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Incident

The Major Nicholson Incident and the Norms of Peacetime Espionage

Michael R. Shebelskie†

Against the background of this luminous and sparkling stage Bond stood in the sunshine and felt his mission to be incongruous and remote and his dark profession an affront to his fellow actors.

Ian Fleming††

I. Problem

On March 24, 1985, a Soviet sentry shot and killed Major Arthur Nicholson, an American intelligence officer stationed at the U.S. liaison mission in Potsdam, East Germany (GDR). Acting under a military agreement between the Soviet Union and the United States, Major Nicholson was on an intelligence gathering mission in the GDR. Although Soviet troops had threatened and harassed Western liaison officers before, Major Nicholson was the first liaison officer shot dead. Given that the Soviet Union perceived Major Nicholson's actions as a grave threat, it is surprising that the Soviet Union did not retaliate more fully against the United States. It is even more surprising that the United States did not strongly protest the shooting.

The outcome of this incident shapes state behavior with respect to military liaison espionage on two levels. First, the incident concerns the degree to which target states can hold gathering states—states authorizing acts of espionage—responsible for the espionage of their agents. Second, this incident questions the degree of force that a target state can use

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1. See infra notes 46-51 and accompanying text.
2. See infra notes 52-55 and accompanying text.
3. Although the shooting occurred in the GDR, the Soviet Union and the United States are the primary participating elites because the U.S. military liaison officers are accredited directly to the Commander-in-Chief of the Soviet army stationed in the GDR. See infra note 48 and accompanying text.
against individual spies to prevent espionage. Currently, international law provides ambiguous answers to both of these questions. However, a brief analysis of these conflicting norms is necessary to assess the incident.

A. Responsibility of the Gathering State for Peacetime Espionage

Although most authorities agree that espionage is a legitimate ruse of war, they are divided as to whether peacetime espionage is "legal," i.e., whether peacetime espionage constitutes a wrong for which the target state can hold the gathering state responsible. If the target state cannot hold the gathering state responsible, then the target state can take only limited diplomatic retaliation against the gathering state.

Many commentators believe that peacetime espionage is unlawful. They argue that the legitimacy of wartime espionage is premised on a belligerent's lack of duty to respect the territory of its opponent. During peacetime, however, a state must respect the territorial integrity of other states. An act of espionage directly contravenes this duty. Furthermore, a diplomat's violation of a receiving state's espionage laws constitutes illegal interference in the affairs of the receiving state. Supporters of this position also argue that by limiting the available inter-state responses, this norm inadequately protects the security interests of the tar-

4. Oppenheim defines spies as "secret agents of a State sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets." 1 L. Oppenheim, International Law § 455, at 673 (5th ed. 1937).

5. See, e.g., 6 G. Hackworth, Digest of International Law § 581, at 304-06 (1943); W. Hall, International Law § 188, at 578 (1917); H. Halleck, International Law 406 (1861); 7 J. Moore, Digest of International Law § 1132, at 232 (1906); 2 L. Oppenheim, International Law § 159, at 422 (7th ed. 1948). See also Convention Respecting the Laws and Customs of War on Land, opened for signature Oct. 18, 1907, Annex art. 24, 36 Stat. 2277, 2302, T.S. No. 539, at 32 (hereinafter cited as Hague Convention). But see 3 C. Hyde, International Law Chiefly as Interpreted and Applied by the United States § 677, at 1865 (2d rev. ed. 1945) ("conduct of a spy is in reality at variance with the laws of war which are a part of the law of nations").


get state. Instead, a strong inter-state response is needed to deter the incidence of peacetime espionage.\(^8\)

On the other hand, other scholars believe that peacetime espionage is lawful.\(^9\) Proponents of the legality of peacetime espionage defend their position on the basis of necessity\(^10\) and self-defense.\(^11\) They also assert that since accredited diplomats are properly admitted into the target state, their presence cannot constitute trespass regardless of what they do.\(^12\)

Despite this scholarly division, target states rarely hold gathering states responsible for their peacetime espionage. Although states may purport that espionage is unlawful, elaborate operational codes of behavior govern their actions.\(^13\) The target state usually lodges a mild protest, and the gathering state issues a pro forma denial. Target states rarely demand an apology and compensation. Thus, peacetime espionage does not seriously disrupt diplomatic relations.\(^14\) In two celebrated espionage

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8. See, e.g., Note, Espionage in Transnational Law, 5 Vand. J. Transnat’l L. 434, 441 (1972) (rules of land warfare lack international framework for providing minimum security against espionage); Delupis, supra note 6, at 70-71 (arguing that both the gathering state and the spy should be held responsible under international law).

9. See, e.g., N. Leech, C. Oliver & J. Sweeney, Cases and Materials on the International Legal System 264 (1973); J. Stone, Legal Control of International Conflict 563 (1954); Stone, supra note 7, at 39-40. Oppenheim’s definition of a spy, see supra note 4, does not differentiate between wartime and peacetime; therefore, his observation that it is not “wrong morally, politically, or legally” for a state to use spies applies equally to peacetime. \(\text{Id.}\)

Others condition the legality of peacetime espionage on the absence of an accompanying delict such as the destruction of property. McDougal, Lasswell & Reisman, The Intelligence Function and World Public Order, 46 Temple L.Q. 365, 393-94 (1973). However, it is the accompanying delict and not the espionage per se that constitutes the wrong. Thus, espionage is a legitimate state activity, even if accompanied by a nondelictual use of force. \(\text{Id.}\) at 418-19.

10. Oppenheim legitimates espionage during war by arguing for the necessity of military intelligence for the waging of war. 2 L. Oppenheim, supra note 5, at 422. Intelligence is also needed for the successful waging of peace. Thus the United States partially justified the U-2 spy flights over the Soviet Union as the only means of obtaining information it needed to maintain the balance of power. Wright, Espionage and the Doctrine of Non-Intervention in Internal Affairs, supra note 6, at 17-18.

11. Delupis, supra note 6, at 68; Coyle, Surveillance From the High Seas, 60 Mil. L. Rev. 75, 92-93 (1973). The United States also asserted that the U-2 flights were necessary to prevent a surprise attack. Wright, Espionage and the Doctrine of Non-Intervention in Internal Affairs, supra note 6, at 17-19; Note, Legal Aspects of Reconnaissance in Airspace and Outer Space, 61 Colum. L. Rev. 1074, 1095-1100 (1961).

12. See Note, supra note 11, at 1100 n.144.

13. In every legal order, expectations are shaped by both a “myth system” and an “operational code.” Myth systems represent the norms expressed in rhetoric and ideals. Operational codes refer to the norms as practiced by elites. Both levels of expectations influence behavior in legal systems. See W. Reisman, Folded Lies: Bribery, Crusades and Reforms 15-17 (1979).

14. Note, supra note 8, at 445-46. Sometimes the target state does not even publicize its actions. See Expulsions of Soviets, supra note 7. In one of the rare examples of disrupted relations, the Canadian government closed the Soviet mission in Ottawa after discovering a major Soviet spy ring. However, Canada never labeled the spying a wrong or requested repa-
incidents—the U-2 incident and the *U.S.S. Pueblo* incident—the United States acknowledged that it had authorized espionage against the Soviet Union and North Korea respectively. In both instances, however, the target state did not say that the U.S. had committed a wrong because it had committed espionage. Rather, its attack focused on other aspects of international law, such as sovereignty over air space and the law of the sea. This reluctance to disavow the legitimacy of peacetime espionage suggests that the relevant elites do not view peacetime espionage as a wrong under international law.

B. *Protection of the Spy*

Traditional sources of international law also present conflicting norms concerning the appropriate force a target state can use against a spy.

