

IN THE INTERNATIONAL CRIMINAL COURT

PRE-TRIAL CHAMBER I

March 2016

Prosecutor v. A. Owen

A. INSTRUCTIONS

- 1 *Proceedings*: The hearing takes place pursuant to Article 61 of the ICC Statute (confirmation of charges). At this stage, the Prosecutor has to “support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.” The Accused may “object to the charges” and/or “challenge the evidence presented by the Prosecutor”.
- 2 For the purpose of the moot, the hearing comprises a main speech and a rebuttal for the Prosecution and a main speech and a surrebuttal for the Defence (see Moot Rule 12).
- 3 *Facts and evidence*: The case is entirely fictional. The Moot problem includes all the facts supported by evidence that have been transmitted to the Defence, as well as facts and evidence presented by the Defence for the purpose of the hearing. Teams should confine themselves to the facts supplied. Neither the Prosecutor nor the Defence may introduce new evidence or facts at the hearing (Article 61 (6) (c) of the ICC Statute is not applicable). Teams may nonetheless draw reasonable inferences from the facts. They may also question the credibility or weight of the evidence. Teams should not hand anything to judges unless specifically asked to by a judge.
- 4 *Procedure*: The problem is not intended to raise questions of procedure other than the rights of the accused pursuant to Articles 66-69 of the ICC Statute. Any other procedural questions should be ignored.
- 5 *Jurisdiction and admissibility*: Counsels may, if relevant, address any issue regarding the admissibility of the case.
- 6 *Applicable law*: In accordance with Article 21 of the ICC Statute:
The Court shall apply
 - a) *In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*
 - b) *In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*
 - c) *Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that*

would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

The Court may apply principles and the rules of law as interpreted in its previous decisions.

- 8 Teams are encouraged to look at the case law of international and national courts. If teams rely on decisions of national courts, these should be leading decisions and teams should expect to be asked for copies of the head note and the portion of the transcript or judgment referred to in their argument.
- 9 *Participation to treaties:* At all material times, the following treaties were in force for the States indicated (✓):

	Boronia	Acacia	Clematis
1948 <i>Convention on the Prevention and Punishment of the Crime of Genocide</i>	✓	✓	✓
1949 <i>Geneva Conventions I-IV</i>	✓	✓	✓
1969 <i>Vienna Convention on the Law of Treaties</i>	✓	✓	✓
1977 <i>Protocols I and II Additional to the 1949 Geneva I-IV</i>	✓		✓
1980/2001 <i>Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its Protocol I, II (amended), III, IV and V.</i>	✓	✓	✓
1984 <i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>	✓	✓	✓
1998 <i>Statute of the International Criminal Court</i>	✓		✓
2006 <i>International Convention for the Protection of All Persons from Enforced Disappearance</i>	✓	✓	✓

B. FACTS

1. Acacia, Boronia, Clematis and Darwinia are all independent nation states occupying the continent of Pangaea (pan'dʒi:ə). The continent of Pangaea is surrounded by ocean.
2. Acacia occupies the northern end of the continent of Pangaea while Boronia occupies the south-western portion of Pangaea.
3. The four States Acacia, Boronia, Clematis and Darwinia are all members of a regional continental union known as the Pangaeian Union (PU).
4. Boronia is a middle-income country with a population of some 30 million inhabitants. It is governed by a parliamentary system. The Prime Minister heads the government, while the President is appointed by Parliament as the head of State. The President has mostly a ceremonial role.
5. Acacia is an advanced economy occupying territory equivalent to that of France. It has a population of some 50 million persons. It is governed by a presidential system, where the President is head of State and leads the executive branch. The President is also commander-in-chief of the armed forces and chairs the Acacia Military Commission (AMC) which has ultimate authority over all military affairs. Acacia has the best equipped and trained armed forces of the region supported by a sophisticated industrial infrastructure.
6. In the area that spans part of the Acacia-Boronia-Clematis borders lies a territory known as the "Pinattan Lands". Most of the Pinattan Lands (80%) are in the northern part of Boronia, but they also include smaller areas in Acacia (15%) and Clematis (5%). The Pinattan people have occupied this land since antiquity but when Pangaea was divided up in 1945 they missed out on nationhood.
7. In the Boronian Pinattan Lands, also lives a smaller group of different ethnicity known as the Rogues (about 5% of the total Boronian population). The Rogues generally look physically different from the rest of the peoples of Pangaea and are easily identifiable by the way they dress. The Rogues, denied of Boronian citizenship, have been driven out of their land in the southern part of Boronia and forcibly displaced to the Pinattan Lands by the central Boronian authorities some twenty years ago. They continued to be discriminated against, denied citizenship and persecuted by Boronian authorities. They do not have access to most public services, including health and education.
8. Population increase and the lack of economic opportunities in the Boronian Pinattan Lands have resulted in the migration of people from these lands to Acacia. The Pinattans mostly migrate to Acacia in search of economic opportunities, while the Rogues mostly seek to escape persecution in Boronia – although they do not really receive much better treatment in Acacia.
9. The land border area between Boronia and Acacia is mostly flat with small hills and sparsely vegetated. The border is rather porous and border controls have had little impact on the movement of people. Over time, it caused some political groups in Acacia to protest against the uncontrolled influx of people from Boronia, especially the Rogues because the Rogues are often associated with crime and illegal trafficking of pirated electronic goods, clothes, music and films.

