

# Recognition *De Facto*, Recognition *De Jure*, and the United States' Policy Toward the Soviet Annexation of the Baltic Republics

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## Abstract

*The vast majority of scholars maintain that the United States (U.S.) extended neither de facto nor de jure recognition to the Soviet Union's 1940 annexation of Estonia, Latvia, and Lithuania. A small minority of commentators hold otherwise, and they argue that, even though Washington withheld de jure recognition, it accepted the annexation de facto. Some writers simply assert that the U.S. refused to recognize this incorporation de jure. Others describe the U.S.'s position without any reference to the concepts of de facto and de jure recognition. This Article seeks to determine which of these approaches is most consistent with the U.S.'s actual attitude toward the Baltic annexation. To address this issue, which has previously received almost no consideration, this Article examines the relevant aspects of the U.S.'s non-recognition policy with respect to the subjugation of the Baltic Republics. Particular attention is given to statements by authoritative U.S. decisionmakers and diplomats. The Article also demonstrates why this historical analysis is relevant in light of Russia's recent claims to Crimea. The findings consider whether the concepts of de facto and de jure recognition add anything useful to the body of knowledge on the subject and deepen our understanding of U.S. policy in the Baltic case.*

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## I. INTRODUCTION

The Baltic Republics of Estonia, Latvia, and Lithuania were annexed by the Union of Soviet Socialist Republics (U.S.S.R.) in 1940 and remained part of it for more than fifty years. The annexation was brought about by the threat of force<sup>1</sup> and was devoid of military resistance.<sup>2</sup> This fact, however, did not prevent the United States (U.S.) from opposing the incorporation. Washington condemned the subjugation of the Baltic Republics even before its formal completion in August 1940.<sup>3</sup> It then pursued a manifest and longstanding policy of non-recognition until Estonia, Latvia, and Lithuania reached independence in 1991.<sup>4</sup>

The U.S. attitude toward the absorption of the Baltic countries provoked a wealth of scholarly commentary, an analysis of which reveals an interesting detail: a small minority of writers describe the position of the U.S. without any reference to the concepts of *de facto* and *de jure* recognition. Studies by William Hough and Thomas Grant are good examples of this.<sup>5</sup> Both writers thoroughly discuss the non-recognition policy pursued by Washington between 1940 and 1991 but make no mention of the concepts of *de facto* and *de jure* recognition.

The vast majority of academics prefer the opposite approach. They utilize the concepts of *de facto* and *de jure* recognition, but their descriptions of the U.S.'s attitude vary. Most of these scholars argue that the U.S. "accorded neither *de jure* nor *de facto* recognition to the Soviet annexation of the Baltic States."<sup>6</sup> Some of these commentators express the same idea in a slightly different way. They point

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<sup>1</sup> See YAEL RONEN, *TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW* 22 (2011).

<sup>2</sup> See Hans Baade, *Die Bundesrepublik Deutschland und die Baltischen Staaten*, 7 GERMAN Y.B. INT'L L. 34, 35 (1957); Igor Grazin, *The International Recognition of National Rights: The Baltic States' Case*, 66 NOTRE DAME L.R. 1385, 1405 (1991); LAURI MÄLKSOO, *ILLEGAL ANNEXATION AND STATE CONTINUITY: THE CASE OF THE INCORPORATION OF THE BALTIC STATES BY THE USSR* 84, 189 (2003).

<sup>3</sup> See Thomas Grant, *United States Practice Relating to the Baltic States, 1940–2000*, 1 BALTIC Y.B. INT'L L. 23, 28–29 (2001).

<sup>4</sup> See *id.* at 24; Robert Vitas, *U.S. Nonrecognition of the Soviet Occupation of Lithuania*, 267–68 (1989) (Ph.D. dissertation, Loyola University of Chicago) (on file with author); MÄLKSOO, *supra* note 2, at 126.

<sup>5</sup> See William Hough, *The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 301, 391–412 (1985); Grant, *supra* note 3.

<sup>6</sup> MÄLKSOO, *supra* note 2, at 118. See also Wilhelm Grewe, *Gerichtbarkeit*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 153, 154 (1946); HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 432 (1947); Vitas, *supra* note 4, at 267; STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW* 103 (1998); HEIKE KRIEGER, *DAS EFFEKTIVITÄTSPRINZIP IM VÖLKERRECHT* 440 (2000); MALCOLM SHAW, *INTERNATIONAL LAW* 469 (6th ed. 2008); KAAREL PIIRIMÄE, *ROOSEVELT, CHURCHILL, AND THE BALTIC QUESTION: ALLIED RELATIONS DURING THE SECOND WORLD WAR* 41 (2014).

out that certain countries acknowledged the incorporation *de facto* but not *de jure*, contending that the U.S. “refused all recognition.”<sup>7</sup>

Another group of authors—Daniel Turack, Undine Bollow, Soonchun Lee, and Susan Himmer<sup>8</sup>—maintains that the U.S. did not accept the incorporation of the Baltic Republics *de jure*. Whether *de facto* recognition, in their view, was also rejected is unclear. Turack, Bollow, and Lee do not raise this question at all, while Himmer asserts that “the international community eventually gave *de facto* recognition to the Soviet Union’s illegal annexation of the Baltics.”<sup>9</sup> This statement implies that the U.S., as a part of the international community, also acknowledged *de facto* the submergence of Estonia, Latvia, and Lithuania into the U.S.S.R. Further, Himmer writes that “many countries eventually gave *de facto* recognition to the annexation.”<sup>10</sup> However, she fails to clarify whether the U.S. was among these “many countries.”