1. **Norms Providing Protection to State Agents**

Diplomatic immunity and the rules of warfare provide a basis for the protection of persons identifiable as state agents who commit espionage. These norms prohibit the target state's use of force against such spies. The Vienna Convention on Diplomatic Relations accords absolute immunity to diplomats for their private acts as well as for acts in their official capacity. Although observation is a traditional diplomatic function, a diplomat must respect the laws of the receiving state and is not entitled to commit espionage. However, if a diplomat commits espionage, he does not sacrifice his immunity. The receiving state can expel...
him, demand his recall, or petition the sending state to waive his immunity, but it can neither try nor punish him. Although the receiving state can temporarily detain a diplomat to prevent him from committing a crime, it cannot exact punishment under the guise of preventing illegal acts.

Consistent with these norms, the Soviet Union and the United States tolerate a considerable amount of legation-based espionage. Although Soviet bloc countries occasionally arrest Western diplomats simply in order to harass them, by and large the Soviet Union respects diplomatic immunity. It detains U.S. diplomats allegedly caught committing espionage but promptly expels them unharmed. The U.S. accords the same treatment to Soviet diplomats.

Similarly, military forces receive considerable immunity in peacetime. Target states cannot retaliate against warships and their crews committing espionage on the high seas. Furthermore, warships and their crews are immune from legal process for intelligence gathering done in a coastal state's territorial waters. In addition, the armed forces of a foreign state generally receive immunity during peacetime based on custom and treaty as visiting friendly forces. In fact, the territorial state's consent to the presence of foreign armed forces could constitute an implied waiver of jurisdiction.

20. The Vienna Convention provides that "without prejudice to their privileges and immunities it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State." Id. art. 41. See also E. DENZA, supra note 18, at 263-65; Bassiouni, supra note 17, at 616, 623-25 (espionage does not forfeit immunity under Islamic law). The United States has interpreted this as preserving immunity despite the commission of espionage. See, e.g., United States v. Butenko, 384 F.2d 554, 566-67 (3d Cir. 1967), vacated and remanded sub nom. Alderman v. United States, 394 U.S. 165 (1969) (Soviet attaches retain diplomatic immunity against espionage charge).

21. See 1 L. OPPENHEIM, supra note 4, § 388; 2 C. Hyde, supra note 17, § 442.


24. For a listing of Soviet diplomats expelled since 1970, see EXPULSIONS OF SOVIETS, supra note 7, at 4-6.

25. See Delupis, supra note 11, at 80-81.

26. See id. at 95; Delupis, supra note 6, at 55-57, 71-75. The United States accepts the right of innocent passage for all ships; the Soviet position concerning warships is uncertain. Coyle, supra note 11, at 85-86.

27. See, e.g., Barton, Foreign Armed Forces: Immunity from Supervisory Jurisdiction, 26 BRIT. Y.B. INT'L L. 380, 387 (1949); King, Jurisdiction Over Friendly Foreign Armed Forces, 36 AM. J. INT'L L. 539 (1942). Some writers suggest that armed forces enjoy immunity from local jurisdiction in peacetime even if their presence is without the consent of the territorial state. See Delupis, supra note 6, at 55 & note 10.
The rules of war also protect soldiers who commit espionage. A soldier in uniform or clearly identifiable as such must be treated as a prisoner of war (POW) even if captured while committing espionage. Furthermore, if a soldier successfully completes an act of espionage by rejoining the army to which he belongs and is later captured, the target state cannot punish him for his prior espionage. Instead, it must treat him as a POW. Even soldiers who commit espionage while not in uniform receive some limited protection. For example, target states must provide a trial before punishing disguised combatants accused of espionage.

28. For example, Professor Baxter has delineated three categories of intelligence gathering: legal with the participants protected, legal without protection for the participants, and illegal with the participants entitled to punishment. He argues that emerging norms place espionage by state agents, including soldiers, in the first category. Baxter, supra note 6, at 332-33.

29. See Hague Convention, supra note 5, art. 29 (“soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies”); 2 L. Oppenheim, supra note 5, § 160. McKinney refers to the analogous situation of balloonists reconnoitering enemy lines during the Franco-Prussian War. These missions were conducted by soldiers in uniform and in vessels with distinctive military insignia. Even though France and Germany disagreed as to whether balloonists were spies, subsequent state practice accorded them a protected status. McKinney, Spies and Traitors, 12 Ill. L. Rev. 591, 595-96 (1918).

Some writers label these soldiers “scouts” or “spying state agents” to indicate their protected status. 2 L. Oppenheim, supra note 5, at 423; Delupis, supra note 6, at 62. Others contend, however, that since false pretense is an independent criterion of a spy, a soldier in uniform can still be treated as a spy. For example, if a soldier comes behind enemy lines under a flag of truce but with the intent to discover the enemy’s weaknesses, his false pretense would be sufficient to justify his being treated as a spy. Halleck, Military Espionage, 5 Am. J. Int’l L. 590, 598 (1911).

For the protections accorded POWs, see generally Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

30. Hague Convention, supra note 5, art. 31; Baxter, supra note 6, at 331-32; W. Hall, supra note 5, at 580.

31. Hague Convention, supra note 5, art. 30. During the war trials following World War II, the Allies executed certain persons for ordering or taking part in the executions of alleged spies without a trial. 2 L. Oppenheim, supra note 5, § 161, at 424. This protection extends to civilians as well. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3517, 3520, T.I.A.S. No. 3365, at 575 U.N.T.S. 287, 293 (civilians detained for espionage are to be treated with humanity and provided a fair and regular trial). Furthermore, espionage is not triable as a war crime under international law. See Delupis, supra note 6, at 68. But see Ex parte Quirin, 317 U.S. 1, 31 (1942) (suggesting that espionage is a war crime).

The trial requirement may also limit the target state’s right to use force to capture a spy. If a target state could recklessly shoot to kill persons allegedly committing espionage, then the trial requirement would be meaningless. Cf. Lissitzyn, The Treatment of Aerial Intruders in Recent Practice and International Law, 47 Am. J. Int’l L. 559, 587 (1953) (aerial intruders known to be unarmed should not be fired upon even if they ignore orders to land). This contention is particularly salient since peacetime espionage often entails an aerial intrusion.

However, the trial requirement only minimally restricts the target state’s ability to punish a spy, for summary military procedures satisfy the trial requirement. J. Stone, supra note 9, at 562-63; Baxter, supra note 6, at 340, 343-44. Furthermore, foreign nationals awaiting trial as spies are not entitled to the assistance of consular officials. L. Lee, Consular Law and Practice 125 (1961). In fact, since the Hague Convention applies only to land warfare, there
2. Norms Permitting Retaliation Against a Spy

In contrast to the immunity accorded state agents, other sources of international law emphasize the target state's need to control the flow of classified information and permit the use of considerable force to protect this information from spies. First, international law recognizes a state's right to promulgate espionage laws. For example, both the U.S. and the U.S.S.R. have enacted legislation proscribing espionage. Both states have recognized the other's right to enforce that legislation. Thus the U.S. never objected to the trial and imprisonment of Gary Powers in the U-2 incident, and the Soviet Union did not object to the trial of Colonel Rudolph Abel.

Second, the rules of war permit the target state to punish spies. Soldiers caught committing espionage in disguise are not entitled to POW status and can be executed. Furthermore, because the target state can punish spies under its municipal espionage laws, their espionage need not constitute a wrong by the gathering state in order for the target state to execute them.

may not exist a duty to provide a trial in peacetime. Cf. 2 L. OPPENHEIM, supra note 5, § 210, at 509 (no duty to provide trial for espionage in naval warfare).