10. Immediately after newly elected President A. Owen (who campaigned on a platform advocating halting the flow of people from Boronia) took office in January 2013, a presidential order was issued instructing all concerned departments to search and expel without exception all Boronians found in Acacia without a valid entry permit. The implementation of the order mostly affected the Rogues as they were easily identifiable as they tended to congregate in lower socio-economic suburbs in Acacian cities and towns.
11. The Owen government also started to erect fences and create a heavily guarded “no-man’s land” area (a 500m wide strip running along the Acacian-Boronian-Clematis border). The main border fence ran along the international border between Acacia and Boronia and Clematis. The Owen government also accelerated the deployment of the “Sentinel Border Protection Program”. The program, initiated by the previous government, aimed at deploying autonomous immovable armed robot sentries called “Sentinels” along the length of the Boronian border (in the “no-man’s land”). Sentinels are positioned between 100m and 200m on the Acacian side of the border. Once activated each Sentinel can operate either under the control of distant operators or under a fully autonomous mode. The mode of functioning and the capabilities of the Sentinels are largely confidential, but a report on what is known about the program written by Dr Mary Brown has been published in the internationally renowned military magazine *Military Matters* (Extracts of the article are reproduced in Annexure A).

12. MAPS

Figure 1: Map of Pangaea

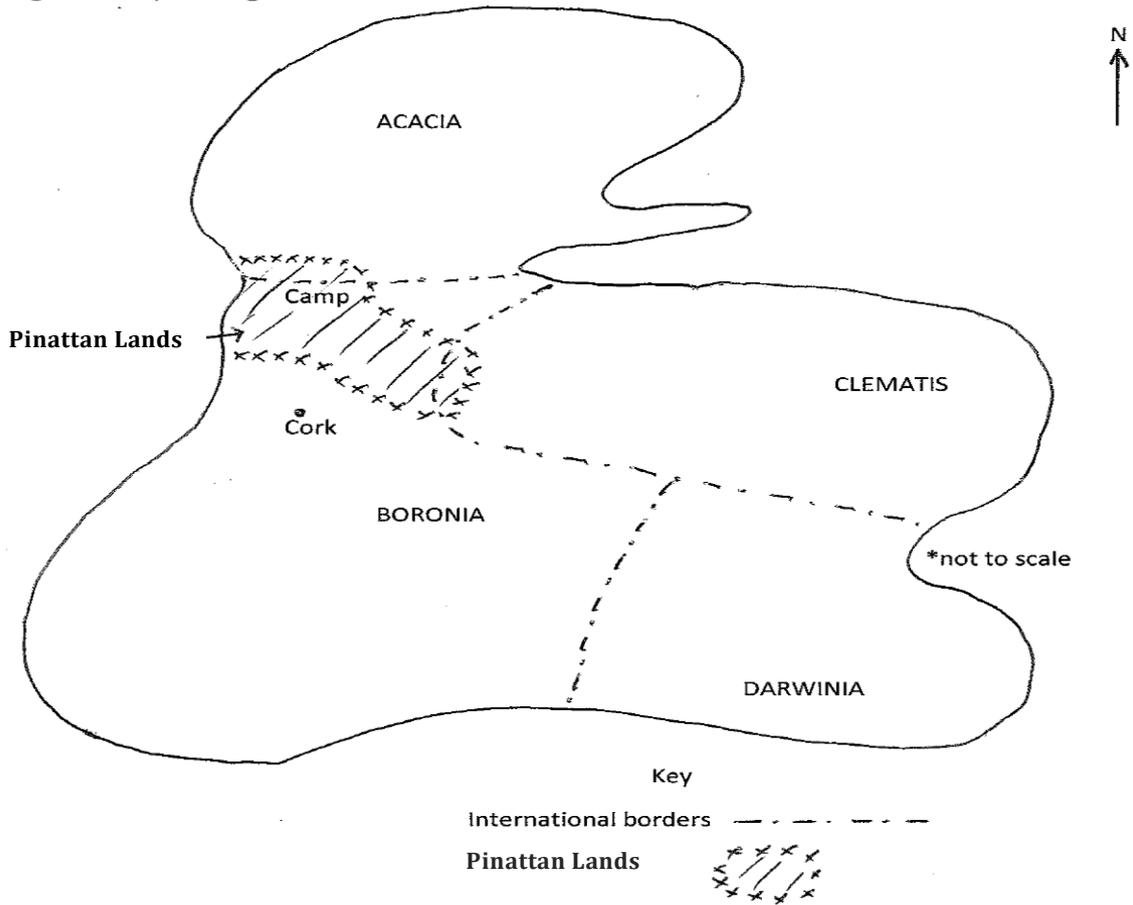
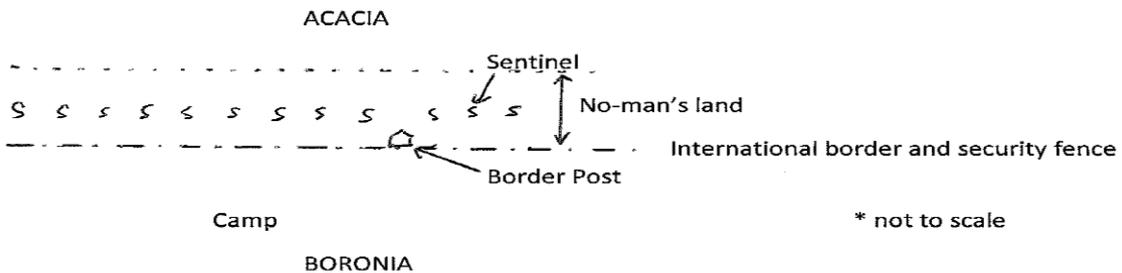