The position of Julius Silverman, member of the British Parliament, on the U.S. policy toward the Baltic situation was less ambiguous. On May 23, 1947, M.P. Douglas Savory, speaking of the subjugation of Estonia, Latvia, and Lithuania, claimed in the House of Commons that “[t]he United States have recognised this annexation neither *de facto* nor *de jure*,”<sup>11</sup> to which Silverman replied:

It has been said by the hon. Member for Queen’s University that the Americans have not recognised, *de facto*, the incorporation of those countries. I venture to disagree. I would refer him . . . to what was said at Potsdam, because at Potsdam there was an agreement which throws a great deal of light on the subject. It is in relation to the incorporation of the city of Königsberg and the adjacent area into the Soviet Union. At the Conference, which included the Americans as well as the British, “the proposal of the Soviet Government was agreed concerning the ultimate transfer to the Soviet Union of the City of Königsberg and the area adjacent to it, subject to examination of the actual frontier.” . . . What I am pointing out is that it clearly could not be intended that this little area of East Prussia should be delivered over as a disembodied entity to the territory of the U.S.S.R. without any contiguity to any other part of Soviet territory. The implication is inescapable. As this particular territory is adjacent to the Soviet territory of Lithuania, it implies

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<sup>7</sup> 1 OPPENHEIM’S INTERNATIONAL LAW 193 (Robert Jennings & Arthur Watts eds., 1992). See also Craig Gerrard, *Britain and the Baltic States: The Late 1940s and the Early 1990s*, in THE BALTIC QUESTION DURING THE COLD WAR 73, 76 (John Hiden, Vahur Made & David Smith eds., 2008).

<sup>8</sup> Daniel Turack, *Selected Aspects of International and Municipal Law Concerning Passports*, 12 WM. & MARY L. REV. 805, 826 (1970–1971); Susan Himmer, *The Achievement of Independence in the Baltic States and Its Justifications*, 6 EMORY INT’L L. REV. 253, 272 (1992); UNDINE BOLLOW, DIE BALTISCHE FRAGE IN DER INTERNATIONALEN POLITIK NACH 1945 4 (1993); Soonchun Lee, *Identity and Continuity of State: The Cases of the Baltic States and Korea*, 10 KOREA U.L. REV. 149, 153 (2011).

<sup>9</sup> Himmer, *supra* note 8, at 255.

<sup>10</sup> *Id.* at 271–72.

<sup>11</sup> Hansard HC Volume 437, Column 2761 (May 23, 1947).

the recognition of the Baltic States being Soviet. I do not see how one can escape that conclusion.<sup>12</sup>

In sum, the commentators mentioned above can be divided into four groups. The first group simply argues that the U.S. refused to recognize the Soviet annexation of the Baltic Republics *de jure*. This idea is shared by the second and third groups, although those groups differ from each other in a significant way. The second—and largest—group maintains that the U.S. gave the annexation neither *de facto* nor *de jure* recognition, while the third group asserts that Washington accepted the incorporation *de facto* but not *de jure*. The fourth group describes the position of the U.S. without any reference to the concepts of *de facto* and *de jure* recognition.

This background sets up this Article's main question: Are any of these characterizations of the American attitude toward the Baltic annexation actually accurate? Section II of the Article will demonstrate that the U.S. employed neither *de jure* nor *de facto* recognition when developing its non-recognition policy toward the Baltic annexation. Section III will explain why many commentators have nevertheless resorted to these concepts to describe the U.S.'s position. Section IV will then show how the discussion of the U.S.'s approach to the Soviet absorption of Estonia, Latvia, and Lithuania may be relevant in the context of current efforts to resist Russian claims to Crimea. Drawing on the arguments provided in the previous sections, this Article concludes that the concepts of *de facto* and *de jure* recognition are not always useful, and may, in fact, contribute to a misunderstanding of the U.S.'s actions vis-à-vis its non-recognition policy in the Baltic case.

## II. THE U.S.'S ACTUAL POLICY: NO MENTION OF RECOGNITION

In the first half of the twentieth century, the U.S. occasionally extended *de facto* and *de jure* recognition to new states and governments—especially to those that emerged immediately following the end of World War I.<sup>13</sup> Recognition *de facto* and recognition *de jure* were both discretionary and deliberate acts by the executive branch of government. Acknowledgment of a certain state or government was made, and pertinent legal consequences resulting from such acknowledgment were admitted.

The U.S.'s practice with respect to territorial annexations, however, was different. This became especially evident in the 1930s—a decade in which involuntary border changes befell numerous countries. The U.S. adopted various

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<sup>12</sup> Hansard HC Volume 437, Columns 2769–70 (May 23, 1947).

<sup>13</sup> See Lauterpacht, *supra* note 6, at 333–34; TALMON, *supra* note 6, at 64; Grant, *supra* note 3, at 40, 59.

attitudes toward these changes,<sup>14</sup> but at no time did it express its position by utilizing the notions of *de facto* and *de jure* recognition. When the U.S.S.R. annexed Estonia, Latvia, and Lithuania, the U.S. followed this approach. Instead of announcing that Washington did not accept Soviet rule over the Baltic region *de facto* or *de jure*, U.S. decisionmakers and their spokespersons used other ways to articulate the regime of non-recognition.

