The authors Quigley and Eden advance arguments as to why Palestine is or is not a State. Having regard to the legal issues only, which of the arguments do you consider most persuasive and why?

The contention of Palestine's statehood has inhibited the minds and debates of legal scholars and jurisprudence for many decades. While at times the argument can be lost amid political commentaries, there exists a clear legal criterion for statehood, which when applied, can ultimately indicate the existence of an entity's statehood. This essay will apply these relevant criteria – coming from the Montevideo Convention as a reflection of customary international law – to the arguments submitted by Quigley and Eden in their respective articles. In doing this, it will be held that Palestine, despite possessing several legal features of a state, is *not* a state for the purposes of the Montevideo Convention, as reflected by the work of Eden.

Before a determination of Palestine's statehood can be made, a clear source of international law that provides applicable criteria must be identified. Here, it is argued that the four elements of Article 1 of the *Montevideo Convention on the Rights and Duties of States 1933 ('Montevideo Convention')*[1] are the necessary requirements of statehood. However, as the Montevideo Convention is a treaty, it must be interpreted as such. *The Vienna Convention of the Law of Treaties 1969 (VCLT)*[2] provides the fundamental tools of interpretation of treaties. Despite only applying to treaties established after the VCLT came into force, as enunciated in Article 4,[3] it is largely accepted as representing customary international law, and henceforth the provisions of the VCLT will be applied. Article 34 provides that treaty obligations will only bind the parties to the treaty unless third parties express consent.[4] This necessitates that the Montevideo Convention may not apply in an arbitrary fashion, and must only bind the states party to it. Subsequently, the Montevideo Convention can only apply as to the signatories of the convention.

---

[1] *The Montevideo Convention on the Rights and Duties of States,* opened for signature December 26 1933, 165 LNTS 19 (entered into force December 26 1934) ('*Montevideo Convention'*).
[2] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force January 27 1980) ('VCLT').
[3] *VCLT* art 4.
[4] *VCLT*, art 35.

Despite this, significant argument exists that the Montevideo Convention is merely a crystallization of existing Customary International Law, and as such, can apply as a general principle of international law, rather than just those parties expressly signatories to the treaty. Customary international law is defined as *"international custom, as evidence of general practice accepted as law"*.[5] It is comprised of two elements: state practice and *opinio juris*, as stated in *Continental Shelf* and reaffirmed in *Nicaragua*.[6] [7] In connection to the Montevideo Convention, state practice can be evidenced by the 16 states that ratified the convention, thus acknowledging that

> *"The state as a person of international law should posses the following qualifications:*
>
> *a) A permanent population*
>
> *b) A defined territory*
>
> *c) A government*
>
> *d) Capacity to enter into relations with other states* [8]

This serves as evidence of state practice as the signing and ratification of treaties, as well as actual conduct constitutes sufficient practice.[9] Furthermore, the Arbitration Commission of the Conference on Yugoslavia's use of the above criteria when deciding that the Socialist Federative Republic of Yugoslavia was in the process of decline can further evidence state practice. This is because the Arbitration Commission was an organ of the former European Economic Community (now European Union), and thus under Article 5 of the *Draft Articles for the Responsibilities of States*, is attributable to the state of the European Union – becoming state practice.[10] Furthermore, evidence of *opinio juris* in relation to the Montevideo Convention can be found in Opinion No. 1 of the Arbitration Committee. *"The answer to the question should be based upon the principles of public international law which serve to define the conditions on which an entity constitutes a*

---

[5] *The Statute of the International Court of Justice* art 38(1)(b).
[6] *Continental Shelf (Libya v Malta)* [1985] I.C.J. Rep 13 [27].
[7] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14 [183].
[8] *Montevideo Convention,* art 1.
[9] Stephen Hall, *Principles of International Law* (LexisNexis, 4th ed, 2014) 35.
[10] *Draft Articles on the Responsibility of States for Internationally Wrongful acts* (ILC, 53rd Session, 2001).

state". [11] The Opinion then continues, *"The state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty"*.[12] This is clear *opinio juris* that the criteria of Article 1 one of the Montevideo Convention should be used when defining statehood, thus reflecting that the Montevideo Convention is a consolidation of customary international law. Because of this, Article 1's criteria can be used to analyze Palestine's statehood.

In order for Palestine to be considered a state it must show evidence of a stable population, thus satisfying Article (1)(a) of the Montevideo Convention. As expressed in legal writings, the population need not be large, so long as it is permanent and not *"transient"*.[13] With reference to Palestine, there seems to be little contention that a permanent population exists. This is emphasized in Eden's article, as he notes that no United Nations membership application has ever raised issues regarding permanent population.[14] Quigley, much like Eden, does not raise contention over permanent population and instead evidences its' existence by mentioning Article 80 of the UN charter,[15] stating that it effected in including *"the right to independence of the people of Palestine"*,[16] thus acknowledging a permanent population.

The second criterion, a defined territory, as stated in Article 1(b) can also be met, albeit slightly debated. The Article requires an entity to have a permanent territory over which it may exercise authority.[17] Palestine, through the Oslo agreement is still yet to settle its' borders with neighboring Israel.[18] Eden comments on this, nothing *"the exact boundaries of any future Palestinian state remain to be decided";*[19] a similar view to that of Quigley who maintains *"borders are to be negotiated"*. This,

---

[11] B. G Ramcharan, '*The International Conference on the Former Yugoslavia: Official Papers, Volume 2'* (BRILL, 1997) 1260.
[12] Ibid.
[13] Stephen Hall, above n 9, 210.
[14] Paul Eden, 'Palestinian Statehood: Trapped Between Rhetoric and Realpolitik' (2013) 61(1) *International and Comparative Law Quarterly*, 225, 231.
[15] *The Charter of the United Nations,* art 80.
[16] John B Quigley, 'Palestine at the United Nations: What Does It Take To Be A State?' (2011) 20 *ILSA Quarterly*, 29, 32.
[17] *Montevideo Convention,* art 3.
[18] John B Quigley, above n 16, 33.
[19] Paul Eden, n 14, 231.

however, does not negate the chance of Palestine meeting the territory criterion. State practice demonstrates that *'sufficient consistency'* is adequate territory definition to fulfill the second criterion of statehood, even if those borders aren't completely settled.[20] This is reflected in Eden's work, which also support's the view that the Palestinian situation can be analogs to other state's territorial disputes that have not prevented the existence of statehood. As such, it is well supported that Palestine fulfills the second criterion of statehood.

Moreover, to successfully be considered a state, Palestine must demonstrate an effective government which can exert control over its' specified territory.[21] While there is no definite indicator of an effective government, several elements are enunciated in *Aaland Island Case*.[22] A stable political organization, effective public authorities able to assert themselves, and independence from foreign troops are all to be considered.[23] On this issue, Eden argues that the Palestinian Authority, in light of the political conflicts, does have established governmental functions amounting to the functions of a state government.[24] Quigley seconds this, in expressing that *'governing mechanisms were gradually introduced'*.[25] In both acknowledging the existence of such governmental systems, both Quigley and Eden evidence Palestine's fulfillment of the third criterion of statehood.

The fourth criterion of statehood, as represented by article 1(d) of the Montevideo Convention, is capacity to enter into relations with other states.[26] This can be determined by an entity's political, financial and technical resources to establish and maintain contacts with other states.[27] This view is largely supported by state practice,[28] and is manifested in the widespread subscription to the declaratory theory, which states that international recognition of an entity's statehood is merely

---

[20] *Deutsche Continental Gas-Gesellschaft v Polish State* [1929] 5 AD 11, 15.
[21] *Montevideo Convention* art 1(c).
[22] *League of Nations Official Journal,* Special Supplement No 3, 1920.
[23] Ibid.
[24] Paul Eden, above n 14, 231.
[25] John B Quigley, above n 16, 33.
[26] *Montevideo Convention,* art 1(d).
[27] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States,* 1987, Vol 1 § 201.
[28] Stephen Hall, above n 9, 213.

recognition, not creation of statehood.[29] Evidence of this standard is further reinforced in Article 3 of the Montevideo Convention, which holds that *'the political existence of a state is independent of recognition of other states'*.[30] Eden's work reflects this, stating that widespread recognition of the state of Palestine at the United Nations is *'indicative of a rhetorical commitment to the realization of Palestinian self-determination'*.[31] Implicit in this argument is the impartial role other states play in creating statehood, thus acknowledging that while the Palestinian state may have recognition, it is not adequate for the creation of statehood. Instead, Eden argues that Palestinian Authorities do not have the capacity to enter into foreign relations as they are prohibited such privileges by several self-governing agreement.[32] [33] This contrasts the work of Quigley, who follows a constitutive approach by noting '*statehood…depends on an entity's acceptance in the international community*.[34] In accepting Palestine's statehood (subject to international recognition) Quigley maintains that Palestine is in fact a state. This approach, however, may not be as relevant as the declaratory approach, as in exception of the *Tinoco Arbitration,* which held that lack of recognition is often indicative of lack of control and independence to enter into relations,[35] it is largely not supported by international law.[36] Having considered this, Eden's argument that Palestine is not a state due to its failure to enter into relations - as mandated by international treaties - rather than widespread non-recognition holds greater legal merit, and thus is more persuasive.

As established, the dispute of Palestinian statehood can be analyzed with reference to the Montevideo Convention statehood criteria. In doing this, it appears that Palestine, in light of the first three criteria, may in fact be a state; both Eden and Quigley support this in their writings. Pivotal in the determination, however, is the fourth

---

[29] Ibid.
[30] *Montevideo Convention,* art 3.
[31] Paul Eden, above n 14, 233.
[32] Israeli-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, signed 19 September 1993, reprinted in (1993) 32 ILM 1525.
[33] Israeli-Palestine Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, signed 28 September 1995, reprinted in (1997) 36 ILM 551.
[34] John B Quigley, above n 16, 33.
[35] *Tinoco Arbitration (Great Britain v Costa Rica)* [1923] 1 RIAA 369.
[36] Stephen Hall, above n 9, 213.

criterion – capacity to enter relations. It is here where Eden's argument prevails over Quigley's, as it strays from political evidence and provides legal authority. Eden's argument is closely aligned with general principles and standards of international law, as reinforced by the Montevideo Convention, and as such, in light of the legal standards alone, is more persuasive than Quigley's. This gives effect to the view that Palestine, in a legal sense, is *not* a state.