

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?

INTRODUCTION

John B Quigley and Paul Eden present conflicting articles on the issue of Palestine's legal statehood. Central to both articles is the Montevideo Convention on the Rights and Duties of States¹. The convention is arguably solidified in customary international law through two decisions by the International Court of Justice; the first in 1969² and the second in 1975³. The Montevideo Convention outlined four criteria that an entity must satisfy to be considered a state. It must have a permanent population, defined territory, effective government and independence from other states. Eden adamantly adheres to these criteria, applying the current facts to the law. Quigley addresses the Montevideo Convention as a relevant facet of international law in the determination of statehood, but also argues that historical elements and state opinion all contribute to the determination of Palestine as a state.

Though Eden seems to apply the Palestinian situation at present to the Montevideo convention, Quigley presents a more thorough, diverse and persuasive argument as he analyses Palestine and the International law surrounding it as a whole, rather than solely through the eyes of the Montevideo Convention.

PALESTINE UNDER THE MONTEVIDEO CONVENTION

PERMANENT POPULATION AND DEFINED TERRITORY

¹ *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 1.

² *North Seas Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1969), ICJ Reports 3, 32.

³ *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975.

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Comment [1]: This is a very good introduction. Excellent signposting and summary of your analysis. Well done

Both Quigley and Eden agree that Palestine satisfies the criterion for having a permanent population. There is a permanent Arab population living in the West Bank and in Gaza. Similarly, Quigley and Eden agree that Palestine possesses a defined territory. Quigley however presents a thorough review of what Palestine's borders have been historically and what Palestine currently claims to be their borders. Quigley's review presents a much more definite analysis on the location of Palestine's borders - namely those existing prior to 1967⁴. Quigley also raised the case of Denmark in the Second World War⁵, which was occupied by Germany where Denmark was occupied yet was still a state. These arguments would satisfy the precedent outlined in *Deutsche Continental Gas-Gesellschaft v Polish State*⁶ where territory is to have a 'sufficient consistency' and the state 'actually exercises independent public authority over that territory'. Eden's reasoning is less persuasive in establishing defined territory as he abruptly ceases his enquiry with 'a State does not require exactly defined or undisputed borders to exist'⁷.

EFFECTIVE GOVERNMENT

In his article, Eden advances the argument that Palestine does not possess adequate governance to be considered a state. Eden's reasoning is that as there are two governmental organisations with conflicting policies. Furthermore, Eden references apparent constitutional problems arising from UN membership as it may cause 'fragmentation' and 'disenfranchisement'⁸. Eden does not support this claim with any reasoning or further authority.

Quigley approaches the issue of effective governance through analogy, referencing Vietnam. He states that 'such splits are known to international practice when competing forces contest the territory. Vietnam until 1975 is an

⁴ John B Quigley, 'Palestine at the United Nations: What does it take to be a state?' (2011) 20(2) *ILSA Quarterly* 32.

⁵ *Ibid* 30.

⁶ *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 Ann Dig 11, 15.

⁷ Paul Eden, 'Palestine Statehood: Trapped between Rhetoric and Realpolitik' (2013) 62 *International and Comparative Quarterly* 231.

⁸ *Ibid* 232.

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Comment [2]: You've come to the right conclusion here, but the comments with respect to Denmark were made with respect to independence of government, rather than integrity of borders. Both authors concluded that borders need not be undisputed, but there simply had to be an undisputed core.

example. Such a split does not affect statehood.⁹ Quigley is more persuasive with his reasoning as he applies precedent to the present case and adheres to the law set in the *Aaland Islands* case: that a government must have control over a defined territory and have the ability to make and enforce laws¹⁰. Quigley uses the example of Vietnam prior to 1975, as it did not cease to be a state though it possessed two entirely different governments with conflicting policy. Eden's use of historical authority is more convincing on a legal stage than pure academic writings.

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Comment [3]: Does it matter that Vietnam was a state before division?

INDEPENDENCE AND CAPACITY TO ENTER INTO FOREIGN RELATIONS

Palestine's independence from the influence of other states is disputed through the interpretation of the *Declaration of Principles on Interim Self-Government Arrangements*¹¹ (Oslo Agreement) and the *Interim Agreement on the West Bank and Gaza Strip*¹² (Interim Agreement). Eden argues that these agreements are a clear indication that 'the Palestinian Authority lacks the capacity to conduct foreign relations'¹³, referencing article 3(b) of Annex II of the Oslo agreement and Article XI(5)(a) of the Interim Agreement. Quigley also references both agreements, but interprets them in favour of Palestine's statehood. Quigley's reasoning in the Oslo agreement was that 'the statehood of Palestine is not listed as an issue to be negotiated with Israel. Borders are to be negotiated, and borders matter only as between states'¹⁴. Furthermore, Quigley mentions an objection from the Israeli Prime Minister Benjamin Netanyahu at its conclusion, 'criticising it precisely on the ground that it meant that Israel was recognising Palestine as a State'¹⁵.

⁹ Quigley, above n 4, 33.

¹⁰ *Aaland Islands* case (1920) LNOJ Spec. Supp. No. 3.

