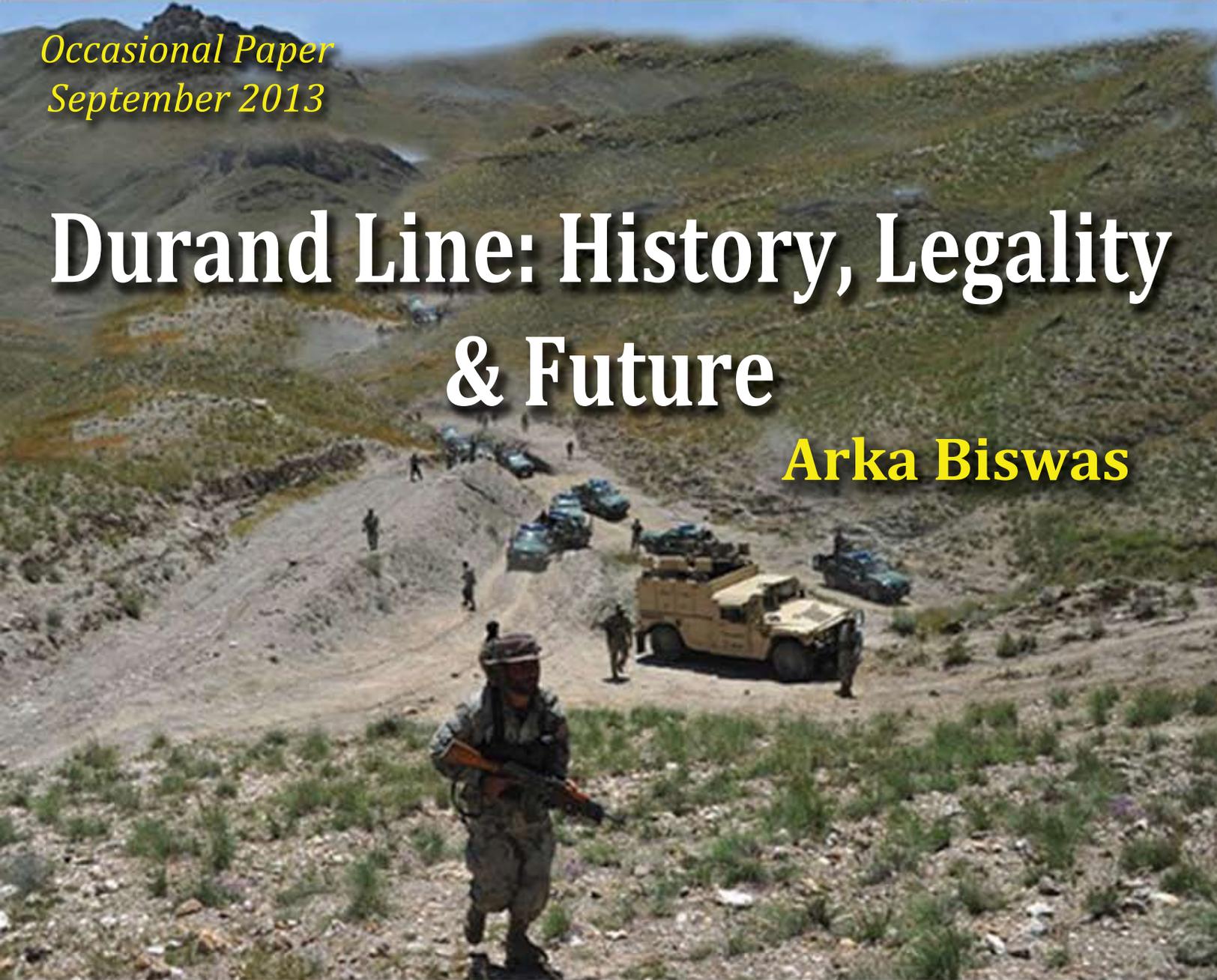


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# Durand Line: History, Legality & Future

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## **About The Author**



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## Content

<b>1. Introduction.....</b>	<b>5</b>
-----	
<b><i>(Data Collection)</i></b>	
<b>2. Need for an Indo-Afghan Border.....</b>	<b>6</b>
<b>3. Beginning of the Controversy: 1893-1901.....</b>	<b>9</b>
<b>4. Renegotiations of the Durand Line Agreement: 1905-1921.....</b>	<b>11</b>
<b>5. The Issue Remains Alive:1947-till date.....</b>	<b>18</b>
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<b><i>(Assessment)</i></b>	
<b>6. Questioning the Legality of the Durand Line.....</b>	<b>20</b>
<b>6.1 Afghanistan-Pakistan Legal Confrontation.....</b>	<b>21</b>
<b>6.2 Flaws in the Pakistani Assumptions and Arguments.....</b>	<b>24</b>
-----	
<b>7. Conclusion.....</b>	<b>34</b>
<b>8. Appendices.....</b>	<b>39</b>
<b>9. References.....</b>	<b>52</b>

## 1. Introduction

It was in the late 1880s, that the Amir of Afghanistan, Abdur Rahman, started demanding a clear defined border with India. The British too wanted to make a clear buffer state, free from its sphere of influence, keeping in mind the Russian expansion towards Central Asia. While the Amir permitted the British to control Afghanistan's foreign policy, he, in return, demanded zero interference from the British in Afghanistan's internal affairs. A clearly defined and well demarcated border would have been an appropriate solution. However, ever since 1893, when the Foreign Secretary of India, Sir Mortimer Durand, finalized an agreement defining the Indo-Afghan border: *the Durand Line*, the controversial border became a reason of great tension between Afghanistan and India, and much more so between Afghanistan and Pakistan, after 1947.

The question of legality of the Durand Line is not much of an interest for the international political and academic community. Most of the Global Powers readily buy Pakistan's legal argument and agree that the Durand Line is a sacrosanct international boundary separating Afghanistan and Pakistan and that it has existed as it is for more than a century now. They also assert that Afghanistan had no legal rights to repudiate any agreement pertaining to their border unilaterally. Pakistan, with support from the UK, the US and China, goes on saying further that the Durand Line issue is a settled one and that there is nothing more to discuss on it.<sup>1</sup> However, there is a new line of scholarly investigation on the legality of the Durand Line as an international border, which has begun recently, and it questions the nature of the agreement and treaties pertaining to the Durand Line.<sup>2</sup> This paper intends to pursue

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<sup>1</sup> The Express Tribune (2012) 'Splintering Relations?: Durand Line is a 'settled issue', says FO', 25 October, available online at <http://tribune.com.pk/story/456881/splintering-relations-durand-line-is-a-settled-issue-says-fo/>, accessed 06 February 2013.

Dawn (2012) 'Durand Line Issue Settled and Closed: Foreign Office', 25 October, available online at <http://beta.dawn.com/news/759397/durand-line-issue-settled-and-closed-foreign-office>, accessed 06 February 2013.

<sup>2</sup> Lambah, S. K. (2011) 'The Durand Line', *Aspen Institute India*, policy paper no.4, available online at <http://www.aspenindia.org/pdf/durand.pdf>, accessed 12 October 2012.

the investigation further and challenge the legality and thereby question the existence of the Durand Line.

The study will begin with the examination of all the original treaties and agreements signed between the Amirs of Afghanistan and the Government of India, and since 1919 between the two Governments, in order to extract raw, verifiable facts which would then form the basis for analysis in the following sections. The paper will then assess the legal reasons given by Afghanistan, while deciding not to recognize the Durand Line, and the counter-arguments given by Pakistan to defend its position. The attempt, thereafter, will be to extract all the assumptions made by Pakistan, and the international community that backs it, and assess these presumptions and subsequent arguments with facts extracted earlier. The analysis will highlight five major flaws in Pakistan's legal arguments over the status of Durand Line. The paper will finally conclude, having subjected Pakistan's assumptions to detailed analysis, by arguing that Afghanistan has always had the legal right to not recognize the Durand Line and repudiate, denounce all the treaties pertaining to it. Paper will end by considering the likely impact of it on the status of the two states and that of the people living on the two sides of the line and suggesting the way ahead.

## **2. The need for an Indo-Afghan Border**

Though the Russian threat from Afghanistan's northern border was, to an extent, eliminated after the demarcation of the Russian-Afghan border in 1888 by the Russo-Anglo Joint Boundary Commission, the Amir remained apprehensive of the British intentions and thus, sought to finalize a boundary between Afghanistan and British India, which was then un-defined. The British too, after having successfully defined Afghanistan's Northern and Western borders, wanted a boundary separating their region of influence from the rule of the Amir. After all, establishing a strong and opaque buffer was the ultimate strategy of the British under the Great Game.

In October 1888, Amir Abdur Rahman wrote a letter to the Viceroy of India, Lord Dufferin, requesting him to send a mission to Kabul to settle the Indo-Afghan border. However, the mission did not go to Afghanistan.<sup>3</sup> In 1890, Amir Abdur Rahman wrote another letter, this time to the Secretary of State of India, Viscount Cross, asking again for a British mission to Kabul to settle the boundaries. To this, Viscount Cross corresponded with the Amir and the new Viceroy, Lord Lansdowne, asking them to resolve the issue of mistrust and miscommunication.

Following the arrival of Viscount Cross' letter, Lord Lansdowne immediately prepared a mission to be sent to Kabul under the command of Lord Roberts (previously General Roberts, during the Second Anglo-Afghan War). The Amir, preoccupied with the internal Hazara war, feared that a mission under Lord Roberts, who fought against the Afghans in the Second Anglo-Afghan War in 1878-80, might be difficult to negotiate with. After assessing his concerns, the Amir attempted to postpone the arrival of the mission.<sup>4</sup>

The British Government, however, did not like the Amir's approach and the Viceroy sent him an ultimatum, asking to either finalize the "indefinite promises of uncertain dates" or agree to the conclusions drawn by the British regarding the boundary of Afghanistan.<sup>5</sup> The concerned Amir took immediate steps to pacify the situation. These steps involved writing a letter to the Viceroy and the then Foreign Secretary in India, Sir Mortimer Durand, asking them to provide a map which would define the boundary between Afghanistan and British India. The Amir sent these letters with Mr. Pyne, an Englishman in the Amir's service, asking him to travel slowly and, if possible, to postpone or delay the British mission to the time Lord Roberts retired.

The Amir did succeed in delaying the mission and as soon as Lord Roberts returned to England, he invited the mission from the Government of India. However, to his disappointment, the map sent by the Viceroy excluded the territories of Waziristan,

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<sup>3</sup> Khan, S. M. (ed.) (1980) *The Life of Abdur Rahman: Amir of Afghanistan*, Karachi: Oxford University Press, p. 154-55. Rome, S. I. (2004) 'The Durand Line Agreement (1893): Its Pros and Cons', p. 5.

<sup>4</sup> Ibid. p. 155-56.

<sup>5</sup> Ibid. p. 156.

New Chaman, Chageh, Bulund Khel, Mohmand, Asmar, and Chitral from the state of Afghanistan.<sup>6</sup> The worried Amir wrote another letter to the Viceroy, warning him that:

...if you...cut them out of my dominions, they will neither be of any use to you nor to me: you will always be engaged in fighting or other troubles with them, and they will always go on plundering. As long as your Government is strong and in peace, you will be able to keep them quiet by a strong hand, but if at any time a foreign enemy appears on the borders of India, these frontier tribes will be your worst enemies... In your cutting away from me these frontier tribes, who are people of my nationality and my religion, you will injure my prestige in the eyes of my subjects, and will make me weak, and my weakness is injurious to your Government.<sup>7</sup>

However, the British Government and the Government of India dismissed Abdur Rahman's warnings and forcefully occupied certain frontier tribal areas, like Bulund Khel and Wana Zhob.<sup>8</sup> Amid rising tensions between Afghanistan and the British India, Sir Henry Mortimer Durand led a mission from Peshawar on 19 September 1893, reaching Kabul on 2 October.<sup>9</sup> The mission was well received and the negotiations were held in peaceful and friendly atmosphere, as mentioned by Sir Mortimer Durand.<sup>10</sup> A final agreement was signed on 12 November 1893 by Amir Abdur Rahman and Sir Mortimer Durand, famously known as the **Durand Line Agreement**.<sup>11</sup>

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<sup>6</sup> Ibid, p.157.

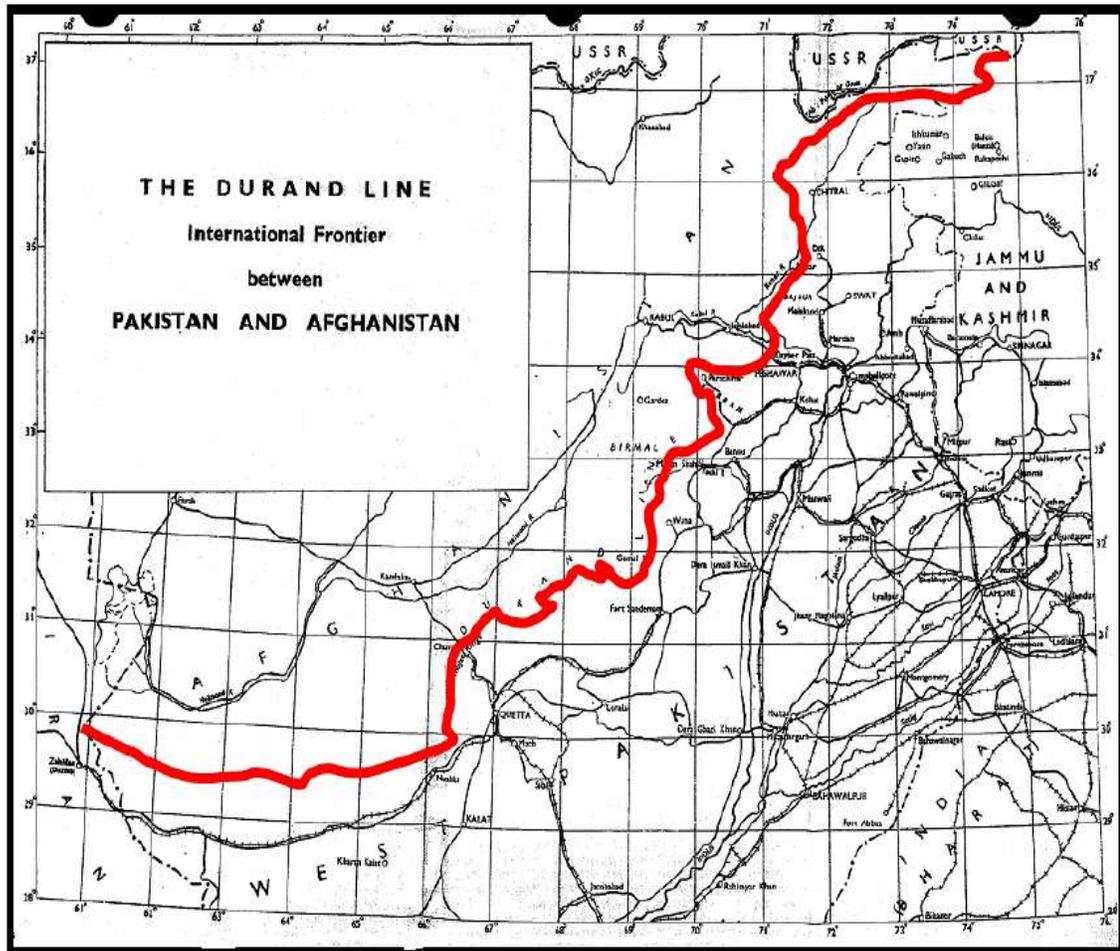
<sup>7</sup> Ibid, p. 158.

<sup>8</sup> Rome, S. I. (2004) 'The Durand Line Agreement (1893): Its Pros and Cons', p. 6.

<sup>9</sup> Ibid.

<sup>10</sup> National Archives of India (1893) 'Mission to Kabul', *Foreign Department, Sect.F. 771/481*, p 578.

<sup>11</sup> For texts of the original agreement, see **APPENDIX I**.



Percy Sykes, Sir Mortimer Durand (London: Cassell and Company, Ltd., 1956), 200-217. The map was reproduced from the booklet by Professor Ralph Braibanti, Durand Line, Duke University Library.

### 3. Beginning of the Controversy: 1893-1901

The Durand Line Agreement was reportedly concluded and signed cordially. On 13 November 1893, one day after signing of the agreement, the Amir held a public Durbar where numerous Afghan tribal leaders were also invited. The Amir presented to the audience a brief of the agreement, explaining the terms. He also thanked Sir Mortimer Durand and other members of the mission for their wise way of settling the disputes.<sup>12</sup> His speech expressed his pleasure and satisfaction at the Agreement.

<sup>12</sup> Rome, S. I. (2004) 'The Durand Line Agreement (1893): Its Pros and Cons', p. 8.

### 3.1 Resentment

However, several other narratives illustrate a contradictory sentiment over the agreement. H. L. Nevill mentions Amir Abdur Rahman's reluctance and opposition to the conclusion of the agreement as he feared that the formal recognition of a sphere of British influence among the frontier tribes would be only a prelude to permanent annexation, and ultimately cause the removal of the only "virtual buffer"<sup>13</sup> between his country and India.<sup>14</sup> Nevill also refers to the apprehension expressed by the Tribesmen regarding the agreement, since it formally ended their "jealously guarded independence".<sup>15</sup> James W. Spain also notes that the Durand line agreement, since it was signed, has been the source of dissension between Afghanistan and British India.<sup>16</sup>

### 3.2 Improper Physical Demarcation

Another issue that popped up was that of the physical demarcation of the boundary. In accordance with the agreement, the two sides had established Joint Commissions for the task of physical demarcation. But when the physical demarcation began in 1895, Amir Abdur Rahman claimed that he was to receive the entire Mohmand territory and not just a section of it.<sup>17</sup> In 1896, in a letter to the Viceroy, Lord Elgin, the Amir protested discrepancies in the map attached with the Durand Line Agreement.<sup>18</sup> To that, Lord Elgin made some minor concessions to the previously decided division of Mohmand and warned the Amir to begin demarcation or else the

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<sup>13</sup> While Afghanistan and British India were neighbours and were only to be separated by a single boundary, there were some Afghan Tribes, like the Mohmands, Afridis, Mashuds and Wazirs, which did not want to come under any rule and preferred to remain independent self governing societies. The Amir of Afghanistan had known the fact and thus, even when the entire region was under Afghanistan, these self-administered tribes were left alone. Thus, although there is no question of a presence of territorial buffer existing between Afghanistan and British India, these self-administered Tribes acted as virtual buffers.

<sup>14</sup> Nevill, H. L. (1977) *Campaign on the North-West Frontier (Re-print)*, Lahore: Sang-e-Meel Publications. P.209

<sup>15</sup> Ibid. p. 210.

<sup>16</sup> Spain, J. W. (1985) *The Pathan Borderland*, p. 117.

<sup>17</sup> Adamec, L. W. (1967) *Afghanistan, 1900-1923: A Diplomatic History*, Berkeley: University of California Press, p. 49-62.

<sup>18</sup> National Archives of India (1897) 'Letter written to the Viceroy from His Highness the Amir', Foreign Department, Secret F, 449, p. 246.

concessions would stand cancelled. Though the Amir allowed the setting up of Afghan and British Commissions to demarcate the Durand line, he failed to provide security to the British Commissioners from the frontier tribes.<sup>19</sup> Infact, certain scholarly investigations claim that the Amir's endeavours and machinations catalyzed the famous uprising of 1897.<sup>20</sup> In retaliation, the British overran the Mohmand territory including Bohai Dag, which was previously given to the Amir in exchange for an early demarcation. And while the other sections of the Durand line were successfully demarcated, they were only done so with pillars and at places where the commissioners could reach.<sup>21</sup>

## **4. Renegotiations over the Durand Line Agreement**

### **4.1 Renegotiation of 1905**

The controversy over the Durand line, however, got renewed after the death of Amir Abdur Rahman on 1 October 1901 and the accession of Amir Habibullah Khan, son of Abdur Rahman. The British refused to pay Amir Habibullah the subsidy which was paid to Abdur Rahman, asserting that the deal was fixed between the Government of India and the previous Amir and was a personal one. The intention of the Government of India was to seek modification and concessions, including a more liberal commercial policy of the part of Afghanistan, delimitation of the Mohmand, and non-interference of Afghanistan in the politics of trans-border tribes. They defended their position by highlighting the use of the Government of India and the Amir as the two parties of the agreement. The British also referred to the treaty of Gandamak (1879) which restricted the Afghans from establishing relations with any country other than India, claiming that Amir Habibullah had accepted subsidies from Russia. However, to that Amir Habibullah questioned: "if the deal was personal

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<sup>19</sup> Rome, (2004) 'The Durand Line Agreement (1893): Its Pros and Cons', p. 8.

<sup>20</sup> Adamec, L. W. (1967) *Afghanistan, 1900-1923: A Diplomatic History*, p. 54.

<sup>21</sup> Rome, S. I. (1995) 'The Malakand Jihad (1897): An Unsuccessful Attempt to Oust the British from Malakand and Chakdara', *Journal of Pakistan Historical Society*, Karachi, p. 178-79. Holdich, T. H. (1987) *The Indian Borderland: 1880-1900 (1<sup>st</sup> Edition)*, Delhi: Gian Publishing House, p. 388.

then would it mean that the Durand Line Agreement stands invalid?"<sup>22</sup> The British ofcourse could not agree and after internal consultations, decided to meet Amir Habibullah to renegotiate the terms of the Agreement and establish new arrangements.

Long and detailed discussions between England and India, and India and Afghanistan were conducted and finally, on 21 March 1905, a new agreement was signed by both the sides. Even though, in a letter to Mr. Dane, Foreign Secretary of India and to the head of the Indian Mission sent to Afghanistan, Amir Habibullah Khan had reiterated his commitment with regard to the frontier tribes that "he would not go beyond his father's principles."<sup>23</sup> However, the problems with the Durand Line could not be resolved.

In the new agreement, Amir Habibullah defended his full rights over Bohai Dag and parts of the Mohmand territory, previously promised to the Amir Abdur Rahman in a concession for an early demarcation, which the British had later seized back under their control in 1897. Amir Habibullah also claimed his right over Smatzai in the Agreement. Eventually, the request from Lord Curzon for the demarcation of parts of the boundary was not accepted and thus the issues concerning the Durand line then remained unresolved.

## 4.2 World War – I

World War I began in August 1914 between two massive opposing alliances: the Allies (centered at the Triple Entente of the UK, France and Russia); and the Central Powers (originally based on the triple alliance between the Germany, Austria-Hungary and Italy<sup>24</sup>). The Ottoman Empire soon joined in the Central Powers to take

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<sup>22</sup> National Archives of India (1904) 'Letters Exchanged between His Highness the Amir and Louis W. Dane', Sec. F, Foreign Department.162-63, Part B.

<sup>23</sup> Adamec, L. W. (1967) *Afghanistan, 1900-1923: A Diplomatic History*. P. 53.

<sup>24</sup> Italy claimed the Triple alliance to be a defensive treaty. Thus, while Germany and Austria-Hungary faced offensive, Italy did not feel obligated to participate in the War. Infact, with a history of enmity between Italy and Austria-Hungary and an expansionist political agenda of the elites in Italy to capture the Italian-dominated regions of Austria-Hungary, Italy was motivated to attack Austria-Hungary. This motivation was captured by the diplomats sent by the Allies and in April 1915, Italy signed the Treaty of

its revenge over the Russian and the British Empires. Although the Ottoman Empire strongly attempted to persuade Afghanistan to rebel against the British, who still controlled Afghan foreign affairs, Amir Habibullah was able to maintain the policy of non-involvement and neutrality throughout the War.<sup>25</sup>

### 4.3 Accession of Amir Amanullah Khan

After the death of Amir Habibullah Khan on 20 February 1919, his brother Nasrullah Khan became the Amir for a week, before being ousted and imprisoned by Habibullah Khan's third son, Amanullah Khan. Soon after becoming the Amir, Amanullah Khan declared Afghanistan an entirely free, autonomous and an independent state both internally and externally. World War I was already over and thus, Afghanistan didn't have to choose between sides. However, Amanullah's anti-British sentiment was common knowledge among the British.

Though Amir Amanullah, in an attempt at mitigating such notions, addressed the Viceroy of India, reassuring his preparedness to conclude any arrangements with the Government of India which may help the "two Governments" in dealing with the pending issue of the Durand line, the British Indian government, however, perceived this declaration as an offensive. Retaining the conduct of Afghanistan's foreign affairs was strongly cherished by the British Empire. For more than a century, Afghanistan had acted like a buffer state between its most precious possession, India, and the threat on its occupation from the Russian empire. This resulted in the third Anglo-Afghan War.

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London with the Triple Entente and participated in the World War I supporting the Triple Entente. Baker, R. S. (1922) *Woodrow Wilson and World Settlement Volume 3*, New York: Doubleday, Page & Co. p. 52-55.

<sup>25</sup> Encyclopedia Britannica (no date) 'The Third Anglo-Afghan War', available at <http://www.britannica.com/EBchecked/topic/24956/Anglo-Afghan-Wars/301079/Third-Anglo-Afghan-War>, accessed 26 November 2012.

#### 4.4 The Third Anglo-Afghan War and Renegotiations of 1919

The third Anglo-Afghan War was a short war fought in May 1919 between an ineffective Afghan force and a heavily exhausted (during the WW I) British Indian force. The “weakened imperial structure of the British Empire” was already shaken by nationalist revolts in Ireland, India and Iraq in 1919 and thus, was undergoing a rapid reformation in its political, economic and ideological foundations.<sup>26</sup> However, when London was to take a stance on the Indo-Afghan border and the tribal areas of Mohmand and Waziristan at India’s North-West Frontier, it decided to plan a military occupation of those regions at the frontier under its forward policy, on which the Afghans laid their claims and had occupied some parts during the initial aggression in the third Anglo-Afghan war.<sup>27</sup>

Afghanistan’s purpose of the war was not only to take control over its own foreign policy but also to “re-establish Afghanistan’s former borders with India, and redress what the Afghans felt was a great injustice, to them.”<sup>28</sup> The War ended after the cease-fire of 3 June, 1919 and negotiations begun at Rawalpindi between the Afghan Mission, headed by Ali Ahmad Khan, Commissary for Home Affairs, and the British Mission, headed by Sir A. H. Grant, Foreign Secretary to the Government of India. The resultant Treaty of Peace was signed on 8<sup>th</sup> August 1919 at Rawalpindi.

The Treaty of Peace<sup>29</sup> concluded some critical points of major implications for Afghanistan:

**(a)** One of them being Article 1<sup>30</sup>, which declared that, from 8 August 1919 onward, all the negotiations and treaties would be conducted and signed by the governments

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<sup>26</sup> Marsh, B. D. (2009) ‘The North-West Frontier and the Crisis of Empire: Post-War India and the Debate over Waziristan, 1919-1923’, *British Scholar*, 1(2), pp. 198.

<sup>27</sup> King, M (2010) ‘Sgt Reginald White – Experiences during the War’, available at <http://sgtreginaldwhite.blogspot.in/2010/07/third-anglo-afghan-war.html>, accessed 27 November 2012.

<sup>28</sup> Adamec, L. W. (1967) *Afghanistan, 1900-1923: A Diplomatic History*, p. 167.

<sup>29</sup> For texts of the Treaty of Peace, 1919, see **APPENDIX II**.

<sup>30</sup> National Archives of India (1920) ‘Article V: Treaty of Peace 1919’, *Foreign Department*, Sect F. Also available at : Aitchison, C. U. (ed.) (1933) *A Collection of Treaties, Engagements and Sanads: Relating to*

of the two nations. This resolved a major misunderstanding that had cropped up a number of times between British India and Afghanistan in the past. All the previous treaties and negotiations were considered by the British to be between the Government of India and the Amirs, thus being personal.

**(b)** Another was the settlement of the territorial claims. While, on the one hand, the British intended to largely accept the original Durand line, except at stretches where they defined adjustments, on the other hand, the Afghanistan Government asserted remarkable readjustments, whereby it included the entire Waziristan and Mohmand territory. However, the Afghanistan Government in the Treaty of Peace accepted to adhere to the boundary previously accepted by the late Amir Habibullah.<sup>31</sup> Another adjustment made by the Afghanistan Government was on the previously un-demarcated lengths of the Durand line to the west of Khyber Pass. Afghans, during the initial aggressive stages of the third Anglo-Afghan War had occupied the region. Sultan-I-Rome describes the process of demarcation in 1919 succinctly:

The British completed the demarcation of the desired un-demarcated Durand Line before the evacuation of Spin Boldak and Dakka. Accompanied by the Afghan General, Ghulam Nabi Khan, the demarcation was carried out by John Maffey defining the border on the spot as he went along. The Afghan General, however, did not take any part in the demarcation but only watched the proceedings. British, however, postponed rectifying their anomalies in respect of the Durand Line over and above the assertion of previously disputed claim, for future discussion and negotiations when the treaty of friendship was concluded.<sup>32</sup>

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*India and Neighbouring Countries*, (Volume XIII), Calcutta: Government of India Central Publication Branch.

<sup>31</sup> Ibid.

<sup>32</sup> Rome, S. I. (2004) 'The Durand Line Agreement (1893): Its Pros and Cons', pp. 11.



**Image 2. Afghan Peace Delegates led by Sardar Ali Ahmad Khan met Sir A H Grant at Murree, a hill station near Rawalpindi on 8<sup>th</sup> August 1919 to sign the Treaty of Peace. Source: National Army Museum, London.**

(c) However, the most important one of them was the letter attached as an Annexure to the Treaty of Peace 1919, written by the Chief British Representative at the Indo-Afghan Peace Conference to the Chief Afghan Representative, which clearly stated that:

[T]he said Treaty and this letter leave Afghanistan officially free and independent in its internal and external affairs. Moreover, this war has cancelled all previous treaties.<sup>33</sup>

This letter was written by the Chief British Representative in response to the concern raised by the Chief Afghan Representative regarding the status of the previously signed treaties. Thus, with the conclusion of the third Anglo-Afghan War and the signing of the Anglo-Afghan treaty of Rawalpindi to restore peace, all previous treaties and agreements got cancelled.

<sup>33</sup> Aitchison, C. U. (ed.) (1933), *op. cit.* Also see **APPENDIX II – Annexure**. Also see National Archives of UK (1925) ‘Afghanistan, Memorandum by Birkenhead’, SECRET C.P. 286(25), Catalogue Reference CAB 24/173/88, p. 831.

## 4.5 Renegotiations and the Treaty of Kabul, 1921

The treaty of peace had only solved all disputes on paper. During the early stages of demarcation of the then un-demarcated lengths of the Indo-Afghan frontier, the British received no assistance from the Afghans and faced continuous troubles from the Pashtun Tribes in the frontiers. A treaty to restore friendly relations was being sought by British Government in India. Afghanistan, however, by 1920 started developing closer ties with Russia who promised to provide monetary assistance, which the British could no longer afford. To avoid any such development of relations between Afghanistan and Russia, the British in 1921 were forced to conclude a treaty which was far away from a formal treaty of friendship.

The Treaty of Kabul<sup>34</sup> was signed on 22 November 1921 by Henry R. C. Dobbs, the Indian Foreign Secretary, and Mahmud Tarzi, Chief of Afghan delegation, after arduous, eleven month long negotiation.<sup>35</sup> During the first session, from January 20 to April 9, 1921 the Afghan Amir *unsuccessfully* demanded territorial concessions based on Afghans' right to self-determination in the North-West Provinces of India.<sup>36</sup> Although the boundary was largely accepted as decided under the Treaty of Peace signed in Rawalpindi in 1919, the British did cede some areas to Afghanistan under Article II of the Kabul Treaty (See Appendix III) and while certain anomalies yet remained. The Treaty of Kabul was, by far, not a formal treaty of friendship as it could not resolve all the pending territorial and diplomatic disputes between the two nations. It also did not resolve most of the pending anomalies in respect of the Durand line that were left for future discussions under the 1919 Treaty of Peace. The Kabul Treaty was agreed by both parties, thus, to be a temporary arrangement. According to Article XIV of the treaty:

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<sup>34</sup> For texts of the Treaty of Kabul, 1921, see **APPENDIX III**.

<sup>35</sup> Adamec, L. W. (1974) *Afghanistan's Foreign Affairs to the Mid-Twentieth Century*, Tucson, pp.46-76.

<sup>36</sup> Encyclopedia Iranica (2011) 'Anglo-Afghan Treaty of 1921', available at <http://www.iranicaonline.org/articles/anglo-afghan-treaty-of-1921-the-outcome-of-peace-negotiations-following-the-third-anglo-afghan-war>, accessed 10 December 2012.

The provisions of this treaty shall come into force from the date of its signing and shall remain in force for three years from that date. In case neither of the High Contracting Parties should have notified 12 months before the expiration of the said three years the intention to terminate it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it.<sup>37</sup>

The two Governments had several other diplomatic exchanges, including in 1930 and 1934, but to only reiterate that the arrangement made under the Treaty of Kabul continued and not to conclude that the issues pertaining to the frontier were resolved permanently. For a lack of an alternative, the treaty remained in force until after India gained Independence in 1947.

## 5. The Issue Remains Alive, 1947 – till date

Afghanistan challenged the Durand Line following the announcement of the partition plan for the Indo-Pakistan subcontinent on June 3, 1947.<sup>38</sup> The government of Afghanistan created an independent Pashtunistan movement that called for independence in the Northwest Territories. In reply, Pakistan hardened its position regarding the territories. In 1948 Pakistan greatly increased its military presence there. The action provoked the Afghan King Zahir Shah to demand renouncement of the Durand Line and return of its territory. Kabul convened an Afghan tribal assembly (a Loya Jirga) on 26 July 1949<sup>39</sup>, which voted its full support for a separate independence for the tribal areas from Pakistan. The Loya Jirga also proceeded to announce the unilateral cancellation of all the treaties that former Afghan governments had signed with the British-India government, including the Durand Treaty, thereby proclaiming that the Afghan government does not recognize

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<sup>37</sup> National Archives of India (1921) 'Texts of the Treaty of Kabul, 1921', Foreign Department, Sec. F, 147/78, pp.1469.

National Archives of the UK (1922) 'Afghan Treaty: Memorandum, Edwin S Montagu', 11 January, Reference: CAB 24/132/6. Downloaded from <http://discovery.nationalarchives.gov.uk/SearchUI/image/Index/D7738128?isFullDescription=False> on 14 February 2013.

<sup>38</sup> Rizvi, Mujtaba, Pakistan and Afghanistan. Westview Press: 1994, p145.

<sup>39</sup> Amin, A. (2004) 'Resolving the Afghan-Pakistan Border Question', *Journal of Afghanistan Studies, Kabul*, Volume 1, Summer June-August.

the Durand Line as a legal boundary between Afghanistan and Pakistan.<sup>40</sup> Though this proclamation did not find any international approval, Afghan government's denunciation of it has remained unchanged in last 65 years, irrespective of the regimes in power. After overthrowing his cousin King Zahir Shah, Mohammad Daoud Khan became the President. A fierce supporter of the Pashtunistan movement, recognition of the Durand Line remained a non-negotiable issue with him. Although in the later stages of his rule as Afghanistan's President, under US pressure, he mellowed down from his earlier position, but he refused to ratify the Durand Line. Even after the Saur Revolution and eventual Soviet invasion, none of the Communist governments in Afghanistan endorsed the Durand Line.

Later after the fall of the last communist regime, Pakistan hoped that the Islamist leaders, which it had supported in their fight against the Soviets, would, in turn, settle the Durand Line question.

However, to Pakistan's disappointment, Burhanuddin Rabbani and Ahmad Shah Massoud, who played an important role in the establishment of an Islamic State of Afghanistan with the Peshawar Accord of 1992, too refused to accept the Durand Line as the international border between Afghanistan and Pakistan. Pakistan then backed Gulbuddin Hekmatyar, a Hizbe Islami Commander, who had refused to sign the Peshawar Accord, to take on Rabbani's Government. However, when it became clear that Hekmatyar's forces would neither be able to destabilize Rabbani government nor force him to recognize the Durand Line, Pakistan abandoned Hekmatyar and shifted its support to the Taliban.<sup>41</sup>

The Taliban established its control over ninety percent territories of Afghanistan by 1996 and formed the Islamic Emirate of Afghanistan. However, even the Taliban refused to discuss the Durand Line.

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<sup>40</sup> Sidhu, W.P.S., "Why the Durand Line is Important," Indian Express (Bombay), November 16, 1999, <<http://www.expressindia.com>>

<sup>41</sup> Grare, F (2006) 'Pakistan-Afghanistan Relations in the Post-9/11 Era' *Carnegie Papers: South Asia Project*, Number 72, October, p.9.

At present, the Karzai Government also refuses to recognize the Durand Line as Afghanistan's border with Pakistan. In October 2012, the US special envoy to Afghanistan and Pakistan, Ambassador Grossman made a remark on the Durand Line, stating that "it is an internationally recognized boundary between Afghanistan and Pakistan."<sup>42</sup> The Afghanistan Government, however, retaliated by stating that

[t]he status of the Durand Line is a matter of historic importance for the Afghan people. The Afghan Government therefore rejects and considers irrelevant any statement by anyone about the legal status of this line.<sup>43</sup>

Aimal Faizi, official spokesperson of the Afghan President Hamid Karzai, also mentioned that "the comments of foreigners on the Durand Line will not have any effect on the verdict of the Afghan people, *to whom the decision belongs*".<sup>44</sup>

The Durand Line issue has thus so far remained unresolved and alive. The Afghan side, at the governmental level has never recognized the Durand Line since 1949. Meanwhile, the Pakistan Government has declared that the Durand Line issue is already settled.

## 6. Questioning the Legality of the Durand Line

Having extracted the facts, the paper will now assess the debate over the legality of the Durand Line agreement. Firstly, it will identify the reasons with which Afghanistan decided to not recognize the Durand Line, focusing principally on the legal aspect of their argument. It will then study and assess Pakistan's argument in opposition to the Afghan claims. Scrutinizing the legal position of Pakistan over the Durand Line issue, it will finally argue that Afghanistan is legally right in not

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<sup>42</sup> Dawn (2012) 'US reaffirms international status of Durand Line', 24 October, available online at <http://beta.dawn.com/news/759101/us-reaffirms-international-status-of-durand-line>, accessed 06 August 2013.

<sup>43</sup> Business Line (2012) 'Durand Line, an internationally recognized boundary: US', *The Hindu*, 24 October, available online at <http://www.thehindubusinessline.com/news/international/durand-line-an-internationally-recognised-boundary-us/article4027386.ece>, accessed 06 August 2013.

<sup>44</sup> Arian, A. W. (2012) 'Decision on Durand Line Belongs to Afghans, Says Faizi', *Tolo News*, 24 October, available online at <http://www.tolonews.com/en/afghanistan/8087-decision-on-durand-line-belongs-to-afghans-faizi-says>, accessed on 23 July 2013, emphasis added.

recognizing the Durand Line and denouncing all the agreements concerning its border.

## **6.1 Afghanistan-Pakistan Legal Confrontation over the Status of the Durand Line**

There have been three major arguments put forward by Afghanistan yet which questions the legal status of the Durand Line agreement:

### **(a) Pakistan a 'clean state' and not the legal successor of British India**

Firstly, the question of state succession was raised by Afghanistan as Pakistan was a new state carved out of the British dominion of India. During a meeting with the British Secretary of Foreign Affairs on July 31, 1947, Afghan Prime Minister, Shah Mahmood Khan, declared that all agreements in respect of the Indo-Afghan border had been concluded with British Indian authorities, and therefore all of them would be null and void after British India ceased to exist and power was handed over to the new state of Pakistan.<sup>45</sup> This official viewpoint of the Government of Afghanistan was announced before Pakistan officially became independent.

This Afghan argument, however, is countered by Pakistan. In the words of A.S. Qaseem from the Institute of Policy Studies, Islamabad:

At the international level, issues pertaining to succession of states are dealt with by the "Vienna Convention on Succession of States in Respect of Treaties (VCSST)." Article 11 of VCSST explicitly states that succession of states cannot impact (a) international border agreed upon in result of an agreement, and (b) rights and obligations concerning international border created through an agreement. Thus, under this agreement, the cessation of

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<sup>45</sup> Qaseem, A. S. (2008) 'Pak-Afghan Relations: The Durand Line Issue', *Policy Perspectives, Special Issue Afghanistan*, available online at <http://www.ips.org.pk/the-muslim-world/986-pak-afghan-relations-the-durand-line-issue.html>, accessed 08 February 2013.

British India and birth of Pakistan as its successor in the northwestern region of the Indian subcontinent does not affect the legality of the border.<sup>46</sup>

This has been the response given by Pakistan to the question of succession of the Durand Line agreement from the time of its independence. The International Court of Justice holds the principle of *Uti possidetis juris* which states that executed bilateral agreements defining international borders with or between colonial powers are “passed down” to successor independent state.

As far as the question whether Pakistan is the legal successor of a part of British India is concerned, the British Government had clarified, in the Indian Independence Act (1947), that the “Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion”. Thus, Pakistan is legally the rightful successor of the British rule before 1947 and therefore any **binding bilateral agreement** defining an international border adjacent to their territory signed by the British should be legally passed onto them.

However, the question that has not been looked into, until recently, is whether the Durand Line agreement is *the binding bilateral* agreement defining a sovereign border or not. For this, there is a need to critically analyze the nature of the Durand Line agreement. There is also a need to distinguish between the Durand Line agreement of 1893 and the subsequent treaties of 1919 and 1921. The same will be done in the following Part of the paper.

### **(b) Pakistan Violated the Durand Line Agreement**

In 1949, after a Pakistan Air-force plane bombed a village in Afghanistan, the Afghan Government convened a “Loya Jirga” (Grand Council) and it was declared that it recognized “neither the imaginary Durand nor any similar line” and that all agreements--from the 1893 Durand agreement onward--pertaining to the issue

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<sup>46</sup> Ibid.

were void.<sup>47</sup> According to the Afghan Government, Pakistan had violated the term of the Durand Line agreement: that no side will exercise interference on the other side of the line.

Pakistan, on the other hand, again highlighting the International Law and with backing from Britain and most of the other global and regional powers, counter-argued by stating that Afghanistan, in any case, could not unilaterally repudiate an executed binding treaty/agreement.<sup>48</sup> However, this Pakistani counter-argument again rests on the presumption that the Durand Line agreement and the subsequent treaties were executed and binding in nature. An assessment of the treaties in the next section questions the nature of the agreements and argues that none of the treaties concerning the Durand Line were binding in nature.

### **(c) The Durand Line Agreement expired after 100 years in 1993**

Some Afghan scholars, most prominent of whom is Dr. Hasan Kakar, argue that the Durand Line agreement, signed in 1893, expired after 100 years of being in force.<sup>49</sup> Their claim is based upon the narration that the Durand Line agreement was, after signing, manipulated by the British and that certain terms and clauses were removed, one of which was the clause of expiration of the agreement. They argue that the translated version of the Durand Line agreement given to the Amir was different from the one which the British declared later. Drawing similarities to the case of Hong Kong and its transfer to China, it has been argued that the Durand Line agreement too was signed under such terms.

This claim received further spark from the Governor of the NWFP, Khalilur Rahman in 2005 after he was quoted by journalists saying that the Durand Line agreement

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<sup>47</sup> Baxter, Craig (1997) 'Country Studies: Afghanistan, the Pashtunistan Issue', *US Library of Congress*, available online at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+af0022\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+af0022)), accessed 08 February 2013.

<sup>48</sup> Ibid.

<sup>49</sup> Yusufzai, Rahimullah (2005) 'Pakistan Governor says Durand Line Agreement expired in 1993', *BBC Monitoring International Report*, 22 September, available online at <http://www.accessmylibrary.com/article-1G1-136535224/pakistan-governor-says-durand.html>, accessed 11 February 2013.

had expired after 100 years of its signing, that is, in 1993, and that he had already spoken with President General Pervez Musharraf to request an arrangement for its renewal.

However, this claim made by both Afghan Scholars and some Pakistani Politicians stand very weak as there is no evidence backing it. Confirmed by the Government of the UK, verified by the Government of the US, accepted and highlighted by numerous scholars studying the Durand Line agreement, is the fact that there is no mention of such a clause of expiration in any documented version of the Durand Line agreement. Even this study did neither come across such a clause in the Durand Line agreement, nor could it locate any mention of such a clause in the subsequent treaties, official memos, or the letters exchanged.

Thus, as such, this line of argument made by the Afghans stand legally weak and is of no vital importance in legal understanding of the Durand Line. However, there is a need to re-study the various translated versions of the 1893 agreement given then to the Amir to see if there actually was a case of manipulation in the terms of the agreement. Scholars who back this claim must, therefore, produce such evidence, without which it would continue to remain legally void and insignificant.

## **6.2 Flaws in the Pakistani Assumption and Arguments**

Thus, it can be deduced from the analysis made above that the Pakistani line of argument mainly rests on the presumption that the 1893 Durand Line agreement was an executed, binding bilateral treaty defining a clear international border. Treating the Durand Line agreement as sacrosanct, Pakistan, ever since 1947, has presumed the Durand Line to be a firm defined and demarcated international boundary. Pakistan also refers to the treaties of 1905, 1919 and 1921, stressing that Afghanistan had also recognized the Durand Line in those treaties. However, this line of argument merely appears to be simple than it is. Rather, reference to both the 1893 Agreement and the following treaties of 1905, 1919, and 1921 further weakens Pakistan's position as explained in the following section.

Pakistan's legal claim and arguments have five major flaws, as follows:

**(a) FLAW – 1:** Firstly, the Durand Line agreement, signed in 1893, simply laid down a political line, separating respective spheres of influence and not a physical line to define two sovereigns. More so, from the British perspective, the Line intended mainly to restrict the Amir's political influence over the Tribal areas adjacent to the British India. The British did not ever control these Free Tribal areas.

It is critical to understand and thereby distinguish between the meaning of "line separating spheres of influence" and that of a sovereign boundary which would also require us to examine how sphere of influence differs from sovereignty.

As explained by Prof Daniel H. Deudney<sup>50</sup>, the phrase first gained currency in the 1880s when the colonial expansion of the European powers in Africa and Asia was nearing its completion. The last stage of that expansion was characterized by the endeavour of all major colonial powers to carry on the mutual competition for colonies peacefully through agreed-upon procedures. Agreements on spheres of influence served this purpose. Thus, the agreement between Great Britain and Germany in May 1885, the first to make use of the term, provided for "a separation and definition of their respective spheres of influence in the territories on the Gulf of Guinea."

Professor Giovanni Distefano of the Public International Law at the University of Geneva, Switzerland succinctly captures the meaning of spheres of influence based on international laws.

Spheres of influence are usually established by international treaties, the object and purpose of which is solely the partition, among the Parties, of those territories which have not yet been occupied (or even explored). Thus, in the case of spheres of influence there is no transfer of sovereignty, or of the right to exercise it. Indeed, such treaties do not confer real and

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<sup>50</sup> Daniel H Deudney is the Professor of Political Science, Johns Hopkins University. This reference was extracted from his contribution to the Encyclopedia Britannica, available online at <http://www.britannica.com/EBchecked/topic/287778/sphere-of-influence>, accessed 30 July 2013.

subjective rights but merely rights and obligations of a personal character over a certain territory (which must be terra nullius). The Contracting Parties are not the holders of sovereign rights on those areas.

Hence, only an actual peaceful and continuous occupation of a terra nullius displaying State's animus possidendi would entitle the latter to the protection afforded by international law. The Contracting Parties to the treaties concerning spheres of influence may not occupy these territories.<sup>51</sup>

Thus, considering only the Durand Line agreement of 1893 which refers to the spheres of influence, the agreement by itself did not give the British the sovereign rights over the tribal territories which fell on the Indian side. The fact that the Durand Line agreement did not intend to define a sovereign boundary was expressed by the person whom the agreement was named after: Sir Mortimer Durand. In an interview, after returning back to India, was quoted saying that:

The tribes on the Indian side are not to be considered as within British territory. They are simply under our influence in the technical sense of the term, that is to say, so far as the Amir is concerned and as far as they submit to our influence or we exert it.<sup>52</sup>

It is critically important as it comes from the Foreign Secretary of India, under whose supervision the Durand Line agreement of 1893 was made. As he clearly said it, the Durand Line was intended to be a virtual boundary which was supposed to define and separate the British sphere of influence from the rule of Amir to create a strong buffer, as a strategy under the Great Game.

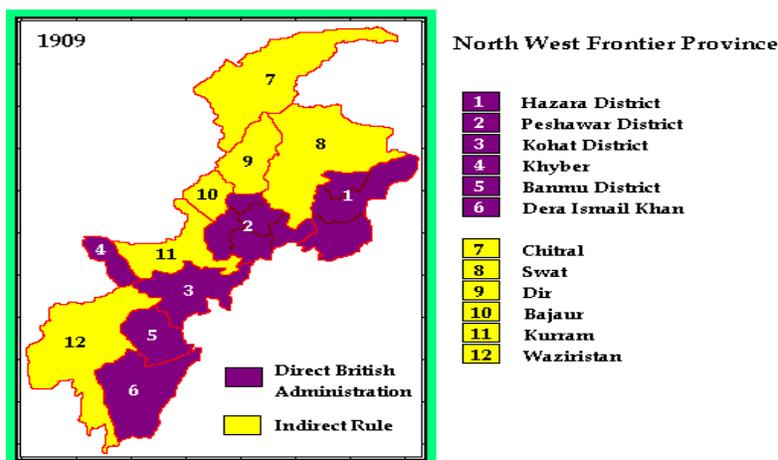
In order to acquire sovereignty, the British needed to completely occupy all the regions peacefully that came under its side of the line.

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<sup>51</sup> Distefano, G. (2010) 'Theories on Territorial Sovereignty: A Reappraisal', *Journal of Sharia and Law*, Issue no – 41, p. 41.

<sup>52</sup> In an interview with Durand quoted by Leitner, G. W. (1897) 'The Amir, the Frontier Tribes and the Sultan', *The Asiatic Quarterly Review Series* 3, p.4, 237, quoted by Kakar, M. H. (2006) *A Political and Diplomatic History of Afghanistan, 1863-1901*, London: Brill, Omrani, B. and Ledwidge, F, *op. cit.*

However, that did not happen in a decade after 1893. Even later, while the North Western Frontier Province (NWFP) was established in 1901<sup>53</sup>, the free tribal areas were kept under separate arrangements with the Federal Government. These separate arrangements included monetary subsidy and supply of arms and ammunitions to the *maliks* (tribal leader) of each of the free Pashtun tribes by the British Government of India, against which the *maliks* conducted their own affairs independently and promised not to interfere in the politics of regions that fell under the NWFP and the Punjab. Special laws under the Frontier Crimes Regulations (1901) gave the colonial administrators sweeping powers to deal with individuals and whole groups outside of the normal judicial process.



**Image 3.** Map of 1909 distinguishing between the areas which were under direct British administration (in purple) under the provincial government of NWFP and the free tribal areas (in yellow). Source *World History at Korean Minjok Leadership Academy*, available online at <http://www.zum.de/whkmla/histatlas/india/haxnwfp.html>, accessed on 25 July 2013.

Even while the Pashtun tribesmen were allowed to enter the Punjab and NWFP for peaceful purposes (mainly trade and business), the British administrators were not

<sup>53</sup> It is important to note that the Historical NWFP (1901-1955) was different from the modern province of NWFP (renamed as Khyber Pakhtunkhwa). For more on the formation of NWFP in 1901, read the Public Notice by J. P. Newett, Secretary to Government of India in **APPENDIX IV**. The Notice does not include Chital, Swat, and Dir as part of NWFP in 1901. These tribal regions along with other free tribal areas (now FATA) were not a sovereign part of the British India but were only under its influence.

permitted inside the free tribal areas which fell on the Indian side of the Durand Line. In simple words, these free tribes on the Indian side of the Durand Line were only kept away from the political influence of the Amir of Afghanistan. The British never enjoyed any sovereign rights over these territories.

Therefore, the question of succession of state specifically with respect to the Durand Line agreement of 1893, which is not a binding bilateral agreement defining a sovereign boundary but a colonial agreement defining line separating spheres of influence, from the British Government to Pakistan after 1947 is certainly not what has been addressed by the VCSSRT and is therefore subject to objections under international laws.

**(b) FLAW – 2:** The second major flaw of the Pakistani argument, that the Durand Line was a clearly defined international border in 1893 and that Afghanistan had merely confirmed it in 1905, is the problem of the 1893 Durand Line agreement being a personal agreement signed between the Amir of Afghanistan, Abdur Rahman Khan, and the Government of British India.

This was, in fact, the position taken by the British when they sought further concessions from Amir Habibullah and decided to withdraw the previously given annual subsidies, arms and ammunitions to the late Amir Abdur Rahman. However, in response, Amir Habibullah had questioned the validity of the Durand Line itself, as explained in section 4.1 of the paper. It was this very reason that the British had to renegotiate the terms of the Durand Line agreement with Amir Habibullah in the new Anglo-Afghan Treaty of 1905. Thus, it would be correct to state that Durand Line Agreement of 1893 had to be revised in 1905 for it was a personal treaty. The British too had accepted it in 1905, when they agreed to renegotiate the terms with Amir Habibullah.

Even the treaty of 1905, signed between Amir Habibullah and the Government of British India, was questioned later by Habibullah's son, Amir Amanullah Khan in 1919. Amanullah's argument was that the Afghanistan of 1905 was not an

independent sovereign state and the British had firm control over the foreign affairs of Afghanistan and that the treaty of 1905 was signed by the Government of India, on the one hand, and the Amir of Afghanistan, on the other. The British recognized that Amanullah had a valid argument and that they could no longer deny Afghanistan complete freedom. After a brief war between the British and the Afghan forces, Afghanistan was given complete freedom. As the ruler of a free and sovereign country, King Amanullah brought the British onto the table to re-re-negotiate the terms of the Durand Line Agreement and, as a result, established an Indo-Afghan Frontier which was territorially different from the 1893 Durand Line.

Thus, both the 1893 agreement and the 1905 treaty were personal in nature. The British had accepted it and, after giving Afghanistan complete independence, had agreed to sit again to discuss the Durand Line, only this time with the Government of Afghanistan.

**(c) