

Interview with Dr Helen Durham

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Dr Helen Durham has been the Director of International Law and Policy at the International Committee of the Red Cross (“ICRC”) since 2014. Previously, she was Head of Office for the ICRC in Sydney, Legal Adviser for the ICRC Regional Delegation in the Pacific and Director of International Law and Strategy, among other roles, for the Australian Red Cross. Along with missions in the field for the ICRC in the Philippines, Aceh, Myanmar and many Pacific nations, she has had more than two decades of experience working in the International Red Cross and Red Crescent Movement. Dr Durham was also Director of Research for the Asia Pacific Centre for Military Law at the Melbourne Law School, and she has a PhD in the fields of international criminal law and international humanitarian law (“IHL”). Her term as an ICRC Director is ending in June 2022, and she sat down with ICRC Legal Advisers Allelu de Jesus and Jeffrey-Michael Sison to discuss her reflections from her eight years in that position and the road ahead, particularly for IHL and the Asia Pacific region.

So firstly, for our readers who might not be too familiar with the ICRC and its somewhat complicated structure, could you briefly explain the role of the ICRC Directorate?

As a Director with the ICRC, you play two roles: one is being a Director of your department and in my instance, it’s the international law and policy department; but you also play a role in the wider infrastructure and decision-making of the institution. So, you have to have a two-layered focus: making sure that in your own department you provide leadership, management and support and at the same time make decisions about and for the whole of ICRC including the 20,000 staff we have. This can include budget issues, or globally on security questions, how we deal with data protection or humanitarian crises requiring increased human resource support. An interesting combination of challenges and leadership.

You have been Director of International Law and Policy for eight years, what are some of your most memorable moments from that time?

There are far too many over eight years to choose just one, but some of those that stand out are the large, important State meetings, such as addressing the United Nations Security Council on the protection of civilians. Then, the experiences I have when I go into the field and meet colleagues who do amazing work in our various delegations around the world, whether it be in Asia, places such as Myanmar, Afghanistan, the Philippines, or the Middle East somewhere like Iraq, or in Africa in Somalia or South Sudan. I've been able to do numerous interesting missions and I can then see how we really bring the key IHL and policy issues to life in the field. Of course, it's always very memorable meeting the people we serve. I can remember very particular instances going into places of detention, engaging with people who are very resilient and have strong ways to cope with terrible situations. Seeing our work in action, in supporting those in need is always memorable.

Have you found that these experiences in the field have also contributed when you find yourself in front of States in forums like the Security Council?

Absolutely. I think the strength of the ICRC is that we combine our experience in the field with our expertise in international law and policy and diplomacy, and this is what sets us apart from, say, a think tank or from academic institutions. Instead, we are an operational humanitarian organization, but with this legal framework, IHL, that is our backbone. So many examples of witnessing breaches of IHL but sometimes those involved actually don't know this, a requirement of extra nutrition for nursing mothers, use of child soldiers or certain conduct of hostilities decisions. The IHL framework and expertise allow me to speak to the authorities for them to understand what their obligations are. And then at the same time, when dealing with the diplomatic issues at the United Nations level, that experience allows me to say that this law is not just the paper it is written on—it makes a difference in people's lives. And I can bring into those more diplomatic discussions the real-life examples. So, I see mutual reinforcement of taking the law into the field and the field into the law.

What are you most proud of from your term as director of international law and policy?

Well, number one: I'm really proud of the people that I've had the honour to lead with on these issues. I'm really proud of the incredible work done at all levels, across the ICRC and of course in my particular department. People are highly committed, people are extremely smart, but also people are kind to each other. In terms of the external outcomes, there are many different elements. Of course, in some areas we've really advanced with new treaties such as the Treaty on the Prohibition of Nuclear Weapons, which was adopted in 2017; declarations around certain other weapons, in particular a recent example is in relation to explosive weapons in populated areas, as well as significant policy work on climate and conflict. Overall, I'm extremely proud that we have remained the reference organization on IHL, and ensured we use this law to make a difference. Activities such as updating the commentaries to the Geneva Conventions, which is work that requires a very deep level of detail, advice to our operational colleagues, plus seeing our armed forces and police delegates provide advice is impressive.

So, from supporting the development of treaties or United Nations Security Council resolutions, our ratification work in the field, our application and implementation work in the field, as well as some of the policies, we have really been able to move forward this idea that even wars have limits.

Thank you for sharing those successes. It's encouraging to hear about the progress that has been made. Turning then to the other side, are there any issues where you would have liked to have made more progress during your directorship and what would you say was the main roadblock that slowed down progress in terms of achieving objectives?

I think as humanitarians we always want to do more and that's one of the things with my beautiful colleagues globally: the *status quo* is never good enough for people like us. We always think there's more we can do to help people. So, of course whilst I leave feeling proud of my team and our achievements, there are always things where we could have done more. One of them is on the issue of pushing more for compliance with IHL. When I started there was a process, a joint Swiss/ICRC initiative in place to create a formal structure to increase compliance. Ultimately, we were not able to

move it where we wanted to, and a lot of that was because I think it was an idea that wasn't ready for its time. A number of the States that we worked with were not ready, and there wasn't the political will. And if you look at the history of ICRC, we are often ahead. We propose things and sometimes they take twenty years, sometimes they take even longer.

That being said, we are still working on a lot of the elements of that issue and we continue to find different ways to advance. Compliance with IHL has been a challenge for us for many years and I would say it will remain so for years to come. How do we ensure that States and non-State armed groups actually comply with the magnificent legal framework that is in place to reduce suffering?

Yes, this is something that we are very familiar with as ICRC Legal Advisers: how to get these beautiful laws into action, and how to also face that frustration in between. Can you share any advice for Legal Advisers who are in that frustrating position of trying to convince parties to a conflict to take an interest in bringing life to those laws that we have?

No doubt, being an international lawyer is always a frustrating job. We have very high ambitions of bringing humanity to the table of authorities, of diplomats, of people in positions of power over others. In some ways we've almost set ourselves up for an impossible job. Thus, the first advice I always give is: we have to have patience and we have to be aware that the journey is long. If you look at even the creation of the Geneva Conventions, we proposed a treaty regime even after World War I. Even then, it took more terrible suffering and many more years before we got the Geneva Conventions of 1949.

I think one thing is that, to have the energy to continue to drive forward ironically requires you also have passion and patience and to be able to find different ways. If you are stuck one way and you can't get access or you can't convince there, come back and think about different ways you can connect it. For example, maybe it is looking at cultural issues and IHL or thinking, "Can I connect it with that religious issue? Can I find different people and contacts that might be able to help me?"

The way we want the world to be is not always the way that we experience it—our job is to try and bridge the reality with the rhetoric. We can often see the ways that we could work to reduce suffering: we know if we can get access to prisoners of war and register them and connect them with their families, it helps. But we can't always get access to detainees or prisoners of war. We have to find methods to deal with that frustration but continue our energy to drive forward.

Excellent advice and relevant not just to Legal Advisers no doubt.

Now moving to current IHL priorities, what would you say are some themes or issues that would be particularly relevant to the Asia Pacific region?

I think it is really important to understand that you constantly have evolving themes and that has been one of the challenges for the ICRC: to make sure we are dealing with the reality of how conflicts are being experienced today but also to anticipate some of the issues on the horizon.

For example, the evidence from places such as Afghanistan to the Philippines to Sri Lanka is that explosive weapons with a wide impact in populated areas creates much suffering. This is both immediate and long term when essential infrastructure is affected. ICRC has made a clear policy call on this issue, requiring avoidance of use of such weapons unless mitigating measures can be taken.

Still looking at weapons issues, cyber warfare will be of growing importance. We know that some countries in your region have acknowledged that they use, or have used, cyber in their military operations and we need to examine the humanitarian consequences of non-kinetic attacks. We know the terrible consequences of kinetic attacks, such as the use of explosive weapons, but there is also—as the world is increasingly interdependent in a digital space—the potential for massive humanitarian suffering even without those more obvious physical effects. So, cyber warfare is another issue very relevant to your region. Indeed, the Asia Pacific region is a place too where there are many advances in technology and innovative, cutting-edge developments. It makes me really proud to come from that part of the world and it means we need to constantly be having these discussions to put the concept of humanity

into the evolution, particularly when it relates to weapons and a digital battlefield.

Finally, on the weapons issue, the work towards the eradication of nuclear weapons is absolutely critical. The Asia Pacific region once again has really spoken out strongly on this, whether it be from those States that have experienced the testing of nuclear weapons or others. At the ICRC, we know from our historical experiences as the first organization on the ground to witness the aftermath of the bombing of Hiroshima and Nagasaki in World War II, the devastating humanitarian consequences. And of course, there are many, many other issues relating to weapons that I think are relevant in your part of the world, from Cambodia's work in mine action and support by the Filipino authorities and others. So, weapons are definitely a key and a very broad issue.

And finally, in the Asia Pacific region, there is a lot of work we need to do on the domestic implementation of the international legal obligations. That is always a critical area of work and, if I may say, I'm really proud of the work we do in this space. It's behind the scenes though. Often, we can't make too much noise about it but as an institution when we are able to support States to ratify these instruments and to put in place strong domestic legal frameworks, that's great. There is definitely some extra work we need to do in our region in that space. We've got the upcoming 45th anniversary of the 1977 Additional Protocols and this will be an ideal opportunity to push for more comprehensive legislation.

On the subject of nuclear weapons, the first Meeting of States Parties to the historic Treaty on the Prohibition of Nuclear Weapons will be taking place in Vienna later this month (21-23 June). What would be some of your hopes in terms of the outcome of those discussions?

I think what is very exciting is we've got our president, Peter Maurer, speaking at that meeting. The international community have acknowledged the role that the ICRC, and the Red Cross and Red Crescent Movement more widely, has played in pushing forward in this space and this is fantastic.

The second thing we're hoping is that the meeting of State Parties encourages more States to sign up, ratify and create domestic legislation. That

this meeting pushes forward the agenda for more support for this critical treaty.

The third thing that we would hope is that there is an understanding and a further discussion around the unacceptable humanitarian consequences that relate to the use of nuclear weapons—from the immediate suffering to the impact on the environment and production of food. This Treaty is only in existence because globally, we know that if there is a use of nuclear weapons, the consequences are going to be horrific and there is no way even an organization like the ICRC can assist to address the humanitarian consequences. So, if you cannot assist, if you cannot respond, then you have to prevent, you have to stop the chance of these terrible weapons ever being used again. This is why we really hope that States continue to have a wider discussion globally about the unacceptable nature of these weapons.

You've mentioned the challenges you faced during your term in strengthening compliance with IHL. What do you see as some of the main challenges now that are acting as obstacles for the kind of promotion and strengthening of IHL that we advocate for?

I think it's a really profound question because as international lawyers with the ICRC, our job is to really counter these challenges. So, it's something that we've thought about a lot.

The first one is that there seems to be a sense today that IHL and the legal framework, that has been so carefully negotiated, is not relevant to the situations we experience. One of the challenges then is that we have to constantly find ways to explain and demonstrate the relevance of the key principles: distinction, proportionality and precautions in attack. One area is also to continue to highlight the relevance of the role of IHL. And that's a challenge because there is a political discourse that often takes over saying that these laws are out of date or no longer relevant to situations of conflict today. Yes, they are over 70 years old but the key principles are extremely relevant and we have updated interpretations of them as we go along in the area of making more specific laws regarding weapons, looking at customary law as well as updating the commentaries which give a fresh view of their application. So, that's the first one: shoring up and confirming the relevance of IHL.

I think the second challenge is that States often see IHL as too restrictive. It's almost as though they see the laws as the highest level, the ceiling. Whereas of course we know that, because they have been extensively negotiated, they are the bottom level, the minimum standards. They're the level that keeps our humanity alive in conflict rather than an aspirational aim for the world to be perfect. So, I think the second thing is, once we demonstrate its relevance, to say that you cannot go below these laws—that is the level to which they were negotiated by you as States, you own that law, we only play our role as guardian and you cannot go below the bare humanity you have agreed to before. There is no category of person that falls outside the law. There's no category of weapon that should not be looked at and tested against the principles of, for example, superfluous injury and unnecessary suffering or that can violate the principle of distinction.

The third issue for me, is we need to continue to work to make sure the general public understands that even wars have limits because the public put pressure on the authorities. The militaries, even non-State armed groups, they don't sit in a bubble. They are looking for authority from the population. So, we need to continue to work with our brothers and sisters in the national Red Cross and Red Crescent Societies, as well as in our own work, to make sure that at a minimum the general public understands that there are certain behaviours in war that are unacceptable.

Those three things: make it relevant, make States understand that it is the bottom line and they cannot go below it and thirdly, make sure we have a wider understanding, are critical going forward.

You are from Australia, and you already highlighted the expertise coming from the Asia Pacific region in terms of new technology and other issues. And yet, you are the first person from this region to hold the position and it seems that Asia Pacific voices are not always prominent in global IHL discussions. Do you have any thoughts as to why that might be the case and what we could do to boost representation and this regional voice?

This is a really good question. Actually, just to let you know, I am the first non-Swiss and first female in 160 years to hold this role. So, for the first non-Swiss and they chose someone from our region, that really was a great honour. And I must admit, people thought perhaps being the first woman in

this role would have some challenges but I felt also coming from a part of the world where we have a different way of seeing was something that hopefully added a different voice to the table. So yes, I'm very proud to have represented this part of the world where I spent so much time when I was a delegate. In fact, all my missions were in the Asia Pacific region so that makes me proud.

I do think there is something about the geographical distance and even something seemingly as simple as the time difference. A lot of the work we do in Africa and even the Middle East is more in a similar time zone and sitting here in Geneva, it is a lot quicker. I am still shocked by how quickly one can get from Geneva to places like Kenya: it's only around eight hours, compared to if I'm going somewhere like Indonesia or to Australia or the Philippines.

Having said that, we should not underestimate the role that the voice of this region has played and continues to play in new negotiations I mentioned that feature in the weapons race, whether it be nuclear weapons or some of the discussions around autonomous weapons systems or other things. So, when you are far away in the Asia Pacific region, you may think that your voice isn't heard, but I do believe there is increasing understanding of the important learnings from that part of the world. Going forward, I think that States and academic institutions and think tanks need to offer opportunities for exchange. We need to bring more people from Europe and other parts of the world out to the Asia Pacific region so they can see the rich and important discussions that are occurring. And at the same time, we also need to have a bit of an exchange in the way that we see the world and the way that we understand these principles. The principles are universal, they apply across the globe. But of course, in the implementation there are different understandings, so I would say going forward we just need to continue to work together and work on standing in each other's shoes.

Moving now to something a little bit lighter, we know that people have written songs about you in the past. So, if you were to choose a theme song to capture your experience as the Director for International Law and Policy, what would it be and why?

Oh there are so many songs and I love music and there's a lot of music in my family. So, this is a hard question.

Conceptually though, I would say the song by John Lennon called “Imagine”. It is a song that has really spoken to me because I think as an international lawyer with the ICRC, you’re constantly imagining a world where there is less suffering. And you’re imagining a world where there is better respect and treatment of each other. As an ICRC lawyer, we have to be both very rigorous and technical but also very creative in finding ways to make sure the law is understood, is applied. You can’t just be a blackletter lawyer; you have to make it live. “Imagine” is a song that gives me great peace and inspiration.

A lovely song, good choice. Now with your term ending soon, can we ask what comes next for you?

Certainly. Well, I am returning back to beautiful Australia and I’m having a sabbatical for at least six to eight months, so I don’t have any plans. I feel very fortunate and I do believe the future could hold a range of things but for now I need to focus on my family, support my husband who has given a lot to my job. This job has been long hours and significant pressure so having some time to “decompress” is important. I have no doubt that you’ll see me popping up again somewhere. I do have a deep passion for IHL, for policy, for diplomacy, but right now I’m going to have a sabbatical and really enjoy life for a while. Read some novels, do some writing and really get back to being a member of my family. Pay back to my family as they’ve supported me so much.

A very well-deserved sabbatical! Thank you, Helen, we know the last few weeks are jam-packed for you, so we appreciate you taking the time for us and for our readers.

I also wanted to thank you for your time; it’s so lovely and I felt so proud to come from this part of the world. I can’t tell you how much being Australian and spending my time in the Asia Pacific region influenced me when sitting there amongst a Swiss environment. And it has been really great to feel that I’ve got behind me all these wonderful people like yourself. So, thank you.