act 32 of 1944)
MCM	Chief Directorate: Marine and Coastal Management
MDP	2003 Mutual Defence Pact between the SADC Member States
MEC	member of a provincial executive council
MFP	1997 Marine Fisheries Policy for South Africa
MLC	2006 Maritime Labour Convention
MLRA	Marine Living Resources Act, 1998 (Act 18 of 1998)
MLRAA	Marine Living Resources Amendment Act, 2000 (Act 68 of 2000)
MLRR	Marine Living Resources Regulations, 1998
MN	Marine Notice
MOSR	Maritime Occupational Safety Regulations, 1994
MOU	memorandum of understanding
MOUCS	2009 Memorandum of Understanding on the Submission of Their Respective Claims for an Extended Continental Shelf to the United Nations Commission on the Limits of the Continental Shelf (CLCS) between the Government of the Republic of South Africa and the Government of the Republic of Namibia
MP	Marine Policy
MPA	marine protected area
MPAR	Marine Protected Area Regulations
MPIA	Marine Pollution (Intervention) Act, 1987 (Act 64 of 1987)
MPRDA	Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)
MRCC	maritime rescue coordination centre
MRSC	maritime rescue sub-centre
MSA	Merchant Shipping Act, 1951 (Act 57 of 1951)
MSCA	Medicines and Related Substances Control Act, 1965 (Act 101 of 1965)
MSR	Merchant Shipping (Maritime Security) Regulations, 2004
MSRR	Merchant Shipping (Mandatory Ships Routing) Regulations, 1998