The crime of aggression – Myths, facts and Swedish law

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The crime of aggression – Myths, facts and Swedish law

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The first casualty of war is truth. This applies not least to those wars in the Middle East where Israel and various Arab countries have fought against each other. However, over time – as the confidentiality of important documents has been lifted – a clearer picture has begun to emerge. Now that more complete information is at hand, it is possible to assess three of the more central Arab-Israeli wars in a sober and objective manner. The assessment shows that Israel has behaved aggressively in at least two of these wars, and likely behaved aggressively in the prelude to the third. The issue may be of continuing legal importance in assessing whether Israel and its representatives are guilty of acts of aggression today. Finally, the evaluation conclusively shows that lawyers in public international law need to assimilate the findings from the latest research in the fields of history and political science to a greater extent than before. Failure to do so risks leading to incorrect legal assessments.

1. Introduction

In an article about the crime of aggression under public international law, Carl Henrik Ehrenkrona enumerates a number of examples of what he considers to be "pure wars of aggression," mentioning among them "The attacks of Arab states on Israel in 1948, 1966 [sic] and 1973."[1] The aforementioned wars are not in themselves a central part of Ehrenkrona's article and he only mentions them to strengthen a thesis that is in itself correct, namely that the 1928 Kellogg-Briand Pact was incapable of preventing the subsequent waging of several wars of aggression.[2]

However, some caution is called for in designating a war as a "war of aggression" on the part of one party or the other. The first casualty of war, as is well known, is truth. Attempts to "spin" information

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[1] Ehrenkrona, Carl Henrik, "Aggressionsbrottet – ett brott i tiden," Svensk Juristtidning 2022, p. 303.

[2] For basic information on the Pact, see Ehrenkrona, note 3.

are the rule and may include outright disinformation campaigns. For example, no country wants to admit that they have committed any kind of "act of aggression"; it is always the other party who started it. The picture only becomes clearer when the confidentiality surrounding official documentation is lifted and the parties involved write their memoirs, and even then, it takes a while before historical and political science research has processed the new material.

The Arab-Israeli wars of 1948-1949, *1967* (rightly) and 1973 are no exception. Like all wars, they have been surrounded by propaganda and disinformation, but here too the picture has become clearer over time. According to the American political scientist Norman Finkelstein, current research is in basic agreement about what has happened.[3] On the basis of this research, the intention of this article is to present an accurate assessment of the wars from the perspective of public international law, basing it on the question of which of the parties can be said to have been guilty of acts of aggression. This account shows that in neither 1948, 1967, nor 1973, did the Arab states wage wars of aggression against Israel. A more reasonable argument is that either Israel, or, before its formation, the Zionist movement, was guilty of wars of aggression.

There are two main reasons why the present account is needed. One reason is the intrinsic value of having an accurate, fact-based view of history and, on that basis, making a correct assessment of the legal rights and obligations that, to this day, still depend on the question of how the wars in question are legally designated. This also affects Swedish law, which is explained below.

There are more wars in which Israel has been involved, in addition to those dealt with here. These other wars will not be touched upon in any degree of detail here, if at all.

What constitutes an armed attack, an act of aggression, or a "pure war of aggression," is regulated, as regards the responsibility of *states,* in Article 2(4) of the UN Charter and in UN General Assembly Resolution 3314 (XXIX) from 1974 (hereafter "Resolution 3314"). The aforementioned resolution codifies customary law and therefore expresses the rules in force at the time of the wars in question.

As for the criminal liability of *individuals* (politicians and military personnel), the crime of aggression is regulated in Article 8 bis of the Rome Statute. The definition of an act of aggression is essentially the same for states as for individuals. An important difference is that individual criminal liability requires that the act of aggression constitute a *manifest* violation of the United Nations Charter; this requirement of manifestness, or being manifest, is missing for states. The application of the Rome Statute may arise as regards the liability of individuals for acts committed after 1 July 2002. In Swedish law, criminal liability for crimes of aggression is regulated in Section 11 a of the Punishment for Certain International Crimes Act (2014:406), hereinafter "the International Crimes Act". The Act's provisions tie in with the Rome Statute.[4]

The Arab-Israeli wars of 1948–1949, 1967 and 1973 are dealt with separately, below, and in turn. Inevitably, some historical sources must be referenced, but only to the extent absolutely necessary to then make a legal analysis. This is followed by a discussion of the significance of crimes of aggression today for the situation in Palestine. The paper ends with a section on conclusions.

[3] Finkelstein, Norman G., Beyond Chutzpah – On the Misuse of Anti-Semitism and the Abuse of History, 2nd ed., Verso, London and New York 2008, pp. xi, xiv and xxvii.

