

# A LEGAL PERSPECTIVE ON RECOGNISING THE DURAND LINE: ITS PROS AND CONS AND WAY FORWARD

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## **Abstract**

*Since 1947, issues of the legitimacy of the Durand Line and Pakhtoonistan have been the major source of concern in Pakistan-Afghan relations. These conflicts have damaged relations between the two countries to the extent that these actions also led to border conflicts. In this paper, majorly discussed issues are related to Durand line and old / current rules relevant to this line. This paper also focuses on the fact that how the relationship between Pakistan and the Afghanistan has always been of difficult nature. It argues how the porous nature of border and the scattered population of tribes across the border have resulted into other evils of cross border terrorism, narcotics smuggling and unregulated flow of immigrants. The paper also covers the legal issue and easement rights that are often included in the arguments in favour or against the validity of Durand Line. It has been argued in this paper that the Durand Line should constitute the legal border and be recognized as such by both the countries.*

**Key Words:** Durand Line, Porous nature of border, Legal Aspect, Easement Rights, Way Forward

## **Background**

The Durand Line, stretching from the Sarikol Range in the North to the Iranian border in the Southwestern region, marks the 2,450-kilometer boundary between Afghanistan and Pakistan. This border was established through the Durand Line Agreement, signed in 1893 in Kabul by Sir Mortimer Durand, a representative of the British-Indian Government, and Abdur Rahman, the then Afghan Amir. It is widely regarded as one of the world's most perilous and insecure border areas due to its permeable nature and weak governmental control. This lack of control has given rise to various criminal activities, including the routine smuggling of weapons, narcotics, vehicles, timber, and electronic goods. Moreover, the border separates numerous families, tribes, and villages on both sides. In recognition of the situation, these divided tribes and families were granted the right to freely traverse the border under the legal provision of "Easement Rights." Consequently, the border has come to be known as a "Soft Border" (Saleem, 2009, pp. 204- 220).

The Pakistani side border areas consist of the Khyber Pakhtoon Khawa Province with six out of seven agencies previously known as the Federally Administered Tribal Areas (FATA) and Balochistan Province. On the Afghanistan side, eleven provinces border Pakistan, namely (from North to South) Badakhshan, Nuristan, Kunar, Nangarhar, Paktia, Khost, Paktika, Zabol, Kandahar, Helmand and Nimruz. Two of these, Nangarhar and Kandahar, are amongst the five densely inhabited provinces of the Afghanistan and they are also home to the two major official border crossing points of Torkham and Spin Boldak.

## **Historical Perspective of the Durand Line**

Although the boundary of Afghanistan with Russia was defined in 1888 however, the boundary with British India was not explicitly defined (Tavares, 2007, pp. 33-37). In 1888, a British mission to Kabul under Henry Mortimer Durand was proposed to be sent but due to the revolt of Ishak Khan and the illness of Amir the mission was postponed (Khan, 1900, p. 155). In 1892, Lord Lansdowne sent a strongly worded letter to the Amir that the time had come for the settlement of the frontiers between India and Afghanistan. Lord Lansdowne wanted the Amir to come to India, but Amir requested that a mission should be sent to Kabul. To this the Viceroy replied that the mission would be sent to Jalalabad. But this was again not acceptable to the Amir. However, the greatest difficulty was about

the person who was to lead the British mission to Afghanistan. Lord Lansdowne proposed the name of Lord Roberts to be the head of this mission (Bijan, 2009).

Amir once again refused the term of this mission. The Viceroy informed that "If I do not hear from your Highness by the first September that you are prepared to receive Lord Roberts, I shall assume that my offer is not acceptable, and it can be withdrawn". The Amir was also at the same time told that the frontier between India and Afghanistan had to be settled and the British had made up their mind about it and whether this offer is accepted or not, it will be mandatory to decide what all territories form part of the kingdom of Afghanistan" (Malhotra, 1982, p. 99).

On the other hand, the Amir on his part was making further efforts. He approached to the government of India for a mission under Mortimer Durand. But on the British side several problems forced British government to accept the Durand mission such as the trouble with Russia over the territories of Roshan and Shignan. The Russians now proclaimed their intention of occupying Roshan and Shignan and insisted that the Amir's forces should be withdrawn from those parts. At the same time there was trouble about the undefined areas around the Pamirs (Macmunn, 1977, p. 219).

The British wished to involve the Chinese in the whole question but this in turn led to China's staking claims over Hunza which the British in India could not possibly afford to lose. The Amir was anxious to extend his control over Chitral while the British were caught up in the three-fold problem of keeping the Russian's away from the Pamirs with Afghan and Chinese help and the Chinese away from Hunza. In the above background Durand mission was sent to Kabul in August 1893 (Dupree, 2012, p. 425).

Durand was equipped with instructions which had been drafted by Lord Roberts. These were the questions of Chitral, Swat and Bajaur and most importantly of Dir and Asmar; he was informed that the British Indian government would wish him to take. But he was possessed with the power to negotiate and make concessions wherever necessary. Durand's first duty was to reassure His Highness generally and to endeavour to remove from his mind any doubts which he may entertain as to our intentions (Malhotra, 1982, p. 103). In mid-September 1893 Durand left Peshawar for Kabul and because of his skilful handling of the negotiations, he arrived at a final settlement with the Amir on the 12<sup>th</sup> November, 1893. He had settled a vast number of queries regarding the Roshan and Shignan. Durand pointed out that the Russian Government has pressed for the precise accomplishment of the agreement of 1873 and that the British government considered itself constrained to stand by the terms of that agreement. Amir said, "My people will not care, to know exactly how they stand on your side" (Sykes, 1981, p. 175). Durand was successful in convincing the Amir to agree to the evacuation of Roshan and Shignan in return for the districts not in his possession on the Southern side of the Oxus in this section (Ali Shah, 2010, p. 1).

On the other side, after many rounds of discussion during which Amir argued vehemently for his viewpoint, Durand was successful in convincing him to accept the conditions, in return for retaining Asmar, he decided not to hamper in any way with Swat, Bajaur or Chitral. The British Government conceded the Birmal tract of the Wazir country to His Highness, who on his part surrendered his claim to the rest of the Wazir country and to Darwar (Macmunn, 1977, p. 219). He also relinquished his claim to Chagai. With reference to the Chaman question, the Amir revoked his objection to the British cantonment at New Chaman and ceded to the British Government the necessary water rights, which he had himself purchased (Dupree, 2012). Finally, to mark this sense of the friendly spirit of His Highness the government of India realizing that his revenue was too small to upkeep an army from the other expenses, undertook to increase his subsidy from 12 to 18 lakhs of rupees a year (Amin, 2004).

#### **Demarcation of the Durand Line**

The demarcation was left to joint British-Afghan commission to demarcate the Indo-Afghan boundary and this work was completed in 1896 except the boundary from Mohmand to the Khyber Pass due to the disturbances in the Chitral. The work was divided into different parties, first under Mr. Udney and Ghulam Hyder Khan (known as Udney Commission), the Amir's representative, dealing with the boundary line from Asmar to the Safed Koh, South of Landi Kotal. The Second under Mr. J. Donald and Sardar Sherindil Khan (Donald Commission), demarcating the Kurram frontier lying from Peiwar Kotal

to the Laram Pea. The Amir requested that the second commission should be undertaken without any delay and even before Nauroz, because the tribal people who inhabit the country, through which this part of the boundary will run, leave their homes in ten days after the Nauroz (Khan S. M., 1980, pp. 154-155). If the people who know the facts are absent, the commissioners would have difficulty in laying down the line of boundary in accordance with the proper divisions of the tribe. The Third under Mr. R.I. Bruce and the Afghan Commissioner (Bruce Commission) were tasked to demarcate boundary of Waziristan from Shariangargh Peak West of Waziristan to Domandi. The work for the demarcation of the boundary, between Balochistan and Afghanistan was taken up by Captain McMahon (Runion, 2007).

#### **The McMahon Commission**

The boundary between Afghanistan and Balochistan was demarcated by the British commissioner, Captain McMahon, and Gul Mohammad Khan the Afghan Commissioner in 1895. The Boundary line started from the Domandi, the junction of the Gomal and Kunder rivers to the line of the water course of the Kunder River. The Viceroy ordered the Captain McMahon of laying down the demarcating in conjunction with a joint-Afghan Commissioner, the boundary between the territories of Balochistan and Afghanistan Westwards from the junction of the Gomal and Kunder rivers at Domandi to the Koh-I Malik-siah on the Persian border". The other members of this commission were Mr. G. P. Tate as surveyor, Captain H.F. Walters, Lieutenant F.C. Webb-Ware and Surgeon Captain F.P. Maynard as medical officers and naturalist (Lambs, 1966, pp. 47-52).

Apart from the physical condition, difficulty was experienced in arriving at a settlement of the Tirwah lands owing to its joint ownership by Shabekhel Tarakis and Lowanas. By an ancient settlement, these two tribes had agreed amongst themselves about the water of the Tirwah canal which was distributed into twenty-two shares. Twelve shares were the property of the Lowanas and nine shares were the property of the Shabeh Khel Tarakis. McMahon got instruction from Viceroy to ascertain and clearly define the prevailing local rights of villages adjoining the frontier and endeavour with the Afghan commissioner to arrive at such mutual understanding regarding the enjoyment in the future of those local rights as may be best calculated to obviate any further question hereafter likely to arise (Runion, 2007). After consultation with the local tribes, it was decided that there was no necessity to disturb this ancient agreement. The boundary line separating the canals between Lowanas and Shabeh Khel Tarakis was also settled by oath by these two tribes themselves and it was agreed by the Commission that this boundary between the lands of these two tribes should constitute the boundary line between India and Afghanistan (Razvi, 1971, p. 24).

The boundary from Killa Zara run in a straight line to Khizr Chah and thence to the prominent hill called RozaKurak. It was agreed upon that the Khizr Chah would be open to all living in the British or the Afghan side of the territory. Moving South-Westwards, it reached the last bank of the Kand River between the Inzlan and Multani hills. The subjects of both the British Government and the Amir were allowed to use the water of this river. Leaving the Kand River the boundary passed through the Junction of the Alajirgha and Ghazluna Nullahs and reached the Kandanai River. The boundary ran for a long distance along the Kadanai River and reached Wala Nullah near the Northern line turned outwards and passing through Pasha Kotal and the Peak above the Upper Sherobo Spring passed halfway between the New Chaman front and the Lasker Dand out post. The final pillar was constructed at a point halfway between the new Chaman railway station and the Mian Baladk hill (Lambs, 1966, pp. 77-84).

