Thank you very much for this opportunity. I am reminded of the time last year after OBL was killed when Martin Scheinin and I as UN special rapporteurs issued a press release saying we were asking the US government for clarity surrounding the facts of the events. Soon people were sending me the news that a US senator on Fox News had asked who were the two ‘jerks’ who had asked such questions. The term obviously caused much delight among my colleagues, in Pretoria as well as Geneva, and also seemed to have a certain resonance with my children.

So let me continue in this tradition of raising questions about some of the issues concerning targeted killing, for example through drone strikes and raids where specific individuals are singled out in advance for the use of lethal force by states acting under colour of law. This is the situation where someone’s name is written onto a proverbial bullet that is just waiting for the right time.

The point I would like to get across tonight is that there are elaborate legal frameworks in existence that regulate the use of force by states, developed over many years to ensure the maximum realisation of humanitarian values. We should be cautious about state practices that abandon or undermine these norms without ensuring that there are new and acceptable standards in their place.

I will try to identify some of the main problems that, from a legal standpoint, are raised by targeted killing.

The first problem is caused by the fact that targeted killings typically involve operations in the territory of other countries, and therefore potentially violate the rules concerning the inter-state use of force and sovereignty, and can as such be seen as acts of aggression.
The justification of self-defence is most often advanced. However, the established legal confines of self-defence are often exceeded in targeted killing.

As a general rule, self-defence should be against attacks that have already occurred. Even if one accepts that 9/11, orchestrated by al Qaida, constituted an armed attack, two problems remain:

- First, it is often not clear that there is a link between individuals targeted, such as Anwar Al-Aulaqi, and al Quida proper; and
- Secondly, even where there is such a link, it is question whether the ‘armed attack’ of 9/11 is now not too far in the past to justify self-defence today.

What about new threats? It is widely agreed that states may engage in self-defence against imminent attacks. But it is a huge stretch to say that threats posed by people half way around the world who are the targets of drones meet this requirement of imminence. As a result more permissive standards of ‘pre-emptive strikes’, without a clear basis in the UN Charter, are advanced in support of what would normally be regarded as aggression.

[A ‘free standing right of self-defence’ is sometimes put forward as a basis for the inter-state use of force, as well as the existence of a general ‘state of necessity’ – both controversial concepts. What should be clear, however, is that no justification of inter-state force can obviate the need for the further enquiry as to whether the demands of international humanitarian law have been met – these are two separate enquiries.]

The second problem is what the applicable legal regime for a particular droning operation should be? Is it law enforcement and thus human rights, or is it conduct of hostilities, and thus IHL as lex specialis, backed up by human rights as lex generalis? While the conduct of hostilities paradigm treats the use of lethal force against legitimate targets as the rule, it is seen as the exception under the terms of the human rights framework.

Target killing may possibly be legal in a recognised conflict zone, such as Afghanistan, or even in spill-over areas such as the FATA regions, but many targeted killings take place in areas far away from a ‘hot battleground’, for
example in the interior of Pakistan or Yemen. Unless the requirements of an armed conflict are met, international human rights law should in my view apply.

One approach supporting the extensive use of droning is to say that IHL ‘knows no borders and follows the warring parties wherever they go. The effect of this approach, however, is that civilians anywhere also risk becoming collateral damage.

A third problem deals with the matter of distinction, and asks **whether a particular person may be targeted**.

The traditional test for the distinction between legitimate targets and civilians in NIACs – which is where drone strikes take place - is whether the person in question engages in direct participation in hostilities. This is largely based on conduct, not status, as is the case with combatants in IAC.

A controversial ICRC Guidance has proposed an additional standard, whereby a civilian in a NIAC who engages in a ‘continuous combat function’ is also subject to continuous targeting. This is problematic because it expands the scope of legitimate targets to include a determination on the basis of status. However, the ICRC has also proposed additional restraints on the right to target combatants and fighters.

Reference should be made to a recent study by the Institute for Investigative Journalism, where the allegation was made that civilians are often specifically targeted by drone attacks. This comes down to a largely factual question; if it is established that this happens – and it is difficult to know because it is hard to get reliable information - there is no doubt about the law: it is a war crime.

Even if a specific person may be targeted as a fighter, the question arises, in a case such as OBL, which involved ground troops, whether he should be **captured if possible**. Clearly the US holds that this is not necessary. One of the problems with drones is precisely that it does not offer the chance to surrender.

A fourth controversy relates to the question **who may conduct targeted killings**. Drones are often operated by the CIA, which falls outside democratic restraints on the military.
In the fifth place there are the requirements of **transparency and accountability**, which apply in respect of human rights as well as IHL. The lack of information on what is done, and what accountability procedures are in place, is probably the main issue here, since accountability relies on the availability of information.

I leave the issue of **domestic law** out of the discussion due to time.

To conclude:

The term ‘targeted killing’ is to some extent misleading in the context of droning, in that it creates the impression that less violence occurs. Yes, the specific target can often be identified with greater precision, and collateral damage in that particular case can be reduced. But because drones eliminate the risk to the soldiers of the state using it, it can be used much more often and as such increases the risk also to civilians. Moreover, information gathered over a long distance can be inaccurate, and lead to irreversible decisions.

Although they are often exaggerated, there are grey areas of law in respect of targeted killing. One approach is to say that where there is legal uncertainty, states have free reign. If this approach is followed, it makes sense for those who want to give more power to states to engage in targeted killing to promote the idea that international law is uncertain. My approach would rather be to say that the very idea of having a *lex specialis* and a *lex generalis* is that gaps in the former are filled by the latter – if there is uncertainty in IHL human rights should fill the gap.

There is a danger in creating new law to meet short term goals. States that use the currently available technology to engage in large-scale targeted killing may be very diligent – we would not know. But even if they are, in the process far-reaching precedents of state practice and *opinio juris* are established that will set the tone for all states to which the technology becomes available – and existing and well established law is violated. The more the international community allows deviations from existing law, the more entrenched self-help will become, and the more difficult it will be to restore the integrity on the international rule of law.
The spectre that haunts this terrain is the one where the entire world is a theatre of war and where the established norms of international law concerning the use of lethal force have been watered down to mean very little. There is, in my view, a cause to pause.