32. Oppenheim writes:

[Spies] have, of course, no recognized position whatever according to International Law, since they are not official agents of States for the purpose of international relations. Every State punishes them severely if they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished.

1 L. OPPENHEIM, supra note 4. However, this treatment is justified as a forfeiture during war, McKinney, supra note 29, at 595-601, and as a deterrent to behavior dangerous to the target state, Baxter, supra note 6, at 329, and not because espionage is "illegal" under international law.

33. Wright, Espionage and the Doctrine of Non-Intervention in Internal Affairs, supra note 6, at 12-13.


The giving away, theft or collection with the intention of conveying to a foreign Power, a foreign organization, or their agents, of information constituting a State or military secret, as well as the giving away or collection on behalf of the institutions of foreign intelligence agencies of other information to be used against the interests of the U.S.S.R., if the espionage is committed by a foreigner or by a stateless person—is punishable by deprivation of liberty for a period of from seven to fifteen years with confiscation of property, or by death and confiscation of property.

Law on Criminal Responsibility for State Crimes, art. 2, reprinted in Ward, Espionage and the Forfeiture of Diplomatic Immunity, 11 Int'l. L. 657, 663 n.46 (1977). This statute criminalizes the collection and dissemination by a non-Soviet of any information "to be used against the interests of the U.S.S.R." whether or not the information is a military secret.


36. See, e.g., 2 L. OPPENHEIM, supra note 5, § 161; W. HALL, supra note 5, at 579. Halleck argues that a state can execute a spy even without municipal espionage laws. Halleck, supra note 29, at 590. But see J. STONE, supra note 9, at 563 (arguing that execution should be limited to exceptional cases).
Third, a target state can use lethal force in peacetime to protect classified information, for a protest to the gathering state after the fact will often fail to protect the target state's security. The use of lethal force in peacetime can also be justified as self-defense. Because espionage can expose military weaknesses, the use of force can be seen as an appropriate proportional response to prevent aggression.\textsuperscript{37} Thus, the immunity in peacetime of warships and their crews extends only to legal process. It does not preclude the coastal state from taking proportional military measures in self-defense.\textsuperscript{38} Further, any duty to warn the spy before the use of force is arguably subject to a standard of reasonableness. If so, a warning may be unnecessary if it allows the spy to escape.\textsuperscript{39} Nor does the use of force to prevent spying constitute a wrong to the gathering state—\textsuperscript{40}at least if the target state's territory is violated.\textsuperscript{41}

Finally, states are allowed to provide non-diplomatic personnel with only functional immunity.\textsuperscript{42} Functional immunity provides immunity only for those acts done in the performance of the agent's official duty.

37. McKinney, \textit{supra} note 29, at 600-01. \textit{See also} Note, \textit{supra} note 11, at 1078 (permissible to fire upon an aerial intruder that ignores a clear warning).

38. Delupis, \textit{supra} note 6, at 72-74. Coyle argues that immunity was premised on "innocent passage" and that a warship sacrificed its immunity if it "disturbs the peace" of the coastal state. The collection of information with the intent to use it adversely to the interests of the coastal state suffices to forfeit immunity. Coyle, \textit{supra} note 11, at 81, 95. Delupis argues, however, that the coastal state is limited to an inter-state response and that it cannot retaliate against the crew even if the warship acts in a threatening manner. Delupis, \textit{supra} note 6, at 57.


40. Whether the Soviet Union will choose to destroy American spy satellites when it becomes capable of doing so depends on Soviet national goals as conceived by the Soviet leaders. For the purpose of a legal analysis, however, it is sufficient to observe that whatever the Soviet Union does in this regard will not appear to be violative of international law . . . .


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ties.\textsuperscript{43} Espionage is not considered to be within the scope of a state agent's official duties.\textsuperscript{44} Soldiers under the command of a military officer are non-diplomatic personnel.\textsuperscript{45} Therefore, they are entitled at most to functional immunity and can be punished for their acts of espionage.

Neither the norms protecting state agents nor the norms justifying the use of force address peacetime espionage by military liaison officers. Because international law lacks clear guidance, the relevant elites have generated norms concerning gathering state responsibility and the degree of force available against spies that apply solely to military liaison espionage. The norms they developed apparently sanctioned espionage by the gathering state and protected the liaison officers against the use of lethal force. Recent Soviet treatment of Western liaison officers, however, has challenged these established norms, and the shooting of Major Nicholson indicates that the elites continue to test the accepted practice. Only future incidents will determine the status of this norm.

II. Facts

In 1947, the armies of the four states occupying Germany—the United States, the Soviet Union, the United Kingdom, and France—established through bilateral agreements Military Liaison Missions (MLM).\textsuperscript{46} These agreements permit the signatories to station a limited number of their officers in each occupation zone. The United States, the United Kingdom, and France share a mission in Potsdam. The Soviet Union has missions in Bunde in the British zone, in Frankfurt in the American zone, and in Baden Baden in the French zone.\textsuperscript{47} MLM personnel are accredited directly to the commanders-in-chief of the army occupying the zone in which they are stationed, and not to either West or East Germany.\textsuperscript{48} They technically provide liaison between the Western and Soviet armies.\textsuperscript{49} In order to perform these duties, MLM personnel pos-

\begin{itemize}
  \item \textsuperscript{43} Note, supra note 42.
  \item \textsuperscript{44} See, e.g., United States v. Melekh, 190 F. Supp. 67, 79, 82 (S.D.N.Y. 1960) (official duties do not include obtaining aerial photographs of defense installations). The receiving state is free to define the scope of the agent's official duties. L. Lee, supra note 31, at 253-54. Former practice denied non-diplomatic personnel immunity for serious crimes even though committed in an official capacity. Id. at 255. There is little practical difference between the two approaches. Id. at 256.
  \item \textsuperscript{45} G. Nascimento e Silva, Diplomacy in International Law 85 (1972).
  \item \textsuperscript{46} The agreement between the United States and the Soviet Union is representative of these agreements. Agreement on Military Liaison Missions Accredited to the Soviet and United States Commanders in Chief of the Zones of Occupation in Germany, Apr. 7, 1947 (available from Bureau of Treaty Affairs, Office of the Legal Advisor, U.S. Dep't of State) [hereinafter cited as Huebner-Malinin Agreement].
  \item \textsuperscript{47} The Economist, Mar. 30, 1985, at 67.
  \item \textsuperscript{48} Huebner-Malinin Agreement, supra note 46, para. 5.
  \item \textsuperscript{49} The Huebner-Malinin Agreement describes the liaison's duties as follows:
\end{itemize}
ess permanent travel passes for the zone in which they are stationed.\textsuperscript{50} Although established specifically to assist in the post-war administration of Germany, the MLM continue to operate under the original agreements.\textsuperscript{51}

Practice under the agreements, including the Huebner-Malinin Agreement between the United States and the Soviet Union, has been relatively peaceful; however, the shooting of Major Nicholson was not the first use of force against MLM personnel. In August, 1982, American liaison officers, eluding capture after entering a restricted zone, seriously injured a Soviet soldier when their truck ran him over. The United States apologized for the accident.\textsuperscript{52} In March, 1984, a French officer was killed on a mission when his jeep was rammed head-on by a Soviet truck.\textsuperscript{53} The Soviet Union dismissed the incident as a “road-accident.”\textsuperscript{54} Furthermore, Soviet soldiers have with increasing frequency beaten, fired “warning” shots at, and rammed the vehicles of Western MLM officers.\textsuperscript{55}