On June 12, 1966, for example, U.S. Vice President Hubert Humphrey proclaimed that “[o]ur Government has soundly refused either to condone or to accept the forced illegal annexation of the Baltic Nations and their territories into the Soviet Union.”<sup>15</sup> On June 26, 1979, Deputy Assistant Secretary of State for European Affairs Robert Barry, speaking before the Subcommittee on International Organizations of the House Foreign Affairs Committee, similarly stated that “[r]ecognition of the Soviet incorporation of Estonia, Latvia, and Lithuania is ours to extend or withhold, and we have not extended it. Recognition is not for others to infer or to assume on the basis of particular acts by the United States involving particular individuals or subjects.”<sup>16</sup>

It follows from the above that statements describing the U.S. position in the Baltic case in terms of recognition *de facto* and *de jure*<sup>17</sup> are historically incorrect. And scholars of U.S. policy are not alone in this mischaracterization of international responses to the Baltic annexation. To give one example: the German Federal Ministry of the Interior issued a letter in 1952 stating that the annexation of Estonia, Latvia, and Lithuania by the U.S.S.R. “was recognized neither by the German Reich nor by the Federal Republic of Germany.”<sup>18</sup> German lawyer and social scientist Boris Meissner construed that letter to mean that “the Soviet annexation of the Baltic States is not (*de jure*) recognized by the former Reich or by the Federal Republic [of Germany].”<sup>19</sup>

Professor Hans Baade was the first to note Meissner’s mischaracterization, pointing out that the words “*de jure*” are not actually part of the letter. He

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<sup>14</sup> The U.S. refused to recognize the Italian annexation of Ethiopia in 1936. See *International Law—Concurrent De jure—De facto Recognition*, 39 COLUM. L. REV. 704, 705 (1939); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 414 (1968). For the opinion that the U.S. recognized the Anschluss (the annexation of Austria into Germany), see James Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 AM. J. INT’L L. 421, 423 (1938); KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 345 (1968); OLIVER DÖRR, *DIE INKORPORATION ALS TATBESTAND DER STAATENSUKZESSION* 328 (1995); MÄLKSOO, *supra* note 2, at 8, 180.

<sup>15</sup> Hough, *supra* note 5, at 406.

<sup>16</sup> Grant, *supra* note 3, at 87.

<sup>17</sup> See *supra* notes 6–8, 11–12.

<sup>18</sup> Baade, *supra* note 2, at 34 (author’s translation).

<sup>19</sup> BORIS MEISSNER, *DIE SOWJETUNION, DIE BALTISCHEN STAATEN UND DAS VÖLKERRECHT* 305 (1956) (author’s translation).

presumed that Meissner deemed it necessary to interpolate them “because earlier [in the text] he stated . . . that the German Reich recognized the Soviet annexation of the Baltic States *de facto* but not *de jure*.”<sup>20</sup>

Baade did not explain why so many commentators have wrongly used the concepts of *de facto* and *de jure* recognition to characterize international policy responses in the Baltic case. The following discussion grapples with this question, particularly with respect to the U.S. response.

### III. WHY THE U.S.’S POLICY HAS BEEN MISCHARACTERIZED

Commentators have characterized the U.S. response to the Baltic annexation in two main ways—both of which are incorrect. One group has argued that the U.S. recognized the Soviet annexation of the Baltic states neither *de facto* nor *de jure*. The other group has asserted that the U.S. recognized the annexation *de facto*, but not *de jure*. This Section demonstrates why these mischaracterizations have arisen, despite evidence that the U.S. actually never used the language of recognition when formulating its policy for this situation.

#### A. Mischaracterization #1: “Neither *De Facto* Nor *De Jure* Recognition”

The proposition that the U.S. recognized the Soviet annexation of the Baltic States neither *de facto* nor *de jure* must imply that the American approach to the subjugation of Estonia, Latvia, and Lithuania was less tolerant of Soviet actions than the approach of countries that accepted it only *de facto*. And some members of the U.K. Parliament in the 1940s clearly believed that this was the case. Illustrative of this is a statement made by M.P. Douglas Savory in the House of Commons in 1947:

His Majesty’s Government . . . recognise[s] that the Baltic States have *de facto* been absorbed into the Soviet Union, but they do not recognise this *de jure*. . . . I appeal to His Majesty’s Government to contrast their attitude with the attitude adopted by the United States of America. The United States have recognised this annexation neither *de facto* nor *de jure*. . . . I would ask the representative of the Foreign Office to explain this difference between the noble attitude adopted by the United States Government and—I will not call it ignoble, because I do not want to say anything offensive—the less noble attitude followed by His Majesty’s Government.<sup>21</sup>

Unlike the U.S., the U.K. did employ the concepts of *de facto* and *de jure* recognition when formulating its policy toward territorial acquisitions resulting from the threat or use of force. For instance, in 1936, the British Government

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<sup>20</sup> Baade, *supra* note 2, at 65 (author’s translation).

<sup>21</sup> Hansard HC Volume 437, Columns 2761–62 (May 23, 1947).

announced that it recognized the Italian conquest of Ethiopia *de facto*<sup>22</sup> and granted *de jure* recognition two years later.<sup>23</sup> In the aftermath of World War II, London then recognized the absorption of Estonia, Latvia, and Lithuania into the U.S.S.R. *de facto*.<sup>24</sup> Australia and Canada are the only known countries to have taken the same step.<sup>25</sup>

The mischaracterization under consideration may convey the idea that the U.S.'s attitude toward the Baltic annexation was less lenient and tolerant compared to that of Australia, Canada, and the U.K., but only if the following assumption is true: the legal and political consequences that flowed from Australian, British, and Canadian decisions to accept this incorporation *de facto* do not flow from the U.S.'s position. The following analysis provides a brief survey of non-recognition policies pursued by London and Washington in the Baltic case to determine whether these consequences are indeed absent as a result of the U.S.'s practice. The focus is on the British, and not on the Australian or Canadian, attitude toward the Soviet annexation of the Baltic Republics. This is because the U.K., in the words of Robert Vitas, was "at the head of countries extending *de facto* recognition."<sup>26</sup>