Figure 2: Portion of border between Acacia and Boronia including refugee camp



13. The Pinattan Lands within Boronia have a functioning local government with a large degree of autonomy in the administration of the territory and its population. There is no equivalent local government entity in the portion of the Pinattan Lands in Acacia or Clemantis. Historically, the central government of Boronia has tolerated self-administration as long as the Pinattans did not seek self-government or independence and contributed to the national revenue (paid a reasonable amount of taxes). However, in recent years, media outlets have increasingly reported on what seemed to be a growing militarization of Pinattan local police forces, as well as the formation of armed militias. In 2011 and 2012 the central Boronian police uncovered

military weapons trafficking operations in Pinattan lands. The weapons that were seized were found to be military surplus or ex-military weapons that had been manufactured in Acacia. Investigators were lead to believe that members of the Rogue community were controlling and organizing the traffic, although none had been formally charged.

14. In late March 2013, a civil war broke out in Boronia. The uprising took the central Boronian government by surprise which allowed Pinattan militias to rapidly take over military installations in Pinattan Lands, including large stocks of weapons and ammunition, and air defence weapon systems. The Rogues tended to side with the Pinatans and Rogues young men enrolled in large numbers with the Pinattan militias. At the same time, a number of soldiers of Pinattan origin deserted the Boronia and Clematis' armed forces and joined the militias, taking with them artillery and anti-aircraft equipment with accompanying supplies. By August 2013, the fighting had spilled over into other parts of Boronia, beyond the Pinattan Lands.
15. Stories started appearing on social media and local news outlets about mass executions of civilians and large scale destruction by Pinattan militias. A series of reprisal actions by the Boronian Armed Forces on the Pinattan population also took place. The Rogues were particularly targeted, as the Boronian government felt that they had instigated the uprising and had been instrumental in providing weapons and other military resources. Entire neighbourhoods where a sizeable part of the population was of Rogue origin were decimated. Hundreds of Rogues were found dead while thousands vanished. The Boronian Armed Forces claimed that those who had vanished had either joined the Pinattans militias or simply fled to Acacia because of the on-going violence and attacks by Pinattan militias, while those reported dead were Pinattan fighters.
16. By the end of 2013, there were an estimated 100,000 people heading north on foot towards Acacia. Amongst the fleeing population were large numbers of Rogues who felt particularly threatened, given the Boronia government's rhetoric on getting rid of foreign – understood by all as meaning "Rogue" – influence in the Pinattan Lands.
17. In the first week of January 2014, President Owen held consultations with Boronian Prime Minister Razor, who had been in power for the last ten years. President Owen offered his full support to the Boronian government in battling the rebellion. He also informed the Prime Minister that the land border between Acacia and the states of Boronia and Clematis would be closed and that the Border Protection System was to be put on high alert. Prime Minister Razor welcomed the support and the cooperation of the Acacia government. He mentioned that he considered the Rogues largely responsible for instigating the conflict. The Rogues were a long-standing problem for Boronia that had to be permanently resolved. Both leaders also agreed to set up a coordination committee to handle the cases of Boronian nationals (excluding the Rogues migrants or refugees) expelled or surrendered to Boronian authorities. They still agreed to re-discuss further how to deal with the Rogues crossing into Acacia from Boronia.
18. On 15 January 2014 the Sentinels were put on high alert – became fully autonomous – following a decision of the AMC. In a public announcement, President Owen said:
We have a duty, a moral duty to help people fleeing life-threatening conflicts, however action is also required to prevent an uncontrolled flood of persons into our country that could threaten the security of our population. [...] The Acacia