The Viceroy wrote to the Amir that in view of the progress made by the Sardar Gul Mohammad Khan and Captain McMahon in demarcating the boundary between the Balochistan agency and the territories of Afghanistan it was expected that they would be free to continue their work even further as the season would also be favourable for it. It was suggested that the work along the boundary from the New Chaman to Nushki and thence through the Registan to the Persian frontier at Koh-I Malik-1-Siah might be taken up immediately after the completion of the Balochistan-Afghanistan boundary (Palke, 2001, pp. 123-135).

The boundary which was terminated between the New Chaman Railway station and Mian Baldak Hill continued in a conventional line, towards the South and passing through the road known as Sina Lar

it reached about the Ghawazha which was at a distance of about thirty-five miles from the New Chaman. Further progress of the demarcation was hampered at this point owing to certain claims which were advanced by the Afghan Commissioner, Muhammad Umar Khan. Sardar Muhammad Umara Khan, Chief of the Nurzai Durrani tribe was appointed as the Amir Representatives for the second section of the frontier. He met McMahon and attempted to reopen the boundary question related to neighbourhood of New Chaman. The British commissioner Captain McMahon has authorized by the Government of India to break off the work for the summer. The Viceroy informed the Amir that he was not prepared to discuss the question of the boundary line from the Chamman to Ghwazha. Since the boundary had already been demarcated by the Afghan Commissioner, who had jointly signed the agreement defining that line, the Amir should accept it and should not think to reopen the question (Lambs, 1966, pp. 122-124).

The work of the demarcation was resumed in the middle of the October 1895, and the boundary from the Ghwazha proceeded through the Northern bank of Wuchdarra to the watersheds of the Khwaja Amran range and to the junction of Lora with Shista Nullah. Leaving Lora it ran towards the crest of the watersheds which divided the water draining into the Kurram Nullah on the West and the draining into Shorarud on the East and thence up to the Mian Haibat Kahn Ziarat. The boundary from this place took a westerly direction and passing through Kambar Koh and Jari Nazar, South of Siah Sang, entered the sand hills of Registan. Further it crossed the North portion of Lora Hamun and the mountains between the Lora Hamun and Shibian Kotal and reached South of the Mazar I- Kotal passed through several Nullahs and went to a point six miles South of Rabat. From Rabat it was decided that two commissioners should take small parties to the Kuh-1-Malik Siah. But due to shortage of water Camels were used for the transportation of water for two to three days. From Rabat it turned westwards and to some extent southwards to a point, twelve miles north of the Amir Chah and ran up to the Sour and the Jiljil water towards the Afghan boundary line. Due to heavy sand, it was not possible to demarcate the boundary ahead of Soru for some distance by the boundary pillars. As the commissioner reached the Persian frontier, McMahon noted that during a period of nine weeks, only three residents of this deserted area were seen. Further the God-i-Zirreh, a Salt Lake was next surveyed by the boundary commissioners. Then the demarcation started from the southern point of the God- I-Zirreh to South of Gumbaz-1-Shah and finally reached the top of the Koh-1-Malik- 1-Siah (Lambs, 1966, pp. 129-133).

After the work of the demarcation found satisfactorily completed up to the Koh-l Mallick-1-Siah, the final maps and agreements were drawn up and signed on the 13 May 1896. The question of securing for the railway line at New Chaman, and some military question as negotiated by Durand were settled. But some important questions such as the inclusion of British Balochistan of Chagai, which despite protests by the McMahon commission, had been held for many years by the Amir (Sykes, 1981, p. 204).

#### **The Udney Commission 1894-95**

Mr. Udney and Gulam Hyder khan were delegated the responsibility in dealing the boundary line from Asmar to Safed Koha, South of LandiKotal. The total length of the boundary as per the agreement was around 130 miles, of which 75 miles were surveyed. Mr. Udney with the surveyor party of Colonel Holdich, R.E. Lieutenant Coldstream, R.E. and native Surveyor Khan Sahib Abdul Gufar Khan first time met at Landi Khana and proceeded to Kabul and later joined by the Ghulam Haider the Amir Commander in Chief and the Chief Commissioner. These officers were escorted by the Afghan troops ascended with great difficulty through very heavy snow to a point on the Western watershed of the Bashgal valley which was sketched in as drawn on the agreement map. By the Udney Agreement of 1893, it was decided that on the Western side of the River Kunar, the frontier would be the stream of Bashghal in Kafiristan, so that all the country could belong to Afghanistan (Quddus, 1982, pp. 171-183).

The Afghan Amir asserted that it was unnecessary to delineate the Hindukush range. According to his perspective, the boundary from the vicinity of Dora Pass to the higher tributaries of the Kunar River traced the summit of the massive Shawal range, which served as the western boundary of the Chitral valley. The Amir wished to convert the pagan Kefirs to Islam, and also to set up a trade route between

Jalalabad and Badakhshan (Sykes, 1981, p. 185). Resultantly, the decision was in the favour of Amir. Mr. Udney informed the Viceroy that since the whole course of the Landi Sin from its source to its junction with the Kunar lay through Kafiristan which belonged to the Amir he had agreed to leave this portion on the Afghan side of the boundary. He also agreed to leave to the Amir the small strip of the country on the East bank of the river between the Sao and Amawai as it might have led to friction, if the Kafiris had to serve two masters (Holdich, 1916, p. 266).