In each zone, the mission will have the right to engage in matters of protecting the interests of their nationals and to make representations accordingly, as well as in matters of protecting their property interests in the zone where they are located. They have the right to render aid to people of their own country who are visiting the zone where they are accredited.\textsuperscript{Id. para. 14.}

Each member of the missions will be given identical travel facilities to include identical permanent passes in Russian and English languages permitting complete freedom of travel wherever and whenever it will be desired over territory and roads in both zones, except places of disposition of military units, without escort or supervision.\textsuperscript{Id. para. 10.}

The Huebner-Malinin Agreement does not specify any termination date. Nor does its description of the MLM’s duties necessarily imply such a date. See supra note 49. Since the Agreement was part of the post-war accords, it might have been assumed that the four occupying powers were to terminate the Agreement when the formal occupation of Germany had ceased. However, the U.S., U.K., and France have retained control over West Berlin. Convention on Relations Between the Three Powers and the Federal Republic of Germany, May 26, 1952, United States-United Kingdom-France, art. 2, 6 U.S.T. 4251, 4254, T.I.A.S. No. 3245, at 4. The Soviet Union contends that the post-war accords no longer apply to East Berlin because it is the capital of the GDR. The Western allies maintain that the accords apply to both East and West Berlin. See Quadrupartite Agreement on Berlin, Sept. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551. Despite its position, the Soviet Union has not requested the termination of the Huebner-Malinin Agreement.\textsuperscript{52. N.Y. Times, Mar. 28, 1985, at A3, col. 4. For a Soviet account of the incident that fails to mention the U.S. apology, see \textit{Pravda Version of Nicholson Shooting Incident}, FBIS (USSR), Mar. 28, 1985, at A1 (text from Pravda, Mar. 27, 1985, at 5) [hereinafter cited as \textit{Pravda Version}].}

\textit{Soviet Vehicle Rams French Patrol, Kills Officer}, FBIS (W. Eur.), Mar. 30, 1984, at E1 (GDR).\textsuperscript{53}

British MLM officers have been shot at twice in recent years. The Times (London), Mar. 27, 1985, at 5, col. 1. In August, 1982, a Soviet sentry fired at an American MLM patrol. N.Y. Times, Mar. 28, 1985, at A3, col. 4. On May 19, 1982, Soviet troops detained American MLM officers and beat them while their hands were tied behind their back. Wash. Post, Mar. 27, 1985, at A30, col. 1. For other examples of Soviet harassment, see \textit{id.}; L.A. Times, Mar. 31, 1985, at VIII, col. 1. The increased friction in recent years may have resulted from the lack
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Although the Soviet Union and the United States disagreed over two important facts in the Nicholson incident, they agreed on the basic details. On March 24, 1985, Major Arthur D. Nicholson and Sergeant Jessie G. Schatz, both members of the American MLM, were on a reconnaissance mission near Ludwigslust, GDR, seventy miles northwest of Berlin and twenty-five miles from the FRG. They arrived at the scene of the incident at approximately 3:30 pm in a jeep bearing U.S. military plates and markings and containing electronic listening equipment. Major Nicholson, wearing a regular military camouflage field uniform and carrying a camera, left the jeep. Sgt. Schatz, the driver, remained in the vehicle. Major Nicholson then began photographing the interior of a nearby tank shed.

A Soviet sentry guarding the building then fired three shots, one of which struck Major Nicholson. Soviet troops appeared and kept Sgt. Schatz in the jeep. A Soviet soldier with a first aid kit arrived at 4:20 pm but did not attempt to help Nicholson until twenty minutes later. By then Nicholson had already died. The Soviets released Sgt. Schatz within a few hours and turned over Nicholson's body to the American mission later that day.

56. See infra notes 65-68 and accompanying text.
57. The United States never detailed the purpose of the mission; however, Major Nicholson may have been trying to photograph a new Soviet tank gun-mount. The Sunday Times (London), Mar. 31, 1985, at 24, col. 3; Nicholson Allegedly Looking for New Soviet Tank, FBIS (USSR), Apr. 25, 1985, at A1 (Tass report). Another possibility is that Nicholson's mission was related to Soviet military exercises. Ludwigslust is a Soviet training ground, and the Soviets normally hold maneuvers there in the spring. The Economist, Mar. 30, 1985, at 67. Furthermore, American MLM have increased their monitoring since the installation of short-range nuclear missiles in the GDR. N.Y. Times, Mar. 29, 1985, at A11, col. 1.
59. Pravda Version, supra note 52. The Soviet Union claimed it possessed photographic evidence that Nicholson had done this, Soviets Claim Film Evidence of Nicholson Spying, FBIS (USSR), Apr. 29, 1985, at A2 (text from London Daily Telegraph), but it never released such evidence.

The United States initially asserted that Nicholson had been merely walking about without mentioning whether he had attempted to take photographs. N.Y. Times, Mar. 26, 1985, at A4, col. 2. The United States soon acknowledged, however, that he had been photographing the tank shed. N.Y. Times, Mar. 28, 1985, at A3, col. 4. After debriefing Sgt. Schatz, Pentagon officials asserted that, contrary to the previous admission, Maj. Nicholson never reached the shed. Wash. Post, Apr. 17, 1985, at A22, col. 6. The State Department, however, refused to release the contents of Sgt. Schatz's debriefing. N.Y. Times, Mar. 30, 1985, at 2, col. 3.
60. N.Y. Times, Mar. 26, 1985, at A4, col. 2. General Zaitsev, the commander of Soviet forces in the GDR, asserted that Nicholson did not bleed to death because he had "died almost immediately." Soviets Claim Film Evidence of Nicholson Spying, supra note 59. Apart from this isolated statement, however, the USSR did not rebut the claim that Nicholson had been denied medical assistance.
The United States mission in West Berlin immediately lodged a "strong protest" with the Soviet Embassy in East Berlin. In Washington, D.C., Reagan Administration officials protested to various Soviet officials. The United States also took some minor retaliatory acts. The Soviet Union likewise filed an immediate protest, demanding the United States take "necessary measures for [the] strict fulfillment of the 1947 Agreement on Military Liaison Missions."

III. Conflicting Claims

The United States and the Soviet Union disagree over two facts in the incident: first, whether Major Nicholson entered a restricted military zone and second, whether the Soviet sentry gave any warnings before firing. According to the Soviet Union, Major Nicholson had entered a restricted zone clearly demarked by signs in both Russian and German. The United States maintained, on the other hand, that the tank shed was not in a restricted zone. The Soviets also asserted that the sentry had fired warning shots. According to the Soviet Union:

Acting in strict compliance with military regulations the sentry demanded in Russian and German that the stranger stop. When the latter failed to comply and tried to flee the sentry fired a warning shot into the air. Since the intruder did not stop even after this, the sentry had to use his weapon. He fired and killed the intruder.

62. Secretary of State Schultz summoned Soviet Ambassador Anatoly Dobrynin both to lodge a complaint and to demand an apology. N.Y. Times, Mar. 30, 1985, at 2, col. 1. This meeting followed an earlier meeting between Assistant Secretary of State for European Affairs Richard Burt and Oleg Sokolov, the second-ranking Soviet embassy official. Id. The Department of Defense summoned three Soviet military attaches for a reprimand. N.Y. Times, Mar. 29, 1985, at A8, col. 2.
63. The United States cancelled its official representation at the April 25 ceremony in Potsdam, GDR, celebrating the 40th anniversary of the joining of Soviet and American forces in World War II. N.Y. Times, Mar. 29, 1985, at A11, col. 1. American MLM officers were ordered not to socialize with Soviet soldiers in Potsdam. Id. The United States also prematurely terminated a West Coast tour by a Soviet military attaché. N.Y. Times, Mar. 28, 1985, at A3, col. 4. Finally, President Reagan cancelled plans to invite the Soviets to participate in a joint space mission. Wash. Post, Apr. 16, 1985, at A13, col. 6.
64. Pravda Version, supra note 52.
65. Id. Major Nicholson was fluent in Russian. N.Y. Times, Mar. 31, 1985, at A1, col. 4. Restricted areas are usually marked on the ground, and MLM maps indicate these areas as well. THE ECONOMIST, Mar. 30, 1985, at 67.
66. American officials first alleged that Major Nicholson had remained 300 to 500 yards away from the nearest restricted zone. N.Y. Times, Mar. 26, 1985, at A4, col. 1. They subsequently clarified the U.S. position by stating that the area had temporarily been restricted but that the ban had been lifted on February 20, 1985. N.Y. Times, Mar. 28, 1985, at A3, col. 3. After debriefing Sgt. Schatz, however, both Pentagon and State Department officials claimed that the area had never even temporarily been designated a restricted zone. Wash. Post, Apr. 17, 1985, at A22, col. 6.
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The United States rejected this account, contending instead that the sentry gave no warning before firing and fired so rapidly that Major Nicholson did not have time to retreat. 68

IV. Conflicting Conception of Lawfulness

In addition to adopting conflicting versions of the facts, the United States and the Soviet Union asserted conflicting interpretations of the norms governing MLM espionage. Neither country explicitly relied on the traditional, and conflicting, norms governing the treatment of spies. 69 Nor did either refer to the other's intelligence-gathering activities apart from the MLM. 70 Nonetheless, their positions reflect the conflicting background norms: the U.S. position analogized MLM officers to diplomats; the Soviet position invoked the target state's right to protect classified information.

A. American Conception of Lawfulness

The United States asserted a norm that denied state responsibility for espionage by MLM personnel and prohibited the use of retaliatory force by the target state against MLM officers. Relying on the Huebner-Malinin Agreement and the practice of MLM personnel, the United States denied it had committed a wrong and claimed that the Soviet Union had acted improperly.

Emphasizing that Major Nicholson had never entered a restricted military zone, the U.S. invoked point ten of the Agreement which entitles MLM personnel to unlimited travel privileges outside such zones. 71 The

68. Statement by the Principal Deputy Press Secretary to the President, 21 WEEKLY COMP. PRES. DOC. 503, 504 (Apr. 23, 1985).

69. See supra notes 16-45 and accompanying text. Nor did either state differentiate between wartime and peacetime espionage, although one Congressman refused to condemn the shooting because relations with the Soviet Union were equivalent to "an actual state of war." 131 CONG. REC. H3070 (daily ed. May 9, 1985) (statement of Rep. Crockett). Although acceptance of that proposition would have affected the outcome of the incident, the participating elites seemingly preferred not to transform the incident into a debate on the legal status of the Cold War.

70. The United States could have pointed to many other Soviet acts of espionage directed at the U.S. See Dudney & Kelly, The Great Superpower Spy War, U.S. NEWS & WORLD REP., Oct. 29, 1984, at 38, 38-42. Since proportionality requires an equivalent and not identical response, even the United States' unilateral use of its MLM for espionage could have been justified. For example, the U.S. asserted that the Soviet Union's extensive espionage justified the U-2 flights even though the Soviet Union did not conduct similar flights over the U.S. Wright, Espionage and the Doctrine of Non-Intervention in Internal Affairs, supra note 6, at 21. By confining its analysis to mutual practice under the Huebner-Malinin Agreement, however, the United States evinced a desire to limit the implications of the incident.

71. See, e.g., Informal Exchange with Reporters, 21 WEEKLY COMP. PRES. DOC. 362, 363 (Mar. 25, 1985) (President invoking Agreement). The House of Representatives expressed a
United States maintained that MLM personnel were entitled to collect military intelligence outside of these zones. Furthermore, the United States argued that the practice of both Soviet and American MLM personnel legitimated the collection of clandestine information inside restricted zones. MLM personnel routinely entered restricted zones to photograph military installations, and their trucks usually contained electronic listening devices. Thus Pentagon officials stated that, "formal military contacts take a secondary role to what is considered . . . "licensed spying" and both teams have evolved into official intelligence gatherers . . . ." 73

American officials repeatedly noted that Major Nicholson had followed the standard procedures of American MLM officers on reconnaissance missions and that there was nothing unusual about his actions. His uniform and jeep were marked with U.S. military insignia, identifying him as an American MLM officer. Like all MLM officers on patrol, he carried a camera visibly and was unarmed. Thus, he was "acting in accordance with procedures and practices which have been completely normal and accepted for many years. He was acting in accordance with the spirit and letter of the Huebner-Malinin Agreement . . . ." 74 Thus the United States contended that Major Nicholson had not committed a wrong; therefore, the Soviet Union could not hold the U.S. responsible for his attempted espionage.

The United States also maintained that the use of force against Major Nicholson was unjustified. 75 This position viewed the immunity of MLM officers for acts of espionage as an extension of the immunity accorded recognized state agents. To support its position, the U.S. relied on Soviet practice. Although Soviet troops impede the efforts of American liaison officers to obtain classified information by such actions as blocking roads, American MLM officers patrol through the GDR daily

similar view in Resolution 125, condemning the shooting as "inconsistent with point 10 of the Military Liaison Missions Agreement." 131 CONG. REC. H2241 (daily ed. Apr. 22, 1985).
States generally accord diplomats freedom of movement in order to fulfill their duties. 2 C. Hyde, supra note 17, § 432A. However, the United States did not invoke this general privilege, relying instead on point 10.
73. L.A. Times, Apr. 17, 1985, at 115, col. 3.
74. Statement by the Principal Deputy Press Secretary to the President, supra note 68, at 503-04.
75. See The Times (London), Mar. 26, 1985, at 36, col. 1 ("any use of force is totally unjustified").
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without harassment. Moreover, this is true even if Western MLM officers enter a restricted zone.

In addition, the United States emphasized its treatment of Soviet MLM personnel to support its conclusion that the use of lethal force was prohibited. American troops must report all sightings of Soviet patrols. They can detain these officers, but "when making [a] detention, no force should be used or lives endangered." Consistent with these orders, American troops do not fire upon Soviet MLM officers who enter restricted zones. For example, on March 20, 1985, less than one week before Major Nicholson was shot, American soldiers detained three Soviet MLM officers who had been performing reconnaissance activities within a restricted zone. After a brief time, the Americans released them unharmed. Although the orders to the Soviet troops were never made public, they presumably are the same. The United States argued that this mutual practice generated a normative expectation that neither state could employ lethal force to detain a MLM officer even if the officer violated point ten of the Agreement by entering a restricted zone.

The protection afforded diplomats and uniformed soldiers supports the U.S. position. Like diplomats, MLM officers are formally accredited state agents. Their frequent patrols with regularized procedures should generate a protected status. They wear uniforms on patrols and drive conspicuously marked jeeps. Because it is very difficult to distinguish the MLM from visiting friendly forces and because the Soviet Union has

76. N.Y. Times, Mar. 29, 1985, at A11, col. 3.
77. N.Y. Times, Mar. 28, 1985, at A3, col. 3. The standing orders to American troops also provide that they should detain Soviet MLM personnel:
   A. If in a permanent restricted area, or temporary restricted area, within the former U.S. Zone, but not on autobahns in such areas.
   B. If S.M.L.M. personnel are observed photographing, sketching or observing U.S. troop installations or activities in non-restricted areas, S.M.L.M. should be detained, provided the detention can be effected within the immediate vicinity of the installation or activity. Once the S.M.L.M. vehicle departs the immediate vicinity of an area of troop disposition, detention is no longer authorized.

Id.


79. A Soviet statement asserted that Soviet troops are under orders not to fire upon American MLM officers. *U.S. Using Nicholson Affair "for Political Aims,"* FBIS (USSR), May 2, 1985, at A2 (text from Pravda). The United States assumed that these were the formal orders. N.Y. Times, Mar. 28, 1985, at A3, col. 3.

80. Compare Delupis, supra note 6, at 57 (immunity for warships developed because their patrols were common and regular).
consented to their presence, an implied waiver of jurisdiction over MLM personnel may be inferred.

B. Soviet Conception of Lawfulness

Although there is some question whether the shooting was accidental, the Soviet Union has always characterized the shooting as a deliberate response consistent with the Huebner-Malinin Agreement. Furthermore, it distinguished between the right to shoot unidentified intruders and its intention not to use force against MLM officers. Despite its broad validation of the use of force, the Soviet Union did not seek any further retaliation against the U.S.

In contrast to the United States, the Soviet Union insisted on a strict interpretation of the Agreement. Because point ten of the Agreement explicitly excepts "places of disposition of military units" and because the Agreement does not list the gathering of military intelligence as a duty of MLM personnel, the Soviet Union concluded that MLM of-

81. One source indicated that the sentry was absent from his post and panicked when he saw Major Nicholson near the tank shed. N.Y. Times, Apr. 24, 1985, at A7, col. 1. Given the increasing incidence of Soviet harassment, see supra note 55 and accompanying text, the shooting may have resulted from official encouragement.

82. Huebner-Malinin Agreement, supra note 50. If a MLM officer wishes to visit such an area, he must file a request with the Soviet forces. Id. Also, the accrediting army sometimes invites liaison officers to observe military exercises, but even then it will restrict what the officers can observe. The Times (London), Mar. 26, 1985, at 36, col. 2. Recent protests have reduced the number of restricted zones in the GDR, but they still cover one-half of its territory. In contrast, restricted zones cover only about one-fifth of the FRG. The Sunday Times (London), Mar. 31, 1985, at 24, col. 1.

Despite the freedom of travel normally accorded diplomats, both the United States and the Soviet Union restrict the travel privileges of each other's diplomats, with currently a quarter of each country declared off limits. N.Y. Times, Feb. 7, 1986, at A5, col. 4. There is no reported instance of a diplomat being killed because he entered a restricted area.

83. See supra note 49. This understanding is supported by the instructions given to the first chief of the U.S. MLM. They provide:

The functions of the Mission will be to assist any US agency in its dealing with the Soviet Headquarters, and to follow up Soviet execution of Quadruplicate agreements, reporting to this headquarters any failure on the part of the Soviets to enforce such agreements. Following are matters with which the Mission will deal, in addition to any other matters specified by this headquarters:

a. Graves registration . . .

b. Assist in securing permission for personnel to travel on compassionate leave in Soviet controlled areas.

c. Secure witnesses for trial in the US Zone when witnesses reside in the Soviet Zone.

d. Extradite prisoners, either military or civilian, for trial in the US Zone.

e. Assist in efforts to protect US trains from pilferage in crossing the Soviet Zone.

f. Assist in the inter-zone transfer of prisoners of war.

g. Assist in improving relations between the military personnel of one Zone of Occupation with military personnel of the other Zone of Occupation in matters arising from the inter-zonal travel, black market activities and border disputes and incidents.

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Officers are not entitled to commit espionage with immunity. The Soviet Union readily recognized that American MLM officers enter restricted areas to obtain protected information even though it never admitted that its officers did the same. Nonetheless, it refused to acknowledge that such practice legitimated their espionage activities. Thus, according to the Soviet version of the facts, Major Nicholson had violated the Agreement by committing espionage in a restricted zone. Although the Agreement provides some limited immunity, the Soviet Union was free to use lethal force to protect its military secrets.

To further justify the shooting, the Soviet Union classified Major Nicholson as an "unknown intruder." This cast Nicholson as a spy removed from any protection under the Agreement and permitted broad retaliatory measures by the Soviet Union. Even the tone of Soviet statements implied that Nicholson had acted improperly. Thus, the Soviet account of the incident stated that, "wearing a camouflage suit," Major Nicholson "secretly approached" the shed. More importantly,

Dep't of State). These instructions also provide that the MLM will maintain a station in Berlin "for the purpose of preparing and processing documents of a confidential nature." Id. para. 6. This does not necessarily indicate that the officers were to commit espionage, for their listed tasks could entail confidential matters.

84. The Huebner-Malinin Agreement endows the mission building with the full rights of extraterritoriality, Huebner-Malinin Agreement, supra note 46, para. 13; provides immunity to liaison couriers to their home army, id. para. 11(b); and assures communication with the home army, id. paras. 11(a),(c).

85. The actions of the Soviet sentry... were not taken against a member of the U.S. military missions as such, but against an unknown intruder who was carrying out an intelligence mission and did not comply with the warnings of the sentry, who was acting in strict conformity with the military manuals.

So, under those circumstances, due to the very behavior of the U.S. serviceman, the procedures could not be applied under which both sides did not use, do not use, and do not intend to use weapons when apprehending and driving out members of the military liaison missions.


86. Although Major Nicholson had performed other reconnaissance missions, N.Y. Times, Apr. 24, 1985, at A7, col. 1, the Soviet Union did not justify the shooting on these grounds. To the extent the Soviet Union was aware of this, its position can be seen as confirming the norm that a spy receives immunity by rejoining his army. See supra notes 28-30 and accompanying text.

87. Pravda Version, supra note 52. This allusion to the disguise requirement, however, does not justify the shooting. A person in military clothing is not in disguise, and has a "complete defense against a charge of spying." Note, supra note 8, at 439. A military camouflage field uniform with U.S. military insignia—the uniform normally worn on patrols by American MLM officers—and a similarly marked jeep would have identified Major Nicholson as a MLM officer.

88. Pravda Version, supra note 52. Secrecy, however, is not a traditional element of a spy. See, e.g., Halleck, supra note 29, at 591 ("an enemy who comes within our lines, without disguise or false pretenses, and seeks information, no matter how secretly, is no spy"). Moreover, if preventing the dissemination of harmful information is the guiding principle, then secrecy should be irrelevant.

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by denying the legitimacy of the MLM's espionage function, the Soviet Union implied that Nicholson had acted under false pretenses. Thus the use of deadly force against Major Nicholson was an appropriate proportionate response to prevent the dissemination of valuable military information. Even though the Soviet Union denied that practice legitimated the intelligence gathering of MLM personnel, it invoked such practice under the Agreement in order to exonerate itself. It emphasized that in conformity with accepted practice, it had posted warning signs and that the sentry had given the requisite warnings before firing.\textsuperscript{89} Furthermore, it quickly released Sgt. Schatz, respecting his privilege under Agreement practice not to answer questions.

If the incident is analyzed in terms of the norms permitting the target state to use lethal force to protect classified information, the Soviet Union was justified in shooting Major Nicholson. MLM personnel are not diplomats; thus they lack immunity for their acts of espionage. Further, Major Nicholson was attempting to obtain highly sensitive intelligence concerning Soviet military capabilities, justifying the shooting as an appropriate proportional measure in self-defense. Despite the potential harm of Major Nicholson's activities, the Soviet Union never claimed that the United States had committed a wrong. Although the Soviet Union said the U.S. was "responsible" for the incident,\textsuperscript{90} it never asked for an apology or demanded any compensation. Thus the Soviet Union too declined to find inter-state responsibility for the attempted espionage.

\textbf{V. International Appraisal}

Unlike previous incidents involving MLM personnel, the Nicholson shooting received significant publicity. The United Kingdom and France—the other states with MLM in the GDR—both condemned the shooting. The U.K. viewed the shooting as provocative.\textsuperscript{91} France was particularly angered because the Soviet Union had assured it after a French MLM officer was killed the previous year that similar incidents would not recur.\textsuperscript{92} Nevertheless, neither continued to criticize the Soviet Union even though the Soviet Union's asserted right to use force applied to all MLM officers. Furthermore, the commanders-in-chief of the Brit-

\textsuperscript{89} See \textit{supra} notes 65-68 and accompanying text.


\textsuperscript{91} \textit{The Times} (London), Mar. 29, 1985, at 4, col. 3 (statement of Prime Minister Thatcher).

\textsuperscript{92} \textit{N.Y. Times}, Mar. 29, 1985, at A11, col. 1.
ish and French armies stationed in West Germany declined to take any retaliatory actions against Soviet MLM officers.\textsuperscript{93}

That the British and French condemnation came while the facts were unsettled could suggest that their reaction was reflexive. However, it may reflect their belief that the use of lethal force against MLM personnel is unwarranted under all circumstances. Nor is their subsequent silence and refusal to retaliate necessarily an acceptance of the Soviet position. Rather, it could indicate their perception that a sustained public debate over the incident would not resolve the conflicting positions.\textsuperscript{94} Furthermore, both France and the U.K. may have felt the United States would adequately defend their claim.

The reaction of the elites on whose territory the MLM are stationed also indicated a desire to downplay the incident. West German politicians criticized the shooting but added the suggestion that the MLM be dismantled.\textsuperscript{95} Significantly, officials of the GDR declined to comment on the incident, stating that the officers were accredited to the Soviet Union.\textsuperscript{96}

Other elites who were not direct participants did not respond vigorously to the Nicholson incident. Any reaction tended to follow an East-West line.\textsuperscript{97} Most states did not respond at all. Their silence suggests that the incident did not implicate norms beyond the Huebner-Malinin
Agreement. Since MLM espionage does not fit into the traditional categories of spying, any governing norms are inapplicable to other contexts. The incident did not affect their interests, and there was no reason for them to influence their actions in unrelated espionage incidents.

VI. Outcome

After their initial protests, the United States and the Soviet Union quickly agreed to hold a series of meetings between General Otis, Commander-in-Chief of the U.S. army stationed in Europe, and General Zaitsev, Commander-in-Chief of the Soviet army in the GDR. The purpose of these meetings was to resolve "this entire matter and also to consider possible measures to prevent [future] incidents . . . ." Only one meeting between Otis and Zaitsev was held, however, because the two sides failed to agree on the appropriate use of force against MLM officers. The United States claimed that the Soviet Union had promised during the meeting not to use deadly force, but the Soviet Union denounced this characterization of its position. As a result, the United States failed to achieve any of its stated objectives from the meeting: agreement on the facts, an apology or compensation, and punishment of the sentry.


Other states, however, blamed neither the U.S. nor the U.S.S.R. and urged restraint. See, e.g., Politika: Ludwigslust Shows Need for Restraint, FBIS (E. Eur.), Mar. 29, 1985, at 111 (Yugo.) (Tanjug report) ("The tragic incident at Potsdam could be a useful moral for the main protagonists of the European and world military-espionage race—rivalry is becoming more and more dangerous, calming down is more and more essential . . . .").

98. See supra notes 61-64 and accompanying text.
100. The State Department reported that the Soviets had promised "that they will not permit the use of force or weapons against the members of our liaison missions in the future." N.Y. Times, Apr. 17, 1985, at A12, col. 5.
103. General Zaitsev stated that he lacked authority to discuss either issue. L.A. Times, Apr. 17, 1985, at I1, col. 6. An unidentified Pentagon official stated, however, that he believed "the United States had got as much as it was likely to receive from the Soviet side." N.Y. Times, Apr. 17, 1985, at A12, col. 6.

The House of Representatives passed a resolution urging the President to expel Soviet Ambassador Dobrynin unless the Soviet Union apologized by June 1, 1985. 131 CONG. REC. H3067, H3071 (daily ed. May 9, 1985). The Reagan Administration thought such action "un-
Even though the Soviet Union and the United States continued to disagree over the use of force, the shooting did not seriously disrupt Soviet-American relations. The United States expelled a Soviet military attaché to protest the failure of the Otis-Zaitsev meeting, but avoided wide political and economic sanctions. Unlike the KAL incident when the U.S. terminated negotiations for a summit, the United States continued arms reduction negotiations with the Soviet Union. The American attitude towards the Otis-Zaitsev meeting demonstrated its desire to downplay the incident. Not only did the United States mildly respond to the dispute over the meeting, but also it did not precondition the talks on a Soviet apology. It was even reluctant to discuss the meeting with the press.

The Soviet Union too sought to avoid any serious rupture in its relations with the U.S. Although the Soviet Union normally responds to an expulsion of one of its diplomats by expelling a diplomat of the other state, the Soviet Union did not retaliate for the expulsion of its military attaché. This failure to respond could be construed as a Soviet admission that the American account of the Otis-Zaitsev meeting was accurate. More likely, it reflects a Soviet desire not to impair relations

104. There were unconfirmed reports that the sentry had been arrested. FRG TV: Soldier Arrested for Nicholson Killing, FBIS (USSR), Apr. 12, 1985, at A2 (Hamburg ARD television news report). However, General Zaitsev stated that “no fault lies with the Soviet soldier . . . . We cannot punish him.” Soviets Claim Film Evidence of Nicholson Spying, supra note 59. Western observers viewed the leak as a disinformation ploy to mute criticism. The Times (London), Apr. 11, 1985, at 1, col. 7. Punishment of the sentry would be wildly inconsistent with Soviet statements and actions.


107. Secretary of Defense Weinberger, however, argued that the Soviet Union should apologize before the United States participated in any talks. L.A. Times, Apr. 17, at 115, col. 3. He did not suggest, however, that the shooting should interfere with the arms control discussions. N.Y. Times, Mar. 27, 1985, at A11, col. 1.


109. The Soviet Union will do this either to protest an abusive expulsion or to avoid the appearance of acknowledging fault. For example, during the incident, the United Kingdom expelled several Soviet representatives involved in espionage. The Soviet Union responded by expelling several British representatives on the same grounds. EXPULSIONS OF SOVIETS, supra note 7, at 2; In the USSR Ministry of Foreign Affairs, Pravda, Apr. 25, 1985, at 4, reprinted in CUR. DIG. SOV. PRESS, May 22, 1985, at 109.
with the U.S. over the incident.\textsuperscript{110} In addition, the Soviet Union never suggested that the arms control talks be cancelled, and it even agreed to continue talks on various issues concerning human rights.\textsuperscript{111} Finally, the tone of Soviet statements concerning the incident was not harsh,\textsuperscript{112} and the content of these statements was sometimes conciliatory.\textsuperscript{113}

The failure of the Otis-Zaitsev meeting to reconcile the conflicting U.S. and Soviet positions could suggest that MLM officers are not entitled to any immunity. The Soviet Union never apologized for the shooting nor undertook any actions that indicated an intention not to use deadly force again against MLM officers. The Soviet assertion that it was unaware that Major Nicholson was a MLM officer appears disingenuous, and in the future, other MLM officers, despite their military insignia, may unwittingly become "unknown intruders." Although the Soviet Union attempted to mute criticism of the shooting, its efforts seem to have been an attempt to avoid a rift with the U.S. rather than a tacit promise not to use lethal force against MLM patrols. In fact, Soviet troops still occasionally harass Western MLM officers.\textsuperscript{114} As for the United States, it did not strenuously seek a Soviet apology. Instead, its attention was directed towards preventing other shootings.

\textsuperscript{110} When the U.S. expelled the attaché, it cautioned the Soviet Union that it did "not wish to get into a fruitless cycle of retaliation and counterretaliation." L.A. Times, Apr. 27, 1985, at I1, col. 1. Two months later, the Soviet Union did cancel a meeting between Soviet and American naval officers, but only after the U.S. cancelled the social events normally accompanying the meeting. Wash. Post, June 20, 1985, at A28, col. 1. These talks, held annually under the Agreement on the Prevention of Incidents On and Over the High Seas, May 25, 1972, 23 U.S.T. 1168, T.I.A.S. No. 7379, aim to develop rules of conduct to prevent collisions between American and Soviet ships as the result of intimidating conduct, thus paralleling the Otis-Zaitsev meeting. Neither side had ever cancelled these talks, not even during the KAL incident. Wash. Post, June 20, 1985, at A28, col. 1.

\textsuperscript{111} Wash. Post, Apr. 17, 1985, at A18, col. 1.

\textsuperscript{112} Unlike Soviet accounts of the KAL downing, the Soviet Union described the incident as "regrettable" and only briefly described the facts. Nor did the reports in Pravda carry the standard headings indicating high authority of origin. N.Y. Times, Mar. 27, 1985, at A11, col. 3. Some believed this demonstrated the Soviet Union's intent to downplay the shooting. Wash. Post, Mar. 27, 1985, at A30, col. 2.

\textsuperscript{113} For example, during a meeting with U.S. Congressmen, Gorbachev reportedly said "that a change in the ground rules governing U.S. and Soviet military liaison officers in Germany 'could very well be the outcome' of Nicholson's death and that 'it should never happen again.'" Wash. Post, Apr. 17, 1985, at A1, col. 5.

\textsuperscript{114} On June 4, 1985, a British MLM patrol was chased and rammed by a Soviet truck even though the patrol was three miles from a restricted zone. The Soviets threw bricks and a shovel at the patrol and held the British officers at gunpoint for several hours. The Times (London), June 8, 1985, at 1, col. 4. The British lodged a complaint that the Soviet Union merely "noted." The Times (London), June 11, 1985, at 8, col. 4. British sources added that the U.K. did not expect an apology. \textit{Id}. On September 7, 1985, a Soviet truck rammed a U.S. MLM vehicle entangled in barbed wire near a Soviet military installation, injuring one American officer. The Soviets briefly detained the officers and never apologized for the incident. L.A. Times, Sept. 20, 1985, at 14, col. 1. There has been no significant international response to the continuing friction.
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It would be premature, however, to interpret the outcome as denying a protected status to MLM officers. Although there has always been friction between Soviet troops and Western MLM personnel, countless MLM patrols have occurred since 1947 without interference. Only recently has the incidence of violence increased. Therefore, the U.S. expectation concerning the safety of MLM officers was well-founded, but U.S. elites probably viewed broad sanctions as unproductive. Instead, the United States maintained that preserving normal relations with the U.S.S.R. would best protect MLM officers.\footnote{See, e.g., Interview with Lou Cannon, Dave Hoffman, and Lynn Downie of the Washington Post, 21 WEEKLY COMP. PRES. DOC. 397, 398 (Apr. 1, 1985).}

Significantly, the Soviet Union too has avoided the maximum assertion of its claim. Because the shooting of Major Nicholson was the first incident involving MLM personnel to generate significant publicity, the Soviet Union may have asserted an extreme claim to avoid public acknowledgement of fault. Furthermore, the Soviet Union never requested that the U.S. dismantle its MLM. This suggests that the Soviet Union benefits from its MLM and the U.S. disavowal of force. Therefore, it will not provoke the U.S. into using force or terminating the Agreement. Since the incident, Western MLM personnel have continued to patrol throughout the GDR,\footnote{N.Y. Times, Apr. 27, 1985, at 2, col. 6.} and only two instances of excessive violence have been reported.\footnote{See supra note 114.} Thus despite the Soviet Union’s position, most MLM patrols remain unmolested.\footnote{Furthermore, the Soviet Union still accords immunity to American diplomats accused of espionage. Since the Nicholson shooting, the Soviet Union has expelled unharmed two American diplomats accused of committing espionage. Pravda, June 15, 1985, at 6, reprinted in CUR. DIG. SOY. PRESS, July 10, 1985, at 18 (P. Stombach, Second Secretary at U.S. Embassy in Moscow); N.Y. Times, Mar. 15, 1986, at 3, col. 2 (M. Sellers, Second Secretary at U.S. Embassy in Moscow). Because these expulsions occurred long after the U.S. expulsion of the Soviet military attaché, see supra text accompanying note 105, it is unlikely that the Soviet expulsions were in retaliation for the U.S. expulsion.}

Although the United States and the Soviet Union disagreed over the protection accorded MLM personnel, they reinforced the norm that espri-
onage does not justify broad inter-state retaliation by the target state. Unlike the KAL and U-2 incidents, the shooting of Major Nicholson did not provoke a major East-West crisis. The reinforcement of this norm has a positive effect on world order, for it enables states to obtain intelligence about each other without any deleterious effect on their overall diplomatic relations. World order requires rational decisionmaking, which in turn requires full information. Elites should therefore generate norms which facilitate the exchange of intelligence, rather than act with a dangerous lack of information.119 With the existence of a closed Soviet society and of mutual distrust between the United States and the Soviet Union, MLM espionage can provide information necessary for planning. Furthermore, as an institutionalized mechanism, the MLM can provide a regular exchange of information.120 Although the MLM's cannot satisfy either state's entire intelligence needs, the U.S. and the U.S.S.R. have recognized a common interest in their operation.

Both the United States and the Soviet Union will continue to use the MLM to collect classified information. Although the issue of the appropriate use of force remains unsettled, the Nicholson incident suggests its resolution can occur without impeding their diplomatic relations. This mutual desire to test the operating norms without disrupting their relations ultimately promotes world order. It is hoped, however, that in the future, challenges to this remote and dark profession will occur without individual tragedy for the MLM officers.

119. See McDougal, Lasswell & Reisman, supra note 9, at 432-33. See also V. Van Dyke, International Politics 349-50 (2d ed. 1966) (discussing need to structure intelligence gathering to problem solving). Professor Falk has argued that unilateral acts of espionage destabilize world order because in the absence of centralized ordering techniques, their legitimacy can only be resolved through extreme assertions of national power: the gathering state will spy, and the target state will shoot back. Furthermore, if the target state feels its weaknesses have been dangerously uncovered, it might be tempted to a first strike before the gathering state can assimilate the information. Falk, Space Espionage and World Order: A Consideration of the Samos-Midas Program, in Essays and Espionage in International Law 45, 55-57, 61 (R. Stanger ed. 1962). Although perhaps overstated, this argument highlights the need for shared exchanges of information.

120. Whether particular information promotes stability depends on its use to the gathering state. Military intelligence can document an opponent's offensive capabilities and indicate its hostile intent. This enables countermeasures and reduces the risk of surprise attack. In fact, some argued that protection from a surprise attack was the MLM's primary function. The Times (London), Mar. 27, 1985, at 5, col. 1. However, military intelligence can also expose a state's weaknesses, tempting the gathering state to the use of force. These two uses have been labelled the "red light function" and "green light function" respectively. Stone, supra note 7, at 41-43. A regularized mechanism providing a constant exchange of intelligence lessens the green light function by minimizing unanticipated developments that leave some actors unprepared.