government has offered its full support to the Boronian people and will provide humanitarian aid to the extent possible in coordination with the Boronia government. [...] The Acacia government stands ready to provide military support to the Boronian government if requested. [...] The government has also taken the decision to close the southern border and put the Border Protection System on high alert to prevent any incursion of armed elements onto Acacia territory.

19. On 20 January 2014, the Boronia's government asked Acacia for air force support against Pinattan forces.
20. On the same date, the United Nations (UN) Security Council adopted unanimously Resolution 12 (2014) under Chapter VII which authorized the deployment of a PU-led mission (UNPM) in Boronia. The Council tasked the UNPM to provide humanitarian assistance to the population affected by the conflict. The Resolution also authorized PU members "to take all necessary measures to protect civilians and the civilian population", in compliance with applicable international humanitarian and human rights law, and in full respect for Boronia's and Clematis' sovereignty and territorial integrity.
21. Pursuant to Resolution 12 (2014), Acacia, Boronia, Clematis and Darwinia established a PU Coalition to support Boronian authorities in re-establishing order and security in Boronia. Acacia, as the only PU country having the necessary resources, supplied surveillance drones, air cargo for humanitarian assistance, as well as fighter planes to support the Coalition and provide protection to humanitarian aid being delivered by air or land convoys. Command and control of air operations remained under the authority of the Acacia Joint Command (AJC), itself under the authority of the Acacia Military Commission. In the following weeks, air strikes against towns and cities in Pinattan Lands, as well as against positions held by Pinattan militias, were conducted by the Acacia Air Force at the request of Boronian authorities. While the information on the location of targets was being provided by the Boronian Armed Forces Command, the AJC authorized and ordered the strikes.
22. The town of Cork, strategically situated at about 500 kilometres south of Acacia's border with Boronia, and south of the Pinattan Lands, harbored some 10,000 displaced families. On 4 March 2014, the Boronian Armed Forces Command informed the PU Coalition HQ that part of Cork was controlled by Pinattan forces armed with anti-aircraft missiles which threatened air cargos bound for Cork. The anti-aircraft missiles were reported to be positioned near the highest building in Cork.
23. On the same day, a fighter pilot was ordered by the AJC to engage and neutralize the anti-aircraft system.
24. The two highest buildings in Cork are about the same height, being Cork's main hospital and an apartment block 150 metres east of the hospital. Cork Hospital is a white building with the words "Cork Medical Center" in very large letters display on the front and back of the building, and with a large red cross painted on the roof.
25. An Acacian drone flying over the building detected people moving pipe-like objects on the roof of the hospital. After requesting and obtaining permission to fire, the fighter pilot fired a missile that destroyed the top floor and roof area of the hospital. Twenty-five patients, four nurses and two doctors were killed and thirty people were

injured. Cork Hospital managers protested immediately saying the activities on the roof was construction work of a non-military nature. Following anti-aerial fire coming from the roof of the nearby apartment building, a second missile was launched causing a partial collapse of the apartment building, killing and injuring dozens of residents. The partial collapse of the apartment building also damaged an annex to the hospital, killing five hospital staff.