[4] The *crime of aggression*, as an offence in its own right, was introduced in Swedish law through SFS 2021:1016, which entered into force on 1 January 2022. For more on how this offence is regulated in Swedish law, see Ehrenkrona. See also Wrange, Pål, Aggressionsbrottet och Internationella brottmålsdomstolen, published by The International Law Council of the Total Defence, Ministry of Defence, Graphic Service May 2011, pp. 14–42.

2. 1948

2.1 The background to the war

In 1947, approximately 1.8 million inhabitants lived in Palestine. Of these, 1.2 million were Palestinians and just over 600,000 were Jews, most of whom had arrived fairly recently. After the British handed over the Palestine issue to the newly formed United Nations, the United Nations recommended in Resolution 181(II) in November 1947 that Palestine be divided into a Jewish and an Arab state.[5] According to the proposal, Jews would receive 55 percent of the land and 84 percent of the usable land, despite the fact that the Jews thus made up only about a third of the population.[6]

The Zionist leadership accepted the partition plan while the Arabs rejected it. The Zionists' acceptance was of a tactical nature, however. The movement sought more territory for a Jewish state than the partition plan proposed. Zionist leader David Ben-Gurion said on various occasions that they sought all of Palestine, or at least 80 percent.[7] Another part of the partition plan that was unacceptable for the Zionists concerned demographics. In the planned Jewish areas alone, Palestinians already made up at least 40 percent of the population, which was more than the maximum 20 percent that Ben-Gurion considered acceptable.[8] In the larger areas sought by the Zionist movement, the Palestinians were in the majority, which is why the Zionist movement recognised the need for "relocation" early on. As Yossef Weitz, another prominent figure in the Zionist movement, put it: "without transfer, there will be no Jewish state."[9]

The expulsion of the Palestinians began soon after the partition plan was adopted. One of the first villages to be emptied of its Arab population as a result of armed Zionist aggression was the village of Lifta, in January 1948. The village was located outside the areas that the partition plan had designated were to be Jewish. In early February, Ben-Gurion visited Lifta and rejoiced that no Arabs remained there.[10] In March 1948, the so-called Plan Dalet was adopted; according to Pappe, the plan delineated how Palestine would be emptied of its Arab population.[11] The Zionists were militarily superior to the Arabs, both numerically and qualitatively.[12] Until mid-May 1948, the Zionists

[5] The partition plan raised a host of legal issues, and attempts were made to refer the matter to the International Court of Justice, in The Hague. See Kattan, Victor, From Coexistence to Conquest – International Law and the Origins of the Arab–Israeli Conflict, 1891–1949, Pluto Press, London and New York 2009, pp. 148–151, 153–155, 163; and Pappe, Ilan, Den etniska rensningen av Palestina, Karneval Förlag, Stockholm 2007, p. 51.

[6] Kattan, p. 152; Pappe, p. 52; Rogan, Eugene, The Arabs – a History, Penguin Books, London 2011, pp. 318–319.

[7] In 1942, a Zionist conference held at the Biltmore Hotel, in New York, adopted a call for a Jewish commonwealth across all of Palestine; see Pappe, p. 40, and Kattan, p. xxvii. By 1946, however, Ben-Gurion had concluded that a somewhat "reduced" state was sufficient; see Pappe, pp. 43 and 50.

[8] Pappe, p. 66. Schlaim cites statistics according to which the Arabs were in the majority even in "Jewish" areas, if one also includes the non-resident population. See Schlaim, Avi, Collusion across the Jordan: King Abdullah, the Zionist movement, and the partition of Palestine, Oxford University Press, Oxford 1988, pp. 117–118.

[9] Quoted in Pappe, p. 80. Ideas about the expulsion of Palestinian Arabs existed early within the Zionist movement; see, for example. Pappe, pp. 11, 12, 16, 40, 65 and the chronology of important dates at the end of Pappe's book.

[10] Pappe, pp. 84–85.

[11] Pappe, pp. 97–104. The letter dalet, "ד", is the fourth letter of the Hebrew alphabet.

[12] Rogan, pp. 319–320; Pappe, p. 62; Kattan, p. 186.

managed to expel 200,000–300,000 Palestinians from both Jewish and Arab areas according to the partition plan.[13]

The surrounding Arab states could only passively watch as wave after wave of Palestinian refugees flooded across the borders of Lebanon, Syria, Jordan and Egypt. Syria announced that it planned to intervene on humanitarian grounds.[14] In practice, no Arab state wanted to intervene as long as Palestine was formally a British mandate. However, somewhere around the turn of April and May 1948, a decision was made to intervene in mid-May 1948, once the British Mandate expired.[15]

2.2 The State of Israel is proclaimed. Intervention of neighbouring Arab states

By mid-May, as mentioned above, between 200,000 and 300,000 Palestinians had been displaced from their homes. In connection with the end of the British Mandate, the State of Israel was proclaimed. The Declaration of Independence invoked the same UN partition plan, of the previous November, that the Zionists themselves consistently violated.[16] In light of the events, this may seem a little strange, and perhaps even as a rash of hypocrisy. However, it may be seen as reflecting an attempt by the Zionists to lend a degree of legitimacy to the newly proclaimed state.

It was in this situation that regular Arab armies intervened. The combined strength of the Arab armies was about 25,000 men against the 35,000 of the Israeli (as we now call them) forces.[17] Moreover, the Israeli forces were also qualitatively superior. The exception was the Jordanian Arab Legion, which was equipped, trained and led by British officers and well on par with the Israeli forces.[18]

As for the Arab war aims, at least Syria (see above) claimed humanitarian reasons, which of course was not the whole truth. Jordan wanted to subjugate territories that, according to the partition plan, would constitute an Arab state, primarily those areas bordering Jordan that are today known as the West Bank.[19] The Jordanian, Iraqi and Lebanese forces never crossed the border into areas that according to the partition plan would accrue to a Jewish state. Egyptian and Syrian forces did so only to a limited extent.[20] It is perhaps a little ironic that the Arabs largely respected the partition plan, even though they had rejected it.

The war did not go well for the Arabs. The exception was the Jordanian Arab Legion, which, along with Iraqi forces, captured and retained most of the West Bank, including East Jerusalem. This realised the goal of Jordan's King Abdallah to expand Jordan's territory. It also prevented Israel from capturing the West Bank, thereby saving the Palestinians on the West Bank from being expelled.[21]

[13] Rogan, p. 329. Pappe estimates the figure at 250,000 people, Pappe, p. 135.

[14] Kattan, p. 179.

[15] According to Rogan, the decision to intervene was taken just a couple of days before Israel was proclaimed; Rogan, p. 330. According to Pappe, p. 134, the decision was made at the end of April.

[16] Kattan, p. 232.

[17] Rogan, p. 334.

[18] Pappe, p. 135.

[19] Pappe, p. 133.

[20] Kattan, p. 179, Pappe, p. 145.

[21] Pappe, p. 137.

Outside the West Bank, however, there was a continuation of the ethnic cleansing that had begun before Israel was proclaimed.

2.3 Legal assessment

As Kattan points out, there are two strong reasons that contradict the idea that the Arabs "attacked." The first is that the Palestinians had the right to defend themselves, and that the Arab states thus had the right to invoke collective self-defence. The second reason is that the Arab armies barely even crossed the line into what was supposed to be a Jewish state, according to the partition plan.[22]

What exactly did the Palestinians have the right to defend themselves against? Judging by Pappe, it was an ethnic cleansing, or rather the crimes that together constitute ethnic cleansing.[23] According to Egypt and Syria, it was an act of aggression.[24] This alleged act of aggression should encompass more than the ethnic cleansing, and then preferably the conquest of territory outside the "Jewish" areas, according to the partition plan. It is also quite clear that Israel's war of conquest and ethnic cleansing went far beyond what the British or the UN had intended to give to the Zionists. To that extent, the Zionist/Israel's actions were a violation of both the mandate and the UN partition plan.

It is worth noting that the UN Security Council did not condemn either party as "aggressive," any more than it called on the parties to cease hostilities.[25] Advisers in public international law at the British Foreign Ministry did not believe that the Arabs were necessarily doing anything illegal when they entered areas of the old mandate of Palestine, not even if they entered territories destined for a Jewish state.[26]

Thus, it cannot be argued that the Arab states concerned were guilty of a "pure war of aggression."

Was it instead the Zionist movement, Israel, or its leaders, who were guilty of acts of aggression? The ethnic cleansing can be considered to be some kind of act of aggression. According to Kattan, the waves of refugees violated the territorial integrity of the surrounding Arab states.[27] However, it is uncertain whether this position reflects the generally accepted view.

[22] Kattan, 179.

[23] In principle, Pappe's entire book is about ethnic cleansing. Regarding the crimes that constitute ethnic cleansing, see, for example, Articles 7(1)(a) (murder) and (d) (deportation or forced displacement) of the Rome Statute, as regards the rules of public international law currently in force. Such acts constitute crimes against humanity if they constitute or form part of a large-scale or systematic attack against a group of civilians. See also Section 2, first paragraph, 1 and 6 of the International Crimes Act.

[24] Syrian Foreign Minister Ibrahim Makhos said, in a conversation with Charles de Gaulle in June 1967, that the founding of Israel constituted a "permanent aggression against the Arabs." Egyptian President Nasser stated at a press conference on May 29, 1967, that "[t]he thing that happened in 1948 was an aggression — an aggression against the people of Palestine." Both Quoted in Quigley, John, The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War, Cambridge University Press, Cambridge 2013, p. 23.