In the years after the absorption of Estonia, Latvia, and Lithuania into the U.S.S.R., the U.K. made no public statement. It never officially recognized, condemned, or protested the annexation.<sup>27</sup> Britain's formal position became transparent only after the end of World War II. On February 10, 1947, Under Secretary of State for Foreign Affairs Hector McNeil was asked in the House of Commons "whether His Majesty's Government have ever approved of the incorporation of Estonia, Latvia and Lithuania in the U.S.S.R."<sup>28</sup> He replied, "No,

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<sup>22</sup> See ROBERT LANGER, SEIZURE OF TERRITORY: THE STIMSON DOCTRINE AND RELATED PRINCIPLES IN LEGAL THEORY AND DIPLOMATIC PRACTICE 137–38 (1947); MAREK, *supra* note 14, at 265–66.

<sup>23</sup> See LANGER, *supra* note 22, at 151, 153; MAREK, *supra* note 14, at 279.

<sup>24</sup> See MAREK, *supra* note 14, at 405.

<sup>25</sup> In 1974, Australia recognized "the incorporation of Latvia, Estonia and Lithuania into the Soviet Union as *de jure* incorporation." Editors, *Australian Practice in International Law 1974–1975*, 6 AUSTL. Y.B. INT'L L. 187, 230 (1975). According to Australian Prime Minister Gough Whitlam, prior to this recognition "Australia accepted . . . the *de facto* situation that the Soviet Government was in effective control of Lithuania, Latvia and Estonia." *Id.* at 231. In 1975, the new Government decided to withdraw *de jure* recognition and restore mere *de facto* recognition. *Id.*; EDGARS DUNSDORFS, THE BALTIC DILEMMA: PART TWO 323 (1982). In 1987, Jean-Guy Hudson, Parliamentary Secretary to Secretary of State for External Affairs, stated that "[e]very Canadian Government since 1940 has firmly refused to give *de jure* recognition to the forced annexation of these countries by the USSR. However, Canada does give *de facto* recognition to their incorporation." Maureen Irish, *Canadian Practice in International Law*, 26 CAN. Y.B. INT'L L. 335, 336 (1988).

<sup>26</sup> Vitas, *supra* note 4, at 267.

<sup>27</sup> See *id.* at 241, 242; MAREK, *supra* note 14, at 404; Geoffrey Swain, "The Highest Flights of Circumlocutory Art": Britain, Latvia and Recognizing the Soviet Annexation of 1940, 43 J. BALTIC STUD. 345, 346 (2012).

<sup>28</sup> Hansard HC Volume 433, Column 5 (Feb. 10, 1947).



Sir, His Majesty's Government recognise that the Baltic States have *de facto* been absorbed into the Soviet Union, but have not recognised this *de jure*."<sup>29</sup> On May 23, 1947, Under Secretary of State for Foreign Affairs Christopher Mayhew reiterated this position:

The Soviet Press . . . has contained statements by responsible Soviet authorities to the effect that the Baltic States are now incorporated permanently in Soviet Russia. They have made their views quite plain that this is a permanent matter, and that these States form part of the Soviet Union for ever. Similarly, they have established effective administrative control over these countries. No one on the other side has questioned that. No one has suggested that there is not effective administrative control over these States. That was begun seven years ago, and, with an interval, it has lasted seven years. There is no prospect at present of any change in that arrangement.

Therefore His Majesty's Government have recognised Soviet administration *de facto*. There is no other sensible course for us to take. We have simply got to take the facts as they are. It is no good thinking wishfully about it . . . It is necessary for us to deal with these facts as we find them. But . . . to suggest . . . that we should . . . somehow restore independence to these countries as they formerly enjoyed it, seems to me a totally fantastic, unrealistic approach.<sup>30</sup>

The U.K.'s decision to accord only *de facto* recognition to Soviet rule in the Baltic area prevented the British Government from entering into normal cooperation with the Kremlin with regard to this region. This effect of the denial of *de jure* recognition is discernible in a number of statements by British officials. In 1954, for example, Under Secretary of State for Foreign Affairs Douglas Dodds-Parker was asked in the House of Commons

whether, in view of the Swedish-Soviet agreement on the payment of compensation for nationalised and expropriated Swedish interests in the Baltic States . . . he will inform the Soviet authorities that it would facilitate our future trade agreements with the Union of Soviet Socialist Republics were she to acquiesce in the distribution to British creditors of Baltic assets now held on British account in this country by the Custodian of Enemy Property.<sup>31</sup>

Dodds-Parker replied: "No, Sir. Her Majesty's Government are not prepared to take any steps which would imply or constitute *de jure* recognition of the Soviet annexation of the Baltic States."<sup>32</sup> He then also reiterated: "It is impossible to do what my hon. Friend wants without *de jure* recognition of the annexation of the Baltic States."<sup>33</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> Hansard HC Volume 437, Columns 2772, 2773 (May 23, 1947).