26. Following the bombing, the Acacian Military Commission issued a communiqué stating that a full investigation would be conducted (the result of the investigation are still to be published). A few weeks later in a televised interview, commenting on the events, President Owen stated that he felt sorry for the victims and their families, however the strikes had been conducted on the basis of self-defence, and the Pinattan militias should be the ones bearing the blame for the damage and injury resulting from them.
27. At two hundred and fifty meters south of the Acacia-Boronia border “no-man’s land”, around 8,000 people displaced by the fighting in Boronia were sheltered in a makeshift camp know as Camp Refuge, hoping to be able to cross the border. On 16 March 2014, through radio and other means, Acacian border authorities informed the people in the camp that the border would remain closed. Pamphlets warning people of the risks of attempting to forcefully cross the border, as well as food packages, water bottles and some medical supplies, were airdropped. Warning signs hung on the fence running along the borderline visually highlighted the dangers to people entering the zone behind the border fence.
28. On 18 March 2014, a group of 30 people decided to attempt crossing the border through the “no-man’s land” at about one kilometre from the nearest border post. As they were running towards the fences, warning shots were fired from a nearby Sentinel causing the people to stop at the fence. When loud speakers warned the group to retreat, some started to throw rocks in the direction of the Sentinel, while climbed through the fence and tried to run past the Sentinel. The Sentinel fired several shots killing three and injuring ten persons. Those who were not dead or incapacitated retreated back as the Sentinel continued to fire warning shots in their direction. In their retreat, they were unable to take care of the wounded or move them to a safe place. Seven of the injured managed to get back to safety on their own, while three died from their injuries before they could be rescued.
29. Two days later on 20 March, the commander of a Boronian army unit which had just entered the camp – Colonel Black – announced that he had information that members of the Pinattan militias were harboured in the camp. Boronian soldiers started lining people up for identity checks while other soldiers began searching the camp. The soldiers separated the Rogues from the rest of the people in the camp and forced them to board unmarked trucks. As the first of these trucks drove out of the camp, unrest among the other camp residents started to rise. When the soldiers pointed their rifles at the protestors, a panic resulted in some civilians running away from the camp with many, including women and children, racing towards the border fence. At one spot, the border fence collapsed resulting in people spilling into the area bordering the Sentinels, followed by Boronian soldiers in pursuit. A Sentinel fired a warning shot as the civilians approached the border fence. When the civilians entered the no-man’s land followed by armed soldiers in close pursuit the Sentinel fired at the group killing five and injuring twelve. Among the wounded were two soldiers. One of the wounded soldiers sat up and tied a tourniquet around his

injured leg to stem the bleeding. This soldier struggled to his feet picking up his rifle to limp back away from the border but was shot again and killed by a Sentinel. The other wounded soldier did not try and move from where he had fallen after being shot.

30. Two hours later, a medical unit dispatched by the Acacian border control arrived on the site to care for the wounded and retrieve the wounded soldier and dead civilians. The medical unit wore vests displaying the Red Cross/Red Crescent symbols. The injured were taken back to the camp and Acacian personnel returned to Acacia, leaving medical supplies for treatment of the wounded civilians. Before leaving, the commander of the Acacian border control post met Colonel Black and told him that he had the duty to prevent illegal border crossing and that Boronian authorities were responsible for the consequences of the failed attempts. The border was to remain closed for the time being. The border control commander noticed that a number of Rogues had been grouped together ready to be embarked on trucks. He later reported that fact to his superiors.
31. The following day, Colonel Black left the camp with his unit, along with three trucks transporting around one hundred and fifty Rogues, mostly young and middle-aged men. Three women, whose husbands had been taken, submitted testimony that, after multiple requests to military authorities, they had not been able to gather any information on the whereabouts of their husbands after they had been taken from the camp in the unmarked trucks.
32. On 20 June 2014, the International Tiresias online published an article by Lucy Brightwell containing a recently acquired WikiLeaks confidential Acacian government memo to President Owen from the head of the Acacian security intelligence dated 10 October 2013. This memo informed the President of the reprisals against the Rogue population. The memo stated that if the policy of reprisals against the Rogue community continues to be carried out “at the current rate”, there will no “Rogue left in the country” by the end of the conflict.
33. On 22 August 2014, the Boronia Armed Forces won a decisive victory with the support of Acacia air force over the Pinattan militias. Within the following weeks, Pinattan forces retreated back to Pinattan Lands and a cease-fire was agreed. Most displaced persons returned to their home towns and villages during the following months. The majority of the Rogues however remained displaced, some within the camps like Camp Refuge, as their homes had been destroyed or occupied by returning Pinattans.
34. A late November 2014 demographic survey in the Pinattan Lands showed a 40 per cent decrease in the Rogue population since early 2013.
35. In the January 2015 Acacian general election President Owen lost office. Ex-president Owen embarked on a world speaking tour about his successful border control policies only to be indicted for trial before the ICC. He was surrendered to the ICC on 4 February 2015.
36. The Prosecutor intends to seek the trial of former President A. Owen on the following charges:
 - (1) In respect of the acts committed against individual members of the Rogue community in Boronia since 1st March 2013, with the intent to destroy, in whole or in