[25] Kattan, p. 180.

[26] Kattan, 187.

[27] Kattan, p. 215.

3. The Six-Day War of 1967

3.1. Preliminary remarks

There are those who argue that the state of war that still formally prevailed between Israel and these Arab neighbours meant that neither party could legally be guilty of an act of aggression against the other party. Any such "act of aggression" would then rightly be considered a continuation of a war that was already going on, formally speaking. However, this does not seem to be the prevailing view. In the following, the opposite view is adopted, i.e., the Arab states and Israel could in and of themselves be guilty of an act of aggression against the other party.

3.2 The course of the war

The Six-Day War in 1967 began on the morning of June 5 with massive Israeli airstrikes against the Egyptian Air Force. Within three hours, Israel had knocked out virtually all of Egypt's warplanes as well as airfields and radar stations.[28] Meanwhile, Israel had falsely stated to the UN Security Council that *Egypt* had attacked *Israel*, and that Israel had exercised its right to self-defence under Article 51 of the UN Charter.[29]

Jordan, and then Syria, entered the war in accordance with the defence pact the countries had with Egypt, but saw their own air forces crushed in much the same way as Egypt's. With total air supremacy secured, Israeli ground troops attacked Egypt.[30] The fighting was initially fierce.[31] However, in a desert landscape with nowhere to hide, and without the protection of one's own air force, the situation quickly became untenable.[32] Egypt retreated in a disorderly manner and suffered heavy losses. Israel was then able to take on Jordan and Syria. Israel occupied vast territories; the entire Sinai Peninsula, the Gaza Strip, the West Bank (including East Jerusalem), and the Golan Heights.[33] By June 10, the war was over.[34] This was entirely in accordance with US and Israeli advance assessments.[35]

3.3 Legal assessment

The war began with massive Israeli airstrikes against Egypt. On that basis, it is already extremely difficult to constitute the war as an *Arab* act of aggression (the Israelis themselves quickly abandoned the false information about a first Egyptian attack).

[28] Rogan, p. 424, Quigley, p. 78.

[29] Quigley, p. 75.

[30] Rogan, p. 424.

[31] Rogan, p. 425.

[32] Rogan, p. 425.

[33] Rogan, p. 427.

[34] Rogan, p. 426.

[35] The Americans and British reckoned that a war would take about a week; Quigley, p. 60. US President Lyndon B. Johnson told Israeli Foreign Minister Abba Eban that an Egyptian attack was not imminent, and if Egypt attacked then Israel would "whip the hell out of them." See Quigley, p. 33.

In addition to the false information about an Egyptian military strike, it has been alleged that Egypt's blockade of the Straits of Tiran would have constituted a legitimate reason to attack Egypt, as Israeli Prime Minister Eshkol claimed in May 1967.[36] However, in order for this to be true, a number of different conditions must be met:

a) Israel must be considered to have had sovereignty over the port city of Eilat, which was the subject of the alleged blockade. Today, Israel's sovereignty over Eilat is undisputed. It was different in 1967. On the one hand, according to the partition plan, Eilat was supposed to become part of the envisioned Jewish state. On the other hand, the partition plan was almost a nullity. Perhaps more importantly, Israel did not have control over the area during the 1948 war, and UN Security Council Resolution 54, of July 1948, prohibited the parties from conquering new territory. Israel's subsequent conquest of the area in March 1949 thus occurred in violation of Resolution 54. If Israel was not entitled to Eilat, they could not reasonably object to a blockade of the city, either.[37]

b) Israel must have had a right under public international law to have access to Eilat from the open sea. The Straits of Tiran were entirely within Egypt's territorial waters. The strait has open sea on one side (Red Sea), but it is far from obvious that the Gulf of Aqaba, on the other side, constitutes the open sea to some extent. It is therefore uncertain whether rules of right of passage were applicable. Egypt had refrained from ratifying an amendment to the Convention on the Territorial Sea and the Contiguous Zone that would have given the right of passage through the Straits of Tiran. It has been alleged that the amendment codified customary law, but it is still unclear whether Egypt was bound by this custom; Egypt had consistently indicated dissent against such a rule.[38]

c) Egypt's actions must be considered as being a blockade. A blockade means that all ships are prevented from reaching a particular port. Egypt's restrictions were much more limited; they concerned Israeli ships as well as other ships loaded with strategic products.[39]

d) Diplomatic action must have proved ineffective. According to Article 33 of the UN Charter, all Member States are obliged to try to resolve conflicts by peaceful means. At the time of Israel's attack, diplomatic attempts to resolve the issue were still underway.[40]

e) The Israeli attack must be proportionate. Assuming Egypt's blockade/restrictions were contrary to public international law, Israel could have responded with various countermeasures. Israel's full-scale war was completely disproportionate, according to an adviser in public international law at the US State Department.[41] Moreover, as Wrange argues, one might ask whether the establishment of a blockade could ever be tantamount to a war of invasion in severity.[42]

As mentioned above, all of these conditions had to be met for the blockade to justify Israel's war of aggression in 1967. A more reasonable assessment is that none of these conditions were met at the

[36] Quigley, p. 46.

[37] Quigley, pp. 47-48.

[38] Quigley, pp. 38-54.

[39] Quigley, pp. 54-55.

[40] Quigley, pp. 56-57.

[41] Quigley, pp. 57-58.

[42] Wrange, p. 41.

time in question. The alleged blockade of the Straits of Tiran thus did not constitute a legitimate reason for Israel to attack Egypt.

In in a debate at the UN 1977, Israeli President Chaim Herzog claimed that Egypt committed an act of aggression through a combination of measures: Egypt moved troops into Sinai, it ordered UN forces to leave the area, the Straits of Tiran were blocked, and the Arabs' war rhetoric became increasingly heated.[43]

Egypt's actions can certainly be considered reprehensible on various grounds, but it is extraordinarily difficult to render them as an Egyptian act of aggression. Egypt, of course, had the right to move its own troops on its own territory, as well as to order UN forces to leave the country.

The blockade of the Straits of Tiran has been virtually abandoned by Israel as justification for its war of aggression in 1967. The same goes for Herzog's argument that Egypt's concerted action would somehow constitute an act of aggression.[44]

Nowadays, the most common defence for the Israeli attack is the doctrine of preventive self-defence. In order for this to be considered as justifying Israel's war of aggression in 1967, a number of conditions must be met:

a) There must be a right to preventive self-defence in the first place. As Quigley notes, its mere existence in public international law is the subject of debate.[45] Wrange goes so far as to say that it is permissible to launch a self-defence action shortly before the start of the anticipated armed attack, if the attack operation has already largely been launched.[46] Wrange writes that the circumstances of the 1967 war are unclear: Was it only a "political" manoeuvre on Egypt's part, or was an attack underway? However, through Quigley's book, which was published after Wrange's work, we now know that no Egyptian attack was on the way. Even the most generous interpretation of the right to preventive self-defence cannot justify Israel's attack in June 1967.[47]

b) If there could be considered to be a far-reaching right to preventive self-defence, Israel must still have had good, objective reasons to believe that Egypt would indeed attack. That was not the case. The Israelis knew of their own superiority. At the Egyptian-Israeli border, this superiority was not only qualitative, but quantitative – the Israeli soldiers outnumbered the Egyptians.[48] That the Egyptian forces would pose a threat to Israel's existence was, according to Israeli general Matitiahu Peled, "an insult to *Tsahal* [the Israeli army]."[49] Moreover, the Egyptian forces in Sinai were grouped in a defensive formation.[50] Israel knew that Egypt was not going to attack. The coming war, as Menachem Begin would later put it, was a war that Israel chose to fight: "We have to be honest with ourselves. We decided to attack him

[43] Quigley, p. 122.

[44] Quigley, p. 123.

[45] Quigley, pp. 124, 149-161.

[46] Wrange, p. 22.

[47] Wrange, p. 20.

[48] Quigley, p. 20.

[49] Quoted in Quigley, p. 129.

[50] Quigley, pp. 27-28, 36, 65 and 128. The United States and France made the same assessment, Quigley, pp. 17, 28 and 29-30.

> [Nasser].”[51] That Israel chose to attack was because it saw a historic opportunity to crush the Egyptian military for a long time to come.[52]

Thus, Israel’s war of aggression in 1967 cannot be justified on the basis of any right to preventive self-defence.

Of great interest is how the war was treated in the UN Security Council and in the UN General Assembly. In the Security Council, the Soviet Union tabled a draft resolution, one of the paragraphs of which condemned Israel for an act of aggression. Four countries voted in favour, no country voted against; but because the other countries abstained, the resolution did not pass. France, which abstained, also considered it to be an Israeli act of aggression. A corresponding resolution in the General Assembly met a similar fate.[53]

No proposals were made to brand Egypt as the aggressive party. Nor was this point of view advanced in the discussions on the Soviet draft.

It should be noted that no country spoke out in favour of any Israeli right to preventive self-defence.[54] This therefore appears more like a fabricated afterthought than a more serious argument.

Security Council Resolution 242 emphasised the inadmissibility of acquiring territory through war. Peace should be based on the principle of the withdrawal of Israel’s armed forces from territories occupied in the recent conflict.[55] The resolution does not place blame for the war on either party.

The support in public international law for calling the war of 1967 a “pure war of aggression” on the part of the “Arab states” is thus thin, if not non-existent. On the other hand, as Quigley believes, there are good grounds for considering that Israel is the aggressive party.

4. October War of 1973

4.1 The course of the war

On 6 October 1973, Syria attacked in the north and Egypt in the south. The Israelis were expecting an attack, but not exactly at that time. The Arabs initially had great success and regained some territory.

On 16 October, an oil embargo and a diplomatic offensive were launched. According to a communiqué by the Arab oil ministers, the embargo would remain in place “until the Israeli forces are fully withdrawn from all Arab territories occupied during the June 1967 War, and the legitimate rights of the Palestinian people are restored.” A number of Arab foreign ministers met with US

[51] Quoted in Quigley, p. 131.

[52] Quigley, p. 27, 31.

[53] Quigley.

[54] Quiglely, pp. 96–99.

[55] The English version of Resolution 242 uses “territories,” an indefinite form. However, the French version speaks of “des territoires,” i.e., in definite form.

Secretary of State Henry Kissinger at the White House to reiterate demands for Israeli withdrawal from Arab territories in exchange for peace.[56]

On 22 October, after the fortunes of war turned, the UN Security Council adopted Resolution 338, which called on the parties to adopt a ceasefire and to implement Resolution 242 in all its parts immediately after the ceasefire entered into force. A truce occurred on the same day.[57]

4.2 Legal assessment

It should be recalled at the outset that the ceasefire entered into after the Six-Day War had the implication that the prohibition on the use of force now prevailed between the parties, even if no formal peace agreement was concluded.

It is easy to state that Egypt and Syria started the war with their attack on 6 October 1973. It is also tempting to conclude that the Arabs even attacked in a way that constitutes an armed attack, an act of aggression or a "pure war of aggression."

At the time of the attack, however, Israel occupied large amounts of Arab territory as a result of the 1967 war. Depending on the view one takes, it can be said that Israel occupied this territory either as a result of a war of aggression or as a result of a war of defence.

If Israel was the aggressive party in 1967, which there are good reasons to believe, then the ensuing occupation is itself also an aggression. Article 3(a) of Resolution 3314 provides that not only a military invasion or an attack by the armed forces of a state could amount to an act of aggression, but also any military occupation resulting from such an invasion or an attack. According to this view, the Arabs exercised their right to self-defence under Article 51 of the UN Charter when they tried to reclaim their own territory. The prohibition on the use of force, which applied between the parties through the ceasefire, did not of course apply to the extent that the right of self-defence applied.

If Israel had only been defending itself in 1967, which is not the most reasonable assessment, it would have had some right to occupy Arab territory, for a limited time. Some believe that this period continues until there are permanent peace agreements.[58] No permanent peace agreement existed in 1973, so in this case there is a stronger basis for claiming that the Arab states committed some kind of aggression. Quigley, for his part, argues that the right to occupy ceases when the attacker's armed forces have been defeated, thus dissolving the right to self-defence. In that case, Israel's right to occupy ended very shortly after the 1967 war.[59] The continued occupation then became illegitimate. Perhaps it even constituted an aggression; the list of acts constituting aggression in Article 3 of Resolution 3314 is not exhaustive. Even in this case, Egypt and Syria can be considered to have exercised their right to self-defence when they tried to retake occupied territory, which in that case is not affected by the prohibition on the use of force that otherwise applied.

It can also be stated that here, too, the Security Council did not issue a resolution blaming one party or the other.

[56] Rogan, p. 465.

[57] Resolution 338, Rogan, p. 467.

[58] Stone and Greig, in Quigley, p. 178.

[59] Quigley, p. 178.

The conclusion is thus that it is extremely uncertain whether Egypt or the other Arab states were guilty of a "pure war of aggression" in violation of the UN Charter or the aforementioned UN General Assembly resolution. On the other hand, it is arguable that the Israeli occupation should be regarded as an aggression in itself, against which the Arab states had the right to defend themselves. However, this is a relatively complex situation, where occupation, ceasefire, prohibition on the use of force, self-defence and other parameters speak in different directions.

5. Contemporary consequences

5.1 Occupation and annexation can constitute acts of aggression

As can be seen above, a military occupation can constitute an act of aggression in its own right. This is if it is the result of an invasion or attack, which itself constitutes an act of aggression. If Israel's attack on Egypt, Syria and Jordan in 1967 constituted an act of aggression, as Quigley believes, then the ensuing occupation is also an act of aggression, which persists to this day and for which Israel is responsible. Israel's annexation of East Jerusalem and the Golan Heights constitutes an act of aggression, regardless of whether Israel's war of aggression in 1967 constitutes an act of aggression or not. This is because it is sufficient that the annexation was effected by the use of force according to Article 3(a) of Resolution 3314.[60]

A prerequisite would be that the act of aggression is committed by one state against another. The West Bank including East Jerusalem belonged to Jordan at the time of Israel's war of aggression in 1967, although Jordan's annexation was not widely recognised. The Golan Heights belonged to (and still belong to) Syria.

Since then, the situation has changed. Jordan has renounced all claims to the West Bank, including East Jerusalem. Instead, a Palestinian state has been proclaimed. It lacks control over its territory, but it has been recognised by a majority of the world's states (including Sweden). In addition, the International Criminal Court has considered Palestine a state for the purposes of the Rome Statute, which is why the Court has jurisdiction over crimes committed in Palestine.[61] The act of aggression, in the form of occupation, is thus being committed against a state other than the one against which the original military attack was directed. That should not in itself be an obstacle to assessing the occupation as an act of aggression. On the contrary, the permanent occupation of another state's territory on a permanent basis should be a clear example of an act of aggression. It is quite clear that Israel is committing an act of aggression against Syria through the occupation and annexation of the Golan Heights, because that area has been conquered by force.

Even occupation for defensive purposes would have had to end sooner or later, as mentioned above. Israel's occupation of the West Bank, including East Jerusalem, has lasted long after a possible right of self-defence ended, and long after peace agreements were concluded with both Jordan and the PLO. The occupation is thus illegitimate, and perhaps even an act of aggression.[62]

[60] This aspect is not addressed by either Quigley or Wrange, nor in Government Bill 2020/21:204, which is part of the preparatory work for SFS 2021:1016, whereby the crime of aggression was introduced into Swedish law.

[61] See the ICC-01/18 decision of the International Criminal Court's Chamber of Criminal Investigations, 5 February 2021.

[62] The list of various forms of offences of aggression in Article 3 of Resolution 3314 is not exhaustive.

There are many who believe that Israel is committing an act of aggression through the occupation, although the basis for that assessment is different from that outlined here. The UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 bases her assessment primarily on a statement in the preamble to Resolution 3314, in which the General Assembly reaffirms the duty of states not to use armed force to deprive peoples of their right to self-determination, freedom and independence; or to disrupt territorial integrity.[63] Ralph Wilde, for his part, argues that the occupation cannot be justified as self-defence, and therefore constitutes an unlawful use of force, that is, an aggression.[64] These assessments are not based on the idea of aggression as a crime committed by one State against another State, which otherwise appears to be a clear general rule in both Article 8 bis of the Rome Statute and Section 11 a of the International Crimes Act.

The matter may eventually be decided by the International Court of Justice, in The Hague.[65]

5.2 Personal liability under the Rome Statute and national law

Something that has happened since Israel's war of aggression in 1967 is that the Rome Statute has come into force. As mentioned above, it now also contains a provision, Article 8 bis, which prescribes individual responsibility for the crime of aggression. The corresponding provision in Swedish law is Section 11 a of the International Crimes Act.

An act of aggression in the form of a military attack or invasion is a crime that is completed when the attack or the invasion takes place. However, aggression in the form of occupation or annexation is probably to be considered continuing crimes. They are committed as long as the occupation continues and the annexation applies. This means that today's Israeli leaders and military risk personal criminal liability for actions that amount to the crime of aggression.

As Ehrenkrona has noted, the jurisdictional issues in the Rome Statute probably break all records in complexity.[66] It is not easy to bring a person to justice, which is probably also the intention of the provisions. However, as far as the situation in Palestine is concerned, there is a real possibility of prosecuting people guilty of various crimes. On 3 March 2021, the Prosecutor of the International Criminal Court opened an investigation into war crimes committed after 13 June 2014.[67] An attached document summarises the conclusions of the preliminary investigation that preceded the decision.[68] Both Israel and Hamas and other armed Palestinian groups are suspected of having committed war crimes. As far as Israel is concerned, it mentions, among other things, attacks on civilians and Israel's illegal construction of settlements in occupied territory. It is emphasised that the prosecutor's investigation is not limited to the crimes that formed the basis of the prosecutor's decision to open an

[63] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/77/356, p. 9.

[64] Wilde, Ralph, The international law of self-determination and the use of force requires an immediate end to the occupation of the Palestinian West Bank and Gaza, July 2022, Policy Brief, based on an Article in the Palestine Yearbook of International Law, p. 4. https://bit.ly/ralph-wilde-palestine [2022-11-20].