<sup>31</sup> Hansard HC Volume 523, Column 1637 (Feb. 15, 1954).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

In 1985, a member of the House of Commons again enquired as to “what action is currently taken by Her Majesty’s ambassador in Moscow in acknowledgement of the fact that Her Majesty’s Government do not recognise the incorporation of the Baltic states into the Soviet Union *de jure*.”<sup>34</sup> Malcolm Rifkind, Minister of State, wrote: “Her Majesty’s ambassador in Moscow avoids any contact with the authorities in the Baltic states which could be taken to imply *de jure* recognition.”<sup>35</sup> Answering the follow-up question of “what contacts Her Majesty’s Government maintain with any of the Baltic States which do not imply *de jure* recognition,”<sup>36</sup> Richard Luce, Minister of State, replied: “There have on occasions been limited contacts between members of Her Majesty’s embassy and officials of the Baltic Republics related to specific events when these were in our interests. A case in point was over the organisation of the British element in a trade exhibition in Riga in 1974.”<sup>37</sup>

These statements demonstrate that by withholding *de jure* recognition, the U.K. elected to reduce, and did so reduce, the amount of interaction it had with the U.S.S.R. with respect to the Baltic States. It is obvious that complete discontinuance of such relations would have been virtually impossible. Hence, the Foreign Office eschewed only those dealings with the U.S.S.R. that would have been inconsistent with *de jure* recognition.

The U.S., on the other hand, pursued a manifest and longstanding policy of non-recognition of the Baltic annexation. This did not, however, prevent the U.S. from entering into dealings with the U.S.S.R. with respect to Estonia, Latvia, and Lithuania. The question to be addressed now is whether such relations were analogous to those flowing from the U.K.’s *de facto* recognition. The remainder of this subsection will attempt to show that the answer should be in the affirmative.

The enquiry begins with contact between American officials and officials of the Baltic Republics. In February 1971, U.S. Consul General Designate Culver Gleysteen arrived in Leningrad to work on the establishment of the American Consulate General. Later, he visited Vilnius and met with Soviet Lithuanian officials.<sup>38</sup> In an October 28, 1972 letter to Senator Hugh Scott, National Security Adviser Henry Kissinger explained this visit as follows: “Our proposed Consulate General in Leningrad includes Vilnius in its area of consular jurisdiction. Mr. Gleysteen visited the city to familiarize himself with it and to meet the local officials with whom our consular officials will have to deal in facilitating contacts between Americans and Lithuanians.”<sup>39</sup>

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<sup>34</sup> Hansard HC Volume 82, Column 273W (Jul. 5, 1985).

<sup>35</sup> *Id.*

<sup>36</sup> Hansard HC Volume 83, Column 908W (Jul. 26, 1985).

<sup>37</sup> *Id.*

<sup>38</sup> *See Vitas, supra* note 4, at 186.

<sup>39</sup> *Id.*

After the establishment of the U.S. Consulate General in Leningrad, interaction between American and Soviet authorities over Estonia, Latvia, and Lithuania increased greatly. In May 1975, James Clarity reported in *The New York Times* that “[s]ince the United States consulate opened here 22 months ago . . . American contacts with political, economic and cultural officials in the Baltic Republics have significantly increased.”<sup>40</sup> His further account deserves citation at some length:

The American consul general, Joseph W. Neuber[t], said in an interview that . . . in effect he was now the United States ambassador to the three republics. Since he became consul general eight months ago, Mr. Neubert has visited each of the Baltic capitals—Vilna in Lithuania, Riga in Latvia, and Tallinn in Estonia . . . “I am pleased,” Mr. Neubert said, “that these three cities fall within the consular district and that our relations with their officials are developing quite well.” The consul general said the Baltic republics were a major part of his job. The consulate, rather than the embassy in Moscow, has responsibility for reporting on the Baltic region to the State Department. . . . Preliminary discussions are under way to bring American educators to Baltic universities to teach English. There are no American exchange students now in the Baltic republics, but their arrival is considered likely in the next few years. American tourists may visit the Baltic capitals and there are no special restrictions on American imports of goods produced in the Baltic republics.<sup>41</sup>

Clarity added that “Mr. Neubert adheres to American policy protocol by not making direct contacts with the highest [communist] party and government officials in the Baltic Republics, but he has met with their deputies.”<sup>42</sup> However, Vitas contends that several months after taking office, “Neubert, and his deputy, Garry L. Mathews, visited the Baltic States and met with *senior* communist officials.”<sup>43</sup> In addition, Lawrence Juda pointed out that “officers of the American embassy in Moscow do make visits from time to time into the territory of Estonia, Latvia, and Lithuania.”<sup>44</sup> However, he gave no concrete examples of such visits.

This kind of cooperation took place during more than just Gerald Ford’s administration. For instance, in September 1986, Latvia hosted a Soviet-American discussion forum in Jurmala that was attended by “approximately 270 U.S. government officials and private citizens.”<sup>45</sup> On July 1, 1987, U.S. Consul General in Leningrad, Lawrence Goodrich, and Vice-Consul, Ian Kelly, participated at the

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<sup>40</sup> James Clarity, *U.S. Eases Policy on Baltic States*, N.Y. TIMES (May 18, 1975), <https://perma.cc/98XE-ERL7>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Vitas, *supra* note 4, at 217 (emphasis added).

<sup>44</sup> Lawrence Juda, *United States’ Nonrecognition of the Soviet Union’s Annexation of the Baltic States: Politics and Law*, 6 J. BALTIC STUD. 272, 286 (1975).