¹¹ *Declaration of Principles on Interim Self-Government Arrangements, Israel-Palestine*, signed 19 September 1993, 32 ILM 1525.

¹² *Interim Agreement on the West Bank and Gaza Strip, Israel-Palestine*, signed 28 September 1995, 36 ILM 551.

¹³ Eden, above n 7, 232.

¹⁴ Quigley, above n 4, 34.

¹⁵ *Ibid.*

The interim agreement from Quigley's perspective 'applies to only the Palestinian Authority ... but not Palestine as a State'¹⁶. Furthermore, Quigley goes on to reason that the Interim Agreement states that 'nothing in it is with prejudice to the positions on basic issues of the two parties' and that 'the Interim Agreement does not purport to prevent Palestine from exercising its role as a state in the international community'¹⁷.

Though both interpretations of international law can be seen as valid, the threshold for independence is very low¹⁸. This means that as a matter of legal reasoning, Quigley's interpretation is slightly more favourable.

PALESTINE AS A PRE-EXISTING STATE

Quigley provides numerous authorities to establish Palestine as a state prior to the 1967 war. Quigley gives a brief history of the statehood of Palestine, which ultimately serves to shift the burden in establishing Palestine as a state. After the First World War and the collapse of the Ottoman Empire, Palestine was established as a successor state with the status akin to that of a protectorate to the British Empire¹⁹. Though Palestine may have been under guardianship of another state, it did not lack the capacity to enter into relations with other states. Palestine's statehood in the 1930s was 'accepted by a consensus of the international community ... that census included the United States'²⁰. The opinion that Palestine is a state was held in mainstream legal opinion until 1967, even after Britain's withdrawal from Palestine²¹. Quigley seeks to establish that Palestine has already been a state because it is harder to cease to be a state than to become one. In effect, this shifts the burden of the argument in that it must show that a state no longer exists rather than prove that one does exist. With this in mind, the criteria of the Montevideo Convention becomes more lenient in its application. Instead of trying to define borders with no historical precedent,

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ *Customs Regime between Germany and Austria* (Protocol of March 19th, 1931) (PCIJ, 1931).

¹⁹ Quigley, above n 4, 31.

²⁰ Ibid.

²¹ Ibid 32.

there is a **clear** record of what Palestine's borders have been. Instead of having to prove the existence of an adequate government to constitute statehood, the existing state need only show that some form of government still exists and that it has the capacity to carry out diplomatic relations with states. Under the shifted burden, Palestine easily satisfies these requirements.

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Comment [4]: Well put. What is your authority?

PALESTINE RECOGNISED AS A STATE

Article 3 of the Montevideo Convention states that 'The political existence of a state is independent of recognition by other States'²². In the international environment, the reality is very different as it is ultimately the states who determine who can or cannot be a state. In this regard, it is important to note whether or not other states recognise Palestine as being a state. Though individual memberships of International Organisations such as the World Health Organisation and the United Nations Economic Scientific and Cultural Organisation can be considered a political issue, when addressed in an aggregate sense, state opinion on Palestine's statehood can be derived. This is central to one of Quigley's arguments, where he argues that Palestine is a member of several international organisations where one must be considered a state to be admitted. Quigley references several authorities where recognition of statehood has been conferred to Palestine. The European Court of Justice acknowledged Palestine as a state in 2010, where it was ruled that 'Palestine was the state with authority over the West Bank'²³. Palestine is also 'accorded the right of reply to statements made by other states' in the General Assembly. 'Only States enjoy a right of reply'²⁴. The UN also acknowledged the statehood of Palestine through the acceptance of 'its instruments of adherence to treaties on road, maritime and rail transport which could not be accepted if Palestine were not considered to be a state'²⁵.

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Comment [5]: This is a good section, but you could bolster it with additional authority for your positions

²² *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 3.

²³ Quigley, above n 4, 34.

²⁴ *Ibid.*

²⁵ *Ibid.*

CONCLUSION

Eden's argument strictly applies the Montevideo Convention to the Palestinian situation with little reference to outside authority. His argument is simple to interpret: if Palestine in its current state fails to meet all criteria outlined by the Montevideo Convention, then it is not a State. Eden then applies this statement to conclude that Palestine is not as of yet a state. Quigley advances that the determination of statehood rests on more than just the Montevideo Convention. His argument consists of three prongs: that Palestine has already been acknowledged as being a state; that even if it hadn't already been acknowledged, Palestine would satisfy the criteria for statehood; and that other states recognise Palestine as a state, therefore it must be a state. *Prima facie*, Eden's article seems to apply the law to the facts in a comprehensive manner, however when examined in depth, his argument seems rather one-dimensional. It is through the employment of other methods in the determination of Statehood that Quigley constructs a more legally persuasive article.

Comments:

This was a very good effort. You have some clearly articulated arguments and a very solid analysis of the key issues. Whilst there were some weaker sections in which your arguments could have used additional detail or further authority, on the whole this was well written and executed, showing a good understanding of the fundamental legal concepts in question. Well done.