part, the Rogue community, the crime of genocide within the meaning of article 6 and 25 (3) (b) of the ICC Statute.

(2) In respect of the bombing of the hospital and other buildings on 4 March 2014, the crime of intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law, within the meaning of Article 8(2)(e)(ii) and 28(a) of the ICC Statute.

(3) In respect of the death and injury inflicted to civilians and persons *hors de combat* on 18 and 20 March 2014 in the border area between Boronia and Acacia, the crime of violence to life and person, within the meaning of Article 8(2)(c)(i) and 25(3)(a) of the ICC Statute.

37. Acacia notified the ICC that it does not recognize the jurisdiction of the Court over its national, Mr A. Owen, since Acacia is not a party to the Statute and that the involvement of Acacia in the conflict in Boronia was mandated by the UN Security Council acting under Chapter VII, considering as well Articles 25 and 103 of the UN Charter. In addition, Acacia claimed that it had exclusive jurisdiction to investigate the conduct of former State officials and to take appropriate measures if appropriate in accordance with the Constitution of Acacia.

Annexure A

*Military Matters: The magazine for latest in military tactics, weapons and news.
July 2012.*

In the News by Commander Mary Brown RUN, FAST.

In this week *In the News* we report on the ““Sentinel Border Protection Program”, a program using armed robots developed by Dynamo International, the main weapon designer and producer in Acacia, to guard the border Acacia/Boronia/Clemantis border.

While authorities in Acacia are secretive about some aspects of the Sentinel Program, they have confirmed it will operate either under the control of distant operators or in a fully autonomous mode when activated on high alert. The deployment of Sentinels to guard Acacia’s southern border has not yet been completed. While Acacian authorities have been very open about what external defenses will protect each Sentinel they have been less forthright about the military capacity of each Sentinel.

[...]

Each Sentinel will be protected by anti-aircraft and anti-missile batteries, the latter being located north of each Sentinel. Each Sentinel is armed with the latest Phalanx weapons system and holds a limited, unknown, number of anti-aircraft and anti-tank weapons. It has independent sensors and radar capable of detecting all external threats. The Sentinels adjoining each other may have as well some capacity to defend each other.

[...]

Available information indicates that:

- a. Sentinels may attack any object or person that it perceives to be a risk to its mission. [...] when a Sentinel is in fully autonomous operating mode, closely approaching it or acting in a manner that it perceives as hostile, it may use lethal force. Signage to that effect will be displayed along the border line.
- b. Sentinels have multiple technologies, including infra-red, ultra-sound and other types of sensors that allows them to scan and identify objects and persons, as well as their movement.
- c. When a person approaches the border Sentinels, warnings by way of loud speakers in the languages of Pangaea that the border is protected and that approaching may cause serious injury will be delivered.
- d. In certain circumstances, warning shots may be fired (not aimed directly at the target).
- e. The Sentinels are linked to a large stand-alone database that enable them to detect and recognize weapons of all types, including weapons such as swords, lances, crossbows, long bows, knives and other bladed instruments. Where there is doubt, the Sentinel may warn the person carrying the object to retreat or discard the object.

- f. The Sentinels' programming allows them to react to protect themselves from direct threats such as objects thrown or heading towards them.
- g. The Sentinel can distinguish military uniforms, equipment and accoutrements. Persons not identified as military but carrying weapons will be warned to retreat or risk death or serious injury.
- h. The Sentinels are programmed to recognize the emblems of the Red Cross and Red Crescent allowing persons wearing those symbols to approach any injured/wounded persons within range of the Sentinel's armaments, as long as persons wearing those signs do pose a threat to the Sentinel.
- i. Each Sentinel is programmed "to learn" from experience and share these learned experiences with other Sentinels.

Military Matters asked various humanitarian organizations for comments. Most indicated that fully autonomous armed robots that could use lethal force were "a great concern", "a dangerous escalation in weapons development" and "an ethical minefield".