#### **Donald Commission on Kurram**

The boundary of the Kurram valleys and the area south of it was demarcated by Mr. J. Donald and Sherindil Khan and the task was finished on 21 November 1894. But a small portion of the line in the Khyber was remained un-demarcated until the conclusion of the Third Afghans war of 1919. The starting point of this boundary was the Sikaram Peak from where it descended and touched Peiwar Kotal whence it reached Kimatal Kotal. From this place passing through the cultivable lands of the Istia Jajis, it ran to the western end of Tewza between the pastures of Jajis and Turis (Malhotra, 1982, p. 79).

The boundary line proceeded to Lora, after passing between the cultivable lands of the people of Patani and Kharlachis. After crossing the Kurram River, it ran to Sulimani Chowki near the South bank of Kurram and reached the Manz Darwazgai Pass. Upwards it ascended to the Walli Hill and passing through Istar Dar the boundary reached to the point of meeting of the watersheds of Kurram and Kohat and Hassan Khels. It ended at the Laram Peak after passing UchaLaram Sar and Bezo Sar. The Amir agreed to the proposal of the Viceroy to erect subsidiary pillars of lands of Patani and Kharlachi and to allow excess water of the Lewannai canal belonging to the Patans to be used by the Kharlachis but it was made a condition that the Kharlachis and the Turis would not set up a claim for the water supply in order that it might not give rise to useless disputes in case there was no excess water after the Patnis had irrigated their cultivation. The Viceroy also asked the Amir to show his friendly spirit in the matter of the construction of the bunds inside the Afghan boundary that might be required for the irrigation of the Kharlachi fields, and the Afghan Governor in the Khost and the British Officer, Captain Roos-Keppel in the Kurram be asked to settle in a friendly manner any disputes arising about the bunds (Khan A. H., 2000, p. 53).

#### **Bruce Commission on Waziristan**

The greatest difficulty was about the demarcation of the Waziristan country as the Waziris were the most turbulent of all the tribal men. It was however believed that without interference in their domestic affairs it would be easy to bring them under British influence and to induce them to accept levy service for the protection of the roads passing through their country and to change the lawless modes of life to which they had been accustomed (Holdich, 1916, p. 56).

According to the Agreement of 1893, the Amir was informed in April 1894 that a commission was being appointed to demarcate the boundary. To avoid any risk of the trouble among the Wazirs he was asked to place a considerable race upon the Waziri frontier while the work of demarcation was conducted. On 13 September 1894, Richard Issac Bruce was appointed as British Joint commissioner for demarcation of this boundary to be assisted by Mr. King, Mr. Anderson and Mr. Grant. The Amir was to send his joint commissioner to meet the British delegation to cooperate in demarcation the boundary (Malhotra, 1982, pp. 134-143).

The work of the delimitation was divided into three sections Mr. L.W. King the officer entrusted to demarcate the first section was, to work Northwards from Domandi to Khawaja Khidr and Mr. Anderson, who was to demarcate the second and the third sections was to commence first at Char Khel and working Southwards to the Khawaja Khidr and returning back to Char Khel was to continue demarcation. It was to be linked up with the boundary already concluded in Kurram by Mr. J. Donald and Sardar Sherindil Khan (Khan A. H., 2000, p. 56).

The first section starting from the junction of the rivers Kundar and Gomal the boundary line proceeded in a Northerly direction to the cliff immediately above the Gomal where the first pillar stood. Thence following the left bank of the Gomal, the crest of the Warsak ridge and the Spera range, it crossed the Sundak Kotal. Running near the Punga peak, the Khand Kotal, the Punga Kotal, the Sunbazah Kotal, it touched the ridge West of Chenai. Crossing the Chenai stream, it proceeded



in a straight line across the Zaboh Mountain to Pushkina and thence turned Eastward reaching Khawaja Khidr after passing near the Zorand stream (Holdich, 1916, p. 57).

The second section starting from the first pillar on the Char Khel, the boundary ran to Saraghar, Mir Chappar Valleys, Zwara China, and Lug Kila Village on the mastoid river. From here the line passed Southeast to the hill known as Sirkai Yowar and further divided Birmal watershed up to the head of the Gorewekht and Zowe valley from the Shawal Valleys it joined Khawaja Khidr (Holdich, 1916, p. 58).

And the third section starting from the pillar already constructed on Char Khel in the previous section of the boundary touched the peaks of Almanzkhan, Tsargair Zita, Kam Kai Mnah, Mastakki, Ghundai, Muzdak, Birzal, and PsarlaiWarghai Sir and reached the Dandi plain. From here the boundary took North Easterly direction passed through the peaks of Tarkholi, Sir Piny, Kash and reached Laram Sir, which was about two furlongs West of the boundary pillar already erected by the Kurram Demarcation commission. The map and the memoranda defining the demarcation from the Domandi to Laram were sent to the Amir for the ratification, but he raised certain objection. He wanted that the boundary should be so changed so to include Musa-Ziarat, Benghar China, Koh-l, Zeba, Kotal-1-Satghae, Kotal-1-Nazam eastern Baluchistan, Kota-1 Nazmearae and Manziolia, within the Afghan Boundary (Holdich, 1916, p. 66).

The British commissioner informed the viceroy that any change of plan would complicate the whole demarcation. The Amir was consequently informed that the Government was unable to meet his wish and reminded him that it was his own proposal that the British commissioner alone should lay down the boundary without the cooperation of an afghan colleague and that he should now accept the boundary in the same amicable way as was done in other parts of the frontier, where the British and the Afghan officers had acted jointly. It was further clarified that the boundary settled by the Mr. King and Mr. Anderson was final (Malhotra, 1982).

#### Legal Status of Pakistan - Afghanistan Border

In 1893, Amir Abdur Rehman of Afghanistan and Sir Mortimer Durand of British-Indian government consented to a border line between British India and Afghanistan (PPI, 2006). Amir Abdur Rehman and Sir Mortimer Durand were satisfied with the outcome of their negotiations. These discussions were able to eliminate the previous misunderstandings between the two (Qaseem, 2008).

While signing the Agreement, Amir Abdur Rehman (the Amir of Afghanistan) held a 'durbar' along with his two sons and top ranking civil / military officers. The 'durbar' was also attended around four hundred leading Chiefs of tribes. Sir Mortimer Durand wrote about this event, that the Amir made an excellent speech urging his people to be friends to British-Indian Government. After every pause of his speech, there were loud slogans of 'Approved! Approved' by those who were present which has also been substantiated by the Amir himself in his memoirs (PILDAT, 2016).

In 1947, at the time of partition, Pakistan possessed all international rights and commitments of the British Government including Durand Line Agreement pursuant to Indian Independence Order 1947 passed under the Independence Act 1947 and under normal international law as codified in Article 62 of the Vienna Convention on the Law of Treaties (Convention, 1946).

On July 26, 1949, the Afghan Loya Jirga one-sidedly stated that all former Durand Line Agreements stand void, refused to recognize Pakistan as a 'successor' and Pakistan to negotiate a fresh border agreement with Afghanistan (PILDAT, 2016).

The international law of *utipossidetis juris* averts Afghanistan from unilaterally rejecting the Durand Line Agreement which is directly applicable in the context of decolonization. This international law allows newly decolonized states to have same borders with preceding dependent area had before their independence. The International Court of Justice has number of times endorsed the principle of *utipossidetis juris*. Some have argued that the 1893 agreement must have expired in 1994 a century after the British negotiated it, like the Hong Kong agreement an expiration date mentioned on it which is not in the case of Durand Line Treaty. The Afghan leader's history of defacto recognition of the border questions the country's attitude towards recognition: -

- The Afghan government had been accepting annual subsidies in return for more than two decades after the original Durand Treaty was signed (Amin, 2004).



- Afghanistan has always considered its border as a defacto international border in terms of transportation, trade and visa for international passengers.
- At the 3<sup>rd</sup> Regional Economic Cooperation Conference (RECCA) meeting in Afghanistan in 2009, Afghanistan authorities decided to work for an effective, combined and contemporary border management mechanism to support stability and progress. The Afghanistan government has also proclaimed that they will revise the customs laws to comply with the international regulations of the World Trade Organization (WTO) and the World Customs Organization (WCO)(RECCA, 2011).
- Durand Line is the border with Pakistan as many steps have been taken by Afghan government that is amounting to defacto recognition of the Durand Line as the international border. Although Pakistan was established as an independent country after India's separation, Pakistani government has always said that it is the legal border between the two states (Goraya, 2009).
- Pakistan does not need to make a deal with Afghanistan to protect the disputed area. The Vienna Convention on the Succession of Treaty Respecting States (VCSSRT) supports utipossidetis juris, the binding bilateral agreement to successor states. Thus, Pakistan is still a party to the agreement, even though it was established in 1947(Convention, 1946).
- The ICJ generally endorsed utipossidetis juris, a bilateral agreement with the "transition" of a colonial power to an independent state. A unilateral statement such as Afghanistan's rejection of the Durand Line will have no effect because the border change must be done bilaterally (Convention, 1946).

#### **Regarding international practice, Pakistan claims:**

- In 1950, the Queen of England later acknowledged that Pakistan was the successor to the former Indian government's rights and obligations under international law, and the Durand Line was its western border (Amin, 2004).
- The Secretary-General is the first depository of the Vienna Convention on the Succession of States declaring the United Nations utipossidetis juris. Its approval of this policy means acceptance of that boundary (Goraya, 2009).
- The United States, a foreign country with significant interests in Pakistan and Afghanistan, sees the Durand Line as a real border, especially since it has ordered the US Army during operations against Taliban in Pakistan and Afghanistan not to cross the Durand Line (Conference, 2007).
- Consequently, claim of Pakistan that Durand Line is an official border is accepted by international law and practice. Hence, there is no legal requirement to renegotiate another agreement on the Durand Line, and the Afghan leadership's opposition to the Durand Line has no legal basis in international law or practice.

#### **Necessity to Draw Southern Border of Afghanistan**

The tension between Britain and Russia continued in Europe and affected Central Asia as well. Events in the region and elsewhere in 1885 plunged Russia and Britain into war for the Afghan-occupied Panjdeh oasis. However, the situation improved because of negotiations between the Russian and British governments, and in 1887 Afghanistan's northern border was firmly established along the Oxus River. Afghanistan also agreed to build a land route between Russia and the British Indian Territory in north-eastern Afghanistan. It's called the "Wakhan Corridor" (Naby, 1998, pp. 205-212).

Following the decision on Afghanistan's northern border, Russia urged that by drawing a border in to Afghanistan, the UK had created a southern border, from which it could not advance. With the political conflict and internal instability in Afghanistan, the border of British India with Afghanistan also needs to be stabilized. The relationship between Amir Abdur Rehman (1880-1901) and the British Indian government were also strained for three reasons: (1) the Amir captured the British envoy in Kabul, and (2) the Amir intervened in parts of India outside his jurisdiction. He checked the Tochi and Gomal crossings at Chitral, Bajur, Swat, Kurram and (3) The Amir also opposed the construction of the British tunnel in Khoja and the construction of the train station and castle in Chaman (Khan M. M., 1900).

#### **Inadequacies of Delineation**

Representatives of the two Governments agreed to share the border as outlined in the Durand Agreement. Since the Amir was eager to complete the border demarcation project as soon as possible, he asked three different coalition groups to decide on the border. The first task was to work on the border near the Khyber Pass; the second in the Kurram Valley and the land just south of it; the third was travelling at the border, in the region of Balochistan Agency. However, this distribution was not completed as expected in Mohmand and Waziristan regions. Therefore, demarcation of border was completed by erecting pillars of Border Posts (BPs). The reasons for the ineffective demarcation project are as given below (Singhal, 1963, pp. 151-152):-

- **The Early Transfer of Sir Mortimer Durand**

Sir Mortimer Durand who was well experienced in Afghan matters was prematurely posted to Persia in 1894 (Sykes, 1981, p. 225).

- **Non-Availability of Area Maps**

Failure to obtain copies of the maps of Durand Agreement from time to time caused interruption in the negotiation. Disappointingly, the work was not enough because Afghans stubbornly refused to do other unnecessary work. The problem of demarcation was super imposed by geographical watershed; particularly it was a major issue in case of Mohmand Tribe due to Kabul and Kunar Rivers (Caroe, 1965, pp. 379-389).

- **Tribal Resentment**

Since the Pashtuns, the world's largest tribe, were divided along the border, the main problem with demarcation was the tribal resentment against British India's frontline policy. The complex character and geography of the Afghan people made this process even more difficult. For some tribes (such as Mohmand's, Waziris, Afridi's, and Ahmadzai's), the Durand Line was absurd, insulting, and ludicrous; nomadic, place of residence, family, group of friends or activity was so foreign to them that they only drag the last year of the century to create a conflict between the boundaries of life. The demarcation of the border between Waziristan and Mohmand could not be completed due to the armed resistance in the areas (Wolpert, 1982, p. 66).

- **Political Expediency and Tribe Divide**

Demarcation is often attempted along tribal borders, i.e. separating tribes from people with financial ties to Khurassan to trade between Peshawar, Kohat, Bannu, Tank and Quetta. However, due to the situation in tribal areas, parts of the border line were inaccessible and most of the border line was still unmarked, especially beyond the Mohmand Agency area and Dorah Pass where ethnological and topographical faults persist (Griffiths, 1967, p. 143).

### **Reaffirmation of the Agreement**

The 1893 treaty was ratified by Afghan leaders after Amir Abdur Rehman. His son, Habibullah (1901-19), signed another treaty with the British government in 1905, which he promised to abide by the "agreements and treaties" signed by his late father. King Amanullah (1919-29), who succeeded his father Habibullah in 1919, signed two treaties with the British government in 1919 and 1921. It was negotiated by Amir Abdul Rahman Khan and reconfirmed by Amir Habibullah (Ali, 1990, pp. 55-75). Article V of the 1919 Treaty was as follows: "The Government of Afghanistan recognizes the Indo-Afghan border as accepted by the late Amir "King Amanullah's successor King Nadir Shah, father of King Zahir Shah (last king of Afghanistan). The documents of the Afghan government and the United Kingdom openly confirmed the 1921 agreement that recognized the Durand Line as the Indo-Afghan border. These are generally anecdotal historical documents that attest to the fact that the Government of Afghanistan had always recognized the Durand Line as the international border between British India and Afghanistan (Haq, 2003).

### **The Validity of the Durand Line Agreement**

- **International Rules and Procedures**

According to international law, Article 62 of the Vienna Convention on International Law states, "Whenever a new country or state breaks away from the existing political system, all international treaties and undertakings that the previous ruler of the region had entered into would be transferred to the new independent central government. Basing on to this policy, the Pakistani government has accepted its obligation to abide by all international agreements signed by the British India



government. Since the Treaty of Durand was an agreement, it seems true that, after Independence in 1947, the Government of Pakistan was entitled to replace the Government of British India and its agreements (**Convention, 1946**).

- **Declaration of Commonwealth**

The Secretary of State Noel Baker said: "The British government regrets the differences between the governments of Pakistan and Afghanistan regarding the situation of the Northwest Frontier Region. Her Majesty's Government acknowledges that Pakistan is in international law of the rights and duties of the old Government and that the Durand Line is the international border " (**Haq, 2003**).

- **Confirmation by SEATO Communiqué**

On 8 March 1956, the content of the communiqué published at the end of the Council of Ministers meeting held by SEATO in Karachi also confirmed, (according to paragraph 8 of the declaration): "Members of the Council recognized that Pakistan's sovereignty is extending up to the Durand Line, the international border areas between Pakistan and Afghanistan, and thus Treaty confirms area referred to in Articles IV and VIII includes the area up to that Line" (**Haq, 2003, p. 19**)

- **Confirmation by the United States**

United States also recognized the Durand Line as an international border between Pakistan and Afghanistan. It was made clear in a press release from the White House in 1956, when the Afghan government was informed officially about recognition of Durand Line as an international border by the United States between Pakistan and Afghanistan (**Ahmed, 2008**).

#### **Tribes Divided by Pakistan- Afghanistan Border (Durand Line)**

For ease of understanding, Pakistan-Afghanistan Border can be divided into two main political divisions namely Khyber Pakhtoon Khawa Province (District Chitral, Upper Dir and Lower Dir, Bajaur, Mohmand, Khyber, Kurram, North Waziristan and South Waziristan) and Balochistan (District Shirani, Zhob, Qilla Saifullah, Qilla Abdullah, Pishin, Quetta, Nushki and Chagai. Ethnography of these sectors is covered in ensuing paragraphs ([iranicaonline.org](http://iranicaonline.org), 2023).

#### **Ethnography of Khyber Pakhtoon Khawa along Durand Line**

In KPK, District Chitral, Upper Dir and Lower Dir shares borders with Afghanistan. The general population of District Chitral is known as **Kho**, who speak the Khowar language. Chitral is also home to the Kalash tribe. Both these tribes are not divided by Durand Line. In District Upper Dir and Lower Dir the people are Pathans mainly including Yousafzai tribe, local Direes, Gujar, Mishwani Wardags, Atrafi, Bahadur Shah Khel, Mast Khel, Miangan and Swati Pashtuns. However, only Yousafzai tribe has relations with the people of Afghanistan ([iranicaonline.org](http://iranicaonline.org), 2023). Six out of seven agencies of former FATA (now known as Tribal Districts) share border with Afghanistan. Following Tribes are divided by Durand Line.

- **Mohmands, Salarzais and Charmungs (Bajaur Agency)**

These three tribes are the sub-sections of Tarakani, a major tribe of Bajaur Agency. Mohmand and Charmung derive their name from the area they inhabit, Southwest of Bajaur Agency. All the three tribes are trans-frontier (Afghanistan) and live in areas around Nawa Pass and Ghakkai Pass on either side of Durand Line ([iranicaonline.org](http://iranicaonline.org), 2023).

- **Utman Khels**

It is one of the main tribes of Bajaur Agency which occupies hills to the North of Peshawar between Mohmands and Ranizais of Swat. Though a cis-frontier tribe but like other tribes, over the years it has established relations / contacts with other tribes' trans-frontier ([iranicaonline.org](http://iranicaonline.org), 2023).

- **The Mohmand's (Mohmand Agency)**

They are split into two main groups called Bar (Hill or Upper) Mohmand's and the Kuz (plain or lower) Mohmand's. The Bar Mohmand's occupy the barren and the inaccessible hills that straddle the Durand Line North of River Kabul, while the Kuz Mohmand lives entirely within Pakistan along River Bara south of Peshawar. Their major centre is Lalpura (Afghanistan) ([iranicaonline.org](http://iranicaonline.org), 2023).

- **The Afridi's (Khyber Agency)**

Afridi is one of the important tribes of Pakistan with substantial numbers in Afghanistan. They have their original homeland in the Spin Ghar, (a mountain range on both sides of the Durand line) Most of

the Afridis live in Tirah, which extends roughly from Kurram Valley in the west to Khyber Pass in the East; Orakzai territory in the South and lofty Morgha Range in the North ([iranicaonline.org](http://iranicaonline.org), 2023).

- **Shamwari's (Khyber Agency)**

It is a major tribe of Khyber Agency which inhabits in the Lowargi plateau. Bulk of this tribe resides in Ningarhar on the northern slopes of Sufed Koh as citizens of Afghanistan. They always maintain close and friendly relations with Pakistan as a measure of tribal policy ([iranicaonline.org](http://iranicaonline.org), 2023).

- **The Bangash (Kurram Agency)**

They are concentrated in the lower reaches of Kurram Valley in Thal-Kohat area, with scattered groups living in the areas from Pelwar base. Many Bangash are also found in the north-eastern section of the Paktia and Paktika Province (Afghanistan)([iranicaonline.org](http://iranicaonline.org), 2023).

- **The Mahsuds**

Known as the wildest of the Pushtuns, Mahsuds are in the central mountains of Waziristan and extend into parts of Gomal and Tank and to the edge of Wana Plain. A number of Mahsud lineages are settled in the Logar Province of Afghanistan, especially in Charkh District, Baraki Barak and Muhammad Agha, but also in Wardak, Ghazni and Kunduz Provinces.

- **The Wazirs**

They live astride the Durand Line. The tribe is often referred to as Darwesh Khel to distinguish it from Mohmands, who are also Waziris in origin. Waziris live in the Birmal area and in the upper tributaries of River Tochi and in a semi-circular strip in Waziristan flanking Mohmand territory. In Afghanistan they live in area southeast between Matun and Kalat-i-Ghilzai and several colonies in Ghazni and Khost ([iranicaonline.org](http://iranicaonline.org), 2023).

- **Foreigners**

Post Russo - Afghan war brought a tremendous change in overall dynamics of tribal areas close to Pakistan - Afghanistan border. Foreigners of different ethnicity like Uzbeks and Tajiks got settled in tribal areas close to Pakistan - Afghanistan border. These over a period have integrated with locals through marriages and wield considerable influence in native affairs ([iranicaonline.org](http://iranicaonline.org), 2023).

### **Ethnography of Balochistan along Durand Line**

Approximately 40% of the population of Balochistan is Pashtuns, out of which approximately 50% reside along by Pakistan - Afghanistan (Durand Line). These Pashtuns can further be sub divided as under: -

- **The Kakars**

They number about hundred thousand in Pakistan and fifteen thousand in Afghanistan. They are considered the weakest of the Pathans. They occupy barren and mountain country in Zhob Valley, North and North-East of Quetta. They are partly nomadic.

- **Achakzai**

Achakzai tribe basically resides on both sides of Durand Line. In Pakistan the tribe is concentrated mainly in district Chaman, Domandi, Gulistan and Tehsil Qilla Abdullah. It is further subdivided into Ashezai, Malezai, Nusratzai, Hameedzai, Ghabezai, Khanozai, Piralizai.

### **Analytical Review of the Paper**

- Although the demarcation of boundary between Pakistan and Afghanistan was defined in consultation with the then Amir of Afghanistan and British India; however there were areas on which both sides either had claims or wanted to be under their sphere of influence.

- In 1947, at the time of partition, Pakistan had clearly qualified as a successor state and possessed all international rights and legal obligations of the British Indian Government including Durand Line Agreement pursuant to Indian Independence Order 1947 passed under the Independence Act 1947 as well as under normal international law as codified in Article 62 of the Vienna Convention on the Law of Treaties.

- The Durand line is still effective even today because in practical world, international boundaries never expire till they are over-ruled mutually by the concerned nations.

- Afghan government while at one hand had repeatedly refused to recognise Durand line as an international border between Pakistan and Afghanistan while at the other it had used the notion of



Easement Rights to cast doubts on the sanctity of this line.

- It was more for a political reason that the sanctity of Durand Line was brought into question by terming it as a soft border and by propagating the issue of easement rights. With little regard for the plight of people living astride border and more of a political point scoring, little was done to settle and streamline the issue. There is no text mentioning such rights for the local masses in original document.
- It was over a period that this aspect was linked to the original pact and is now taken as such. Pakistan for its part never objected to this clause owing to the ground realities of demography and geography (as accepted by Hussain Haqqani, former ambassador of Pakistan). However, it has repeatedly objected to the influx of non-state actors who exploited these easement rights for their nefarious agenda.
- More importantly, easement rights of locals neither permit Pashtuns of all of Afghanistan to travel to Pakistan nor does it stop Pakistan to legitimately stop and check Afghan nationals crossing Durand Line.
- Easement rights across the world don't put any legal bar on the countries to close the border. US-Mexico border is one such example where US has unilaterally closed the border and has put affective border control measures to prevent illegal entries. However, in case of Pak-Afghan border one must consider historical facts and tribal culture of the divided people before making any decision to close the border.
- As Pakistan is putting in efforts to check and deny sanctuaries to terrorist organizations, the erection of border fence and mining on selective basis on Pak-Afghan border is a workable option. The issue of cross border movement of terrorists and other nefarious elements can be dealt by employing such measures. The main impediment in adopting such measure is the unresolved border status between the two countries which must be resolved at the earliest.

#### **Way Forward / Recommendations**

- Pakistan's claim that the Durand Line is an official border is accepted by international law and practice. Therefore, there is no other legal requirement to renegotiate another agreement on the Durand Line. Furthermore, opposition of Afghan leadership to the Durand Line has no legal basis.
- Durand Line is the border with Pakistan as many steps have been taken by Afghanistan government in terms of transportation, trade and visa for international passengers that is amounting to defacto recognition of the Durand Line as an international border.
- Recognizing the Durand Line would be a foremost step toward sustainable trust building between Afghanistan and Pakistan relations. However, official recognition of the border and efficient border management by making good use of 21<sup>st</sup> century tools are mutually dependent. Recognition would not only facilitate the establishment of a more secure environment, but also speed up the economic development of the area and for the people who live on both sides of the Durand Line.
- The future of Pak-Afghan relations relies in solving the unresolved border issue that has been outstanding since 1947. The problem itself is not new but the environment and context has been changing with latest development. In this regard, mediation role of United States and United Kingdom is considered prudent. Declaration of Commonwealth and confirmation by the United States through a press release by White House in 1956 to be pursued through diplomatic maneuvers.

#### **Conclusion**

Following its independence in 1919, Afghanistan initially recognized the Durand Line as its border with British India. However, Kabul later renounced this acknowledgment and raised objections to the legitimacy of the Line after the creation of Pakistan in 1947. Afghanistan's objection stemmed from the desire to unite tribes residing on both sides of the border. Afghan leaders also periodically argued that the agreements, including the Durand Line, between British India and Afghanistan ceased to be valid upon the departure of the British from South Asia. However, Pakistan's stance is opposite to that of Afghanistan, and it respects the Durand line agreement. This lack of agreement between the

two governments results into no control on illegal cross border movement into Pakistan from Afghanistan's side thus facilitating people with all kinds of motives entering Pakistan.

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