[65] Fourth Committee, Concluding Its Work, Approves Six Draft Resolutions, Including Request for ICJ Opinion on Israeli Occupation, UN Press [2002-11-20].

[66] Ehrenkrona, p. 306.

[67] See the Court's home page, Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine | International Criminal Court (icc-cpi.int) [2022-11-08].

[68] Situation in Palestine, Summary of Preliminary Examination Findings (icc-cpi.int) [2022-11-08].

investigation. This means that apartheid and persecution, which are crimes against humanity, can also be the subject of the prosecutor's investigation.[69] More relevant to this article is the question of whether the crime of aggression should also be investigated by the prosecutor of the criminal court.[70] It is also a demand of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.[71] It is unclear whether the UN Special Rapporteur has drawn attention to the provision of Article 15 bis (5). Under that provision, the International Criminal Court does not have jurisdiction over the crime of aggression committed by Israeli citizens, as Israel is not a party to the Rome Statute. However, it cannot be ruled out that persons with citizenship other than Israeli citizenship are guilty of the crime.

The International Crimes Act is, as stated above, based on the Rome Statute. The exemplification of crimes of aggression in Article 3 of Resolution 3314 and Article 8 bis paragraph 2 of the Rome Statute has no direct equivalent in Swedish law, but as Ehrenkrona states, these provisions are important for the Swedish courts when interpreting Section 11 a of the International Crimes Act.[72] What is to be considered a crime of aggression according to the Rome Statute is thus also a potential violation of Swedish law. Unlike other international crimes, Sweden does not claim universal jurisdiction with respect to the crime of aggression, but the crime has a special regulation in Section 17 of the International Crimes Act. However, Swedish prosecutors can investigate crimes committed by someone who, at the time of the crime or when charges are brought, was a Swedish citizen or was domiciled in Sweden: see the above-mentioned Section 17 in conjunction with Chapter 2, Section 3(2)(a) and (b) of the Penal Code. However, it is unlikely that a larger circle of people could be considered for prosecution in Sweden. To be convicted as an offender, a defendant must have been able to exercise control or command over Israel's political or military actions. The same requirements apply to convicting someone suspected of aiding and abetting under Chapter 23, Section 4 of the Penal Code.[73] Nevertheless, Swedish prosecutors should investigate these crimes, in accordance with the demands of the UN Special Rapporteur on human rights in Palestine.[74]

6. Conclusion

The above presentation shows that none of the Arab-Israeli wars of 1948–1949, 1967 and 1973 constituted "pure wars of aggression" on the part of the Arabs. Instead, there is a more solid foundation to stand on for anyone who claims that Israel (formerly the Zionist movement) behaved aggressively in 1948–1949 and 1967, and by occupying and annexing Arab territory after 1967.

The presentation also shows how important it is that more lawyers adopt the findings of the latest political science and historical research. Failure to do so inevitably results in materially incorrect assessments of historical and current events. Both Kattan and Quigley (themselves lawyers) have

[69] Human Rights Watch, A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution, A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution | HRW [2022-11-20], and Amnesty International, Israel's Apartheid against Palestinians: A look into Decades of Oppression and Domination, Israel's apartheid against Palestinians – Amnesty International [2022-11-20].

[70] This is even though, as Wrange notes, there is some resistance to applying provisions on crimes of aggression, Wrange, pp. 58–59.

[71] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/77/356, p. 23.

[72] Ehrenkrona, p. 309.

[73] Government Bill 2020/21:204, p. 77.

[74] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/77/356, p. 23.

lamented the inability of lawyers in this regard. Kattan writes that it is "astonishing that no international lawyer who has written on the history of the Arab-Israeli conflict has felt it necessary to revisit their scholarship in the light of this new factual material."[75] Quigley is more nuanced. Many have changed their minds, but there are certainly many who refuse to adopt new research findings.[76] Kattan and Quigley are likely referring to Anglo-Saxon lawyers, but there is no reason to believe that Swedish lawyers are any better informed.

There are good reasons to believe that the Israeli occupation and annexation of Arab territories since Israel's war of aggression in 1967 in themselves constitute aggression. Since illegal occupation and annexation are likely to be continuing crimes, they could mean the continuing liability of Israel as a state, and also the criminal liability of the Israeli politicians, military and officials who maintain the occupation.

In Ehrenkrona's article, these current wars should not have been mentioned as "pure wars of aggression" on the part of the Arabs. There is stronger support for citing them as examples of Israeli "pure wars of aggression" against various Arab states. In the light of such a correct assessment, one can then draw correct conclusions about the current situation in the Middle East, including the issue of the criminal liability of Israeli politicians and military personnel and also Swedish citizens who contribute to the occupation.

[75] Kattan, p. 172.

[76] Quigley, pp. 132–137, 155–159.