1 Introduction

Treasa Dunworth and Anna Hood

I Reviving disarmament law

Law is a fundamental component of disarmament. There is a complex web of international treaties, Security Council resolutions and soft law instruments that address the threat posed by weapons, an array of international institutions that work to regulate and eliminate weapons, and a steady stream of disarmament law crises that get aired in the media on a regular basis. Despite all this, in recent decades, the field of disarmament law has received relatively little attention from academics. There is limited discussion or debate about key disarmament law issues, and many issues are not addressed at all in the academic literature.

The dearth of disarmament law scholarship stands in stark contrast to the wealth of scholarship that has emerged in other areas of international law over the last 30 years. Since the end of the Cold War, there has been a rich body of work produced about all manner of international legal topics including international trade law, international environmental law, international human rights law, international criminal law, international refugee law, international law of the sea, international humanitarian law, international economic law and the law of international organisations.

For a number of years, we have been concerned about the relative lack of academic work on disarmament law issues. In our view, there needs to be more doctrinal work that explores how disarmament laws operate and interact with one another as well as with other areas of international law. There are also considerable gaps in the conceptual scholarship on the values that underpin disarmament law, the trends and patterns that have emerged within it over time, and the blind spots that exist within it. Critical and theoretical scholarship as well would allow for identifying, questioning and challenging assumptions within the field and so perhaps better understand the myriad dynamics at play in the disarmament law space.

We decided then, in 2017, to begin a project to make space for this scholarship. In making that space, we were mindful of the valuable, and still relevant, work of a host of academics in the first half of the 20th century as they turned their mind to disarmament law issues.[1] Inspired by their work and mindful of the need to engage in more work explaining, developing, critiquing and theoris-

1 We are thinking, for example, of the work of Louis Henkin, Richard Falk, Abe Chayes, Anthony D'Amato, Hans Kelsen and Quincy Wright.

ing the body of disarmament law, we embarked on this project to revive disarmament law. The project had two elements. The first was to convene a conference on disarmament law, bringing together those scholars who were thinking about disarmament law issues to share their work, develop ideas and, in this way, begin building a community of disarmament law scholars. That conference was held in mid-2018 at Auckland Law School. The second element of our project was to produce an edited collection of the papers that were prepared for, and discussed at the conference. Our hope was (and still is) that the edited collection would provide a snapshot of the ideas, concerns and issues that disarmament scholars were thinking about at the end of the second decade of the 21st century and provide a foundation upon which further scholarship could be built.

As we embarked on the project, one of our first challenges was to define its scope. It was all very well for us to say that we wanted to bring together disarmament scholars to discuss their work, to engage with other international lawyers working in the field or to provide a space to explore trends, blind spots or contradictions in disarmament law. But what, exactly, did we mean by 'disarmament'? In drafting our call for papers, we felt we needed to be able to convey a reasonably clear idea of what we thought fell within the scope of our project. In the end, however, we side-stepped this definitional point, deciding not to define the term 'disarmament law' as we wanted to see how others with an interest in the field might approach it. It is worth noting, we think, that many of our contributors sought to adopt their own understandings of disarmament.

While we chose not to be directive about what lay within 'disarmament', we did explicitly exclude some adjacent areas of the sub-disciplines in our call. We specified that we would not include papers focused on international criminal law or on international humanitarian law. While these bodies of law are connected in certain (and important) ways with disarmament law issues, we see them as distinct areas that are well addressed elsewhere in the literature. This project was about reviving disarmament law and doing so by carving out an independent space for disarmament — that was our core objective.

II Overview of the contributions

We were very fortunate to receive positive responses from across the globe and in June 2018 legal scholars from Austria, Australia, Germany, Hong Kong, Japan, New Zealand, South Africa, the United Kingdom and the United States gathered to share their research and ideas. The eight pieces in this book, which emerged from the conference,[2] touch on a wide variety of disarmament law matters and provide a diverse range of views.

There are some synergies within the chapters that have allowed us to group them into three parts. Part I is entitled 'Disarmament Law Research Agendas'

2 Note that there were two other papers presented at the conference that have not been published in this edition. One was by James Fry and Saroj Nair entitled 'Moral Disarmament: Legacy of the First World War' and the other was by Stuart Casey-Maslen entitled 'Are You Taking the Peace? Disarming Armed Groups During Armed Conflict'.

and contains two chapters that look at broad trends and patterns in disarmament law. The first chapter is Treasa Dunworth's. It surveys contemporary disarmament law work and shows how disarmament practitioners and academics have a tendency to react and respond to particular crises of disarmament, and a tendency to focus on disarmament law issues in silos. She terms this state of affairs the 'crisis-silo' dynamic and unpacks what the consequences of these dual preoccupations are for the field before laying out ideas for how the field could break out of this dynamic and adopt new approaches.

The second chapter in Part I is Anna Hood's chapter. It examines the phenomenon of coercive disarmament from 1919 to 2019 and identifies key patterns and themes that have emerged across this sub-field of disarmament law. She focuses in particular on the changes and trends that have emerged within the legal forms that coercive disarmament law measures have assumed, the contexts in which coercive disarmament law measures have appeared and the substantive provisions that coercive disarmament law measures have encompassed. From her findings she identifies new research questions and pathways in disarmament law.

Part II of the book is called 'Humanitarianism and Human Rights in Disarmament'. It explores the implications of the ways in which humanitarianism and human rights are returning to the field. Bonnie Docherty's chapter is the first in this Part and it explores the development and significance of the positive obligations imposed on states parties by three key humanitarian disarmament law treaties — the 1997 *Anti-Personnel Landmines Convention*,[3] the 2008 *Convention on Cluster Munitions* ('*CCM*')[4] and the 2017 *Treaty on the Prohibition of Nuclear Weapons* ('*TPNW*').[5] Specifically, she examines how the provisions in the three treaties that require states to undertake clearance activities and provide victim assistance were conceived and provides important insights into how a humanitarian approach to disarmament ensured that they were embedded in the three treaties despite resistance from some negotiating states. The chapter also assesses the legal and practical impacts of these positive obligations.

Anna Crowe's chapter — the second in Part II — analyses the underexamined relationship between humanitarian disarmament and human rights law. She terms the relationship between the two concepts 'human rights-humanitarianism' and identifies the fact that human rights law contributes legal content to humanitarian disarmament while humanitarianism provides the underlying frame of ending or reducing human suffering. She then examines how human rights-humanitarianism operates in the context of victim assistance provisions in disarmament law treaties. It provides the first in-depth consideration of the connection between humanitarian disarmament and human rights

3 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, opened for signature 3 December 1997, 2056 UNTS 211 (entered into force 1 March 1999) ('*Anti-Personnel Landmines Convention*').

4 *Convention on Cluster Munitions*, opened for signature 3 December 2008, 2688 UNTS 39 (entered into force 1 August 2010) ('*CCM*').

5 *Treaty on the Prohibition of Nuclear Weapons*, opened for signature 20 September 2017 (not yet in force) ('*TPNW*').

and offers valuable insights into the complex and, at times, uneasy relationship between the concepts.

The final chapter in Part II — Emily Camin's — also focuses on humanitarian and rights-based issues in disarmament law and compares and contrasts the extent to which two treaties — the *Chemical Weapons Convention* ('*CWC*')[6] and the *CCM* — recognise and protect the rights of victims including the rights of victims to reparations. Her detailed examination of the treaties' texts allows her to conclude that neither treaty confers specific rights on victims which are directly enforceable at international law. Emily concludes by reflecting on some possible future directions in the overall humanisation trend of disarmament law and suggests that even if a human rights-based approach is not adopted or does not emerge, there may yet be scope for better addressing the suffering of victims of mass violence.

The final part of the book — Part III — is entitled 'Making Disarmament Law'. It contains three pieces that examine issues about some of the key sources of disarmament law. Two focus on treaty interpretation issues and one looks at the significance that soft law can have in a disarmament context. The first chapter to focus on treaty issues is Masahiko Asada's. It looks at what the significance is of the fact that the *Comprehensive Nuclear-Test-Ban Treaty* ('*CTBT*')[7] has still not entered into force nearly a quarter of a century after it was agreed. Specifically, he considers whether *CTBT* signatory and ratifier states are still bound by the obligation in art 18 of the *Vienna Convention on the Law of Treaties* ('*VCLT*')[8] not to carry out 'acts which would defeat the object and purpose of [the] treaty'. To do this he must determine whether the *CTBT*'s entry into force has been unduly delayed and whether any individual signatory state has made it clear that it does not intend to become a party to the *CTBT*. He argues that although it is not possible to conclude that the *CTBT*'s entry into force has been unduly delayed there are a number of complexities around the intention not to become a party provision especially with respect to the United States' practice.

The second chapter in Part III to explore treaty interpretation matters is Barry de Vries and Thilo Marauhn's. It addresses treaty interpretation issues that arise with respect to two other nuclear weapons treaties: the *Treaty on the Non-Proliferation of Nuclear Weapons* ('*NPT*')[9] and the *TPNW*. They engage with concerns that have arisen that the *TPNW* may weaken the *NPT*. In dispelling

6 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997) ('*CWC*').

7 *Comprehensive Nuclear-Test-Ban Treaty*, opened for signature 24 September 1996, 35 ILM 1439 (not yet in force) ('*CTBT*').

8 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT').

9 *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) ('*NPT*').

these concerns they argue that: first, there is no formal incompatibility between the two agreements; second, while there is potential for conflicts to arise between the treaties, these conflicts can be managed by way of interpretation. However, they concede that, given the way in which the two treaties create separate institutional settings each dealing with nuclear weapons, it is possible that political conflicts will emerge which could exacerbate existing tensions between non-nuclear-weapon states and the nuclear-weapon states.

In the final chapter of this Part, Lisa Tabassi and Treasa Dunworth examine the Organisation for Security and Cooperation in Europe ('OSCE'), an organisation that has produced an array of soft disarmament law. The chapter considers two debates arising in the soft law literature — the extent to which actors that generate soft law can be held to account for the exercise of their power and the extent to which soft law-making processes perpetuate and aggravate existing power inequalities between states. They explore whether these concerns have traction in the context of the OSCE's disarmament law-making, concluding that while there are real difficulties in achieving transparency in such regimes, it is possible to overcome those difficulties. Tabassi and Dunworth also argue that while there are real risks that inequalities among participating states can be perpetuated in soft regimes, those risks are not so alive in the OSCE context due to its particular historical context.

III Reflections

While all of the chapters have been through a rigorous review and editorial process, we have not sought to alter the views of individual authors or ensure consistent approaches are taken to issues throughout the book. In embarking on this project, we did not set out to craft a coherent narrative about disarmament law, or to attempt to get participants to coalesce around singular understandings of any particular issue, or even to work within a particular methodology or approach. Rather, our purpose in creating this collection was to open up a space where different ideas and perspectives could be put forward and tested, and different approaches adopted. We wanted to encourage contributions on many different disarmament law issues from a range of different perspectives and approaches.

To some extent we have achieved that. The following chapters reveal a range of views as between the contributors on certain issues, and also engage in a number of contemporary disarmament debates taking place outside this project. Different types of scholarship have also emerged in the eight chapters, including historical, doctrinal and critical approaches. For example, Hood's chapter is an historical study of coercive disarmament, extending back to the peace treaties at the conclusion of the First World War.[10] Camins, as well, looks to the legacy of

10 For example, the *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 13 AJIL Supp 15 (entered into force 10 January 1920) ('*Treaty of Versailles*').

chemical weapons use from the 1940s. Other chapters, such as those by Asada and Marauhn and de Vries, are avowedly doctrinal in their approaches. Dunworth's chapter takes a more critical approach.

We were struck by how many of the contributions tackled questions relating to nuclear weapons. The chapters by Asada, and de Vries and Marauhn focus exclusively on nuclear weapons issues while the chapters by Dunworth, Hood, Docherty and Crowe have significant sections on nuclear weapons. Nuclear weapons also feature, although more briefly, in the chapters by Camins, and Tabassi and Dunworth. It is interesting to consider what this strong emphasis on nuclear weapons reveals about the state of disarmament law and/or disarmament law scholarship in 2020. It may simply be that the attention paid to nuclear weapons serves as a snapshot of contemporary concerns and where the focus of disarmament was at this point in time, and in that way, it can be seen as epitomising the crisis-silo dynamic that Dunworth identifies in her chapter. At the time we conceived of the project, the Humanitarian Initiative had borne fruit and the *TPNW* had just been opened for signature. Further, our conference was convened in June 2018, a month after the United States announced its withdrawal from the 'Iran Nuclear Deal'.[11] There is no doubt that we launched this project at a time when nuclear disarmament was high on the international disarmament agenda.

As we bring this project to a close, it is apparent to us that a great deal of work remains to be done. For example, Dunworth's analysis shows that we need more sustained analysis of current disarmament disputes such as the Iranian nuclear programmes and the North Korean missile testing programme. Hood's exploration of coercive disarmament shows that we have only started to scratch the surface of the history of disarmament endeavours. The chapters by Camins and Crowe demonstrate that we need much more work to understand the full implications of humanitarianism and human rights re-emerging in the world of disarmament. More broadly, we think that this project has shown that there is a need for sustained theoretical and inter-disciplinary work in disarmament.

We very much hope that the pieces here will inspire further work in the field of disarmament law and that in years to come there will be a much greater variety and depth of disarmament law scholarship from a wide array of approaches.

11 Formally, the *Joint Comprehensive Plan of Action*: SC Res 2231, UN SCOR, 7488th mtg, UN Doc S/RES/2231 (20 July 2015) annex A.