<sup>45</sup> Vitas, *supra* note 4, at 291.

official opening of an American art exhibit in Tallinn.<sup>46</sup> In his opening speech, Kelly “stressed the need for widening cultural contacts.”<sup>47</sup> On the same evening, “the American diplomats arranged a reception for Soviet Estonian cultural personalities.”<sup>48</sup>

Apart from visiting Estonia, Latvia, and Lithuania, American officials were engaged in other activities that directly concerned the three republics. For instance, in 1975, K. Scott Gudgeon, Acting Assistant Legal Adviser for European Affairs, wrote in a letter to the Assistant Attorney General of Wisconsin that “United States consular officers in the U.S.S.R. are authorized to perform notarial functions with regard to documents completed in Lithuania and attested to, certified or authenticated by Soviet authorities.”<sup>49</sup>

Sometimes, cooperation between Washington and Moscow over the Baltic States took rather deplorable forms. According to Vitas, from 1944 to 1947, the U.S. Army implemented “a secret repatriation plan which called for the return, forced if necessary, of approximately two million prisoners of war and displaced persons into Soviet hands.”<sup>50</sup> Consequently, “several thousand Baltic citizens [were] removed to their countries against their will.”<sup>51</sup>

While this Section is not intended to be a detailed account of British and American policy toward the incorporation of the Baltic States into the U.S.S.R., it nonetheless provides ample evidence in support of the following conclusion: the U.K.’s decision to extend *de facto* recognition to the Soviet annexation of the Baltic States allowed Britain to maintain a certain measure of actual interaction with the Kremlin with respect to Estonia, Latvia, and Lithuania. However, an analogous cooperation regarding these republics can easily be found in relations between the U.S.S.R. and the U.S. In this respect, it can hardly be asserted that America’s stance was “noble” or less lenient and tolerant compared with the position of the U.K. Therefore, any statement that expresses this fictitious difference, including the proposition that the U.S. recognized the Soviet annexation of the Baltic States neither *de facto* nor *de jure*, must be rejected.

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<sup>46</sup> See Arno Liivak, *Soviet Responses to Western Nonrecognition of Baltic Annexation*, 18 J. BALTIC STUD. 329, 343 (1987).

<sup>47</sup> *Id.* at 348.

<sup>48</sup> *Id.*

<sup>49</sup> Grant, *supra* note 3, at 86 (quoting ELEANOR C. MCDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, 191–94 (1976)).

<sup>50</sup> Vitas, *supra* note 4, at 194–95.

<sup>51</sup> *Id.* at 201. Hough, however, contends that “[t]he Western Allies refused to recognize Balts as ‘Soviet citizens’ within the context of the 1945 Repatriation Agreement since the Allies did not recognize the Soviet conquest of the Baltic States. Accordingly, only those nationals of the Baltic States who affirmatively claimed Soviet citizenship were repatriated.” Hough, *supra* note 5, at 404–05.

## B. Mischaracterization #2: “*De Facto*, but Not *De Jure*, Recognition”

Seemingly the only commentator who provided justification for the proposition that the U.S. extended *de facto* recognition, but not *de jure* recognition, in the Baltic situation was British M.P. Julius Silverman. In a speech in the House of Commons, excerpted above in the introduction, he claimed that the Potsdam Agreement indicated *de facto* recognition of the Baltic States as being considered Soviet because it provided for the official transfer to the U.S.S.R. the city of Königsberg and its adjacent area.<sup>52</sup> It is interesting to note that those scholars who have argued that the U.S. refused to accept the Baltic annexation *de facto* have never addressed Silverman’s argument. This Subsection attempts to fill that lacuna.

The Potsdam Agreement was signed by Joseph Stalin, Harry Truman, and Clement Attlee. Thus, Silverman’s reasoning implies not only American but also British *de facto* recognition of the Baltic annexation. The U.K., however, conferred such acknowledgment only after the conclusion of the Potsdam Agreement, and Silverman must have known that. It seems, therefore, that Silverman had his own understanding of *de facto* recognition. Apparently, he regarded it as any act that signifies simple acknowledgment of the reality of the situation: that Estonia, Latvia, and Lithuania had, as a matter of fact, entered the U.S.S.R. Apart from the Potsdam Agreement, there were plenty of other acts of this kind. For example, in August 1940, the U.S. closed its missions and consular offices in Kaunas, Riga, and Tallinn following a respective order by People’s Commissar of Foreign Affairs, Vyacheslav Molotov.<sup>53</sup> On July 3, 1941, the U.S. State Department wrote to the Estonian Acting Consul General that “this Government does not recognise the absorption of Estonia by the Soviet Union nor *the regime now functioning in Estonia*.”<sup>54</sup> After the Red Army ousted German forces from the Baltic region, Deputy Director of European Affairs at the U.S. State Department, John Hickerson, submitted a memorandum to the U.S. Secretary of State that read:

We know that the three Baltic States have been re-incorporated into the Soviet Union and that nothing which we can do can alter this. It is not a question of whether we like it . . . The point is that it has been done and nothing which is within the power of the United States Government to do can undo it.<sup>55</sup>

These acts and statements represented a simple acceptance of the actual state of affairs: that the U.S.S.R. had established effective administrative control over the Baltic Republics. But is it appropriate to use the term “*de facto* recognition” to

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<sup>52</sup> See Hansard HC Volume 437, Columns 2769–70 (May 23, 1947).

<sup>53</sup> See Hough, *supra* note 5, at 393.

<sup>54</sup> Grant, *supra* note 3, at 42 (emphasis added).

<sup>55</sup> Vitas, *supra* note 4, at 150.

refer to this acceptance? This question should be answered in the negative, because otherwise *de facto* recognition would hold two different meanings. According to one of them, *de facto* recognition could represent any act acknowledging the reality of a situation. According to the other, it could mean the practice of those states that formulated and developed their policies toward the Baltic annexation using the concept of *de facto* recognition. The latter, according to this meaning, is a deliberate act by the executive branch of government, wherein acknowledgment of the Soviet effective administrative control over Estonia, Latvia, and Lithuania is made and pertinent legal consequences resulting from such acknowledgment were admitted.

The two different interpretations of *de facto* recognition lead to an uncomfortable ambiguity. For the sake of clarity, it is reasonable to employ another term to denote acts and statements that signify simple acceptance of the actual state of affairs. One possible term to designate these acts and statements could be the phrase “factual recognition.”

#### IV. RELEVANCE OF U.S. NON-RECOGNITION IN THE BALTIC CASE TO RUSSIA’S INCORPORATION OF CRIMEA

The conclusions and arguments set forth in the foregoing discussion can be extended to more territorial takeovers than just the Baltic annexation. In particular, they are relevant to one of the most controversial changes in the disposition of territory that has occurred in recent years: the accession of Crimea into the Russian Federation.

For more than two decades following the dissolution of the U.S.S.R., Crimea was peacefully and undisputedly considered an integral part of the independent Ukraine. In 2014, however, after a series of actions that have been depicted in detail elsewhere,<sup>56</sup> Moscow absorbed almost the entire Crimean peninsula, creating two federal subjects of the Russian Federation: the Republic of Crimea and the federal city of Sevastopol.

In the Kremlin’s view, this incorporation happened in conformity with international law.<sup>57</sup> However, a significant number of other countries, including

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<sup>56</sup> See, e.g., THE USE OF FORCE AGAINST UKRAINE AND INTERNATIONAL LAW: JUS AD BELLUM, JUS IN BELLO, JUS POST BELLUM (Sergey Sayapin & Evhen Tsybulenko eds., 2018).

<sup>57</sup> On January 5, 2016, President of the Russian Federation Vladimir Putin stated: “What did we do? We did not wage war, we did not occupy anyone [sic], we did not shoot anywhere, not a single person died as a result of events in Crimea. . . . It is important to obey international law. In the Crimea case international law is not violated.” Interview by Bild with Vladimir Putin, President, Russian Fed’n (Jan. 5, 2016), <http://kremlin.ru/events/president/news/51154#sel=10:5:PTi,10:9:ygi> (author’s translation). Minister of Foreign Affairs of the Russian Federation Sergey Lavrov continuously condemns the characterization of the Crimea incorporation as “annexation.” See, e.g., Sergey Lavrov, Minister of

the U.S., perceive the consolidation of Crimea with the Russian Federation as an illegal territorial absorption, and have established a regime of non-recognition against Russian claims.<sup>58</sup>

In academic analysis of the Crimea case, some international law scholars have resorted back to the terminology of *de facto* and *de jure*. Anton Bebie, for example, argues that “[t]he Republic of Crimea and the federal city Sevastopol are today *de facto* parts of the Russian Federation . . .”<sup>59</sup> Peter Tzeng, posing the question “[d]oes Crimea now constitute a part of Russia or Ukraine?,”<sup>60</sup> uses similar language when he argues that “[*d*]e *facto*, the answer is undoubtedly Russia . . . *De jure*, the answer is more complicated.”<sup>61</sup>

Unlike in the Baltic case, some U.S. politicians have begun to use this terminology of recognition when discussing Russian rule over Crimea. In January 2019, the U.S. House of Representatives considered a bill aiming “to prohibit United States Government recognition of Russia’s annexation of Crimea.”<sup>62</sup> It stated, *inter alia*, that “[i]t is the policy of the United States not to recognize the *de jure* or *de facto* sovereignty of the Russian Federation over Crimea, its airspace, or its territorial waters.”<sup>63</sup>

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Foreign Affairs, Russian Fed’n, Speech at the 349th Extraordinary Meeting of the Federation Council of the Federal Assembly of the Russian Federation (Mar. 21, 2014), [https://www.mid.ru/ru/foreign\\_policy/news/1704852/](https://www.mid.ru/ru/foreign_policy/news/1704852/).

<sup>58</sup> On March 19, 2014, the U.S. Representative to the U.N. Security Council declared: “What happened in Crimea cannot be recognized as valid. We must stand together denying recognition and imposing consequences for that illegal act.” U.N. SCOR, 69th Sess., 7144th mtg. at 11, U.N. Doc. S/PV.7144 (Mar. 19, 2014). Several days later, the European Union’s ambassador to the U.N. stated that the European Union “strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognize it.” *Moscow Condemns UN Resolution on Ukraine*, RADIOFREEEUROPE/RADIOLIBERTY (Mar. 28, 2014), <https://perma.cc/5QA9-KVS4>. James C. Pearce and Anastassiya Yuchshenko note, “[O]nly a handful of countries formally recognised Crimea joining the Russian Federation.” James C. Pearce & Anastassiya Yuchshenko, *Defending Russia, Securitising the Future: How the Past Shaped Russia’s Political Discourse regarding Crimea*, 12 EUROPOLITY: CONTINUITY & CHANGE EUROPEAN GOVERNANCE 85, 101 (2018).

<sup>59</sup> Anton Bebie, *Crimea and the Russian-Ukrainian Conflict*, 15 ROM. J. EUR. AFF. 35, 53 (2015).

<sup>60</sup> Peter Tzeng, *Sovereignty over Crimea: A Case for State-to-State Investment Arbitration*, 41 YALE J. INT’L L. 459, 459 (2016).

<sup>61</sup> *Id.*

<sup>62</sup> H.R. 596, 116th Cong. (1st Sess. 2019), <https://perma.cc/F9SM-N4K4>.

<sup>63</sup> *Id.* According to Herbert Briggs, expressions “*de facto* recognition of a government,” “recognition of a *de facto* government,” and “recognition as a (or the) *de facto* government” are “largely interchangeable.” Herbert Briggs, *De Facto and De Jure Recognition: The Arantzazu Mendí*, 33 AM. J. INT’L L. 689, 690 (1939). In a similar vein, Stefan Talmon contends that “States have regularly used the terms ‘*de facto* recognition’ and ‘recognition’ ‘as’ a *de facto* government authority or independent body’ as synonyms.” TALMON, *supra* note 6, at 60. By way of analogy, it can be argued that a distinction between “recognition of *de facto* or *de jure* sovereignty” and “*de facto* or *de jure* recognition of sovereignty” is immaterial.

Utilizing this language could be somewhat problematic, insofar as the *de facto* and *de jure* terminology has previously found almost no application in U.S. diplomatic practice regarding territorial annexations. Its introduction, therefore, may well lead to bureaucratic confusion. To avoid this unsatisfactory result, it would be more rational for the U.S. to continue to develop its non-recognition policy toward Crimea, without any reference to *de facto* and *de jure* terminology, just as was done in the Baltic case.

Sometimes, American diplomats draw parallels between the Soviet annexation of the Baltic Republics and the Russian incorporation of Crimea. For instance, James Gilmore, U.S. Representative to the U.S. Mission to the Organization for Security and Co-operation in Europe, declared on July 23, 2020:

Today marks 80 years since the United States' acting Secretary of State Sumner Welles issued the Declaration condemning the illegal Soviet occupation of Latvia, Estonia, and Lithuania that set in place the non-recognition policy that was so clearly stated in the Crimea declaration issued by Secretary Pompeo on July 24, 2018. Mr. Welles was as right in 1940 as Secretary Pompeo is in 2018; both refused to accept the illegal annexation of sovereign European territories . . .<sup>64</sup>

It should be noted, however, that the reference to the U.S. non-recognition of the Baltic annexation within the context of the Crimea case may only be of marginal significance. As demonstrated in Section III of this Article, despite the announced refusal to accept the Baltic subjugation, Washington maintained a substantial measure of actual interaction with the Soviet authorities with respect to Estonia, Latvia, and Lithuania. This aspect of the American approach was emphasized by Allan Ryan: “Whenever necessary, the United States government deals with Moscow on matters affecting the Baltic countries, and then solemnly pronounces that whatever it has done is not inconsistent with the non-recognition policy.”<sup>65</sup>

Moreover, in 1989, Vitas pointed out that “[i]nitially, the Kremlin declared that the Baltic issue would create a permanent rift between the two countries. Of course, a rift still exists, but the effect of the nonrecognition policy here is minimal . . .”<sup>66</sup> In addition, at the end of 1980s, when secessionist movements in the Baltic gained considerable strength, “the rhetoric of the Western leaders vis-à-vis the Baltic States became much more reserved than it had been during the

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<sup>64</sup> James S. Gilmore III, Ongoing Violations of International Law and Defiance of OSCE Principles and Commitments by the Russian Federation in Ukraine, OSCE, PC.DEL/1005/20 (Jul. 24, 2020), <https://perma.cc/JZE2-8FAV>.

<sup>65</sup> ALLAN RYAN, QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA 68–69 (1984).

<sup>66</sup> Vitas, *supra* note 4, at 188.



Cold War.”<sup>67</sup> In the words of Jan Trapans, George H. W. Bush’s administration did not “gainsay the Baltic demand for recognition of independence. But very much like Great Britain, it was willing to postpone the decision indefinitely.”<sup>68</sup>

Given these illustrations, it is unsurprising that Lauri Mälksoo characterizes non-recognition policy in the Baltic case as “mainly symbolic”<sup>69</sup> and of a “Janus-faced nature.”<sup>70</sup> The conclusion that follows from this discussion is evident. Few countries that are earnest about opposing Russian claims to Crimea in the modern day would be guided by the U.S.’s historical approach to the Soviet annexation of Estonia, Latvia, and Lithuania.

## V. CONCLUSION

Numerous commentators have attempted to characterize the U.S.’s attitude toward the Soviet annexation of the Baltic States using the concepts of *de facto* and *de jure* recognition. As this Article demonstrates, however, these notions do not add anything useful to the body of knowledge on the subject. In fact, they may actually contribute to a misunderstanding of the U.S.’s actual non-recognition policy in the Baltic case.

The U.S. was not the only country whose position on the Baltic annexation has been differently characterized by various scholars. For instance, Heike Krieger, Meissner, and Talmon argue that Portugal accepted this incorporation neither *de facto* nor *de jure*.<sup>71</sup> According to Mälksoo, Portugal withheld *de jure* recognition but acknowledged the subjugation of Estonia, Latvia, and Lithuania *de facto*.<sup>72</sup> Hough, Arno Liivak, Krystyna Marek, and Vitas describe Portugal’s attitude without any reference to the concepts of *de facto* and *de jure* recognition.<sup>73</sup> Future studies may reveal which of these approaches is most consistent with Portugal’s actual policy toward the Soviet annexation of the Baltic Republics. Hopefully, this Article—and, in particular, its methodology—will be beneficial for such studies.

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<sup>67</sup> MÄLKSOO, *supra* note 2, at 127.

<sup>68</sup> Jan Trapans, *The West and the Recognition of the Baltic States: 1919 and 1991: A Study of the Politics of the Major Powers*, 25 J. BALTIC STUD. 153, 168 (1994).

<sup>69</sup> MÄLKSOO, *supra* note 2, at 134.

<sup>70</sup> *Id.*

<sup>71</sup> See KRIEGER, *supra* note 6, at 440; MEISSNER, *supra* note 19, at 301–02; TALMON, *supra* note 6, at 103.

<sup>72</sup> See Mälksoo, *supra* note 2, at 119.

<sup>73</sup> See Hough, *supra* note 5, at 433; Liivak, *supra* note 46, at 333–34; MAREK, *supra* note 14, at 409; Vitas, *supra* note 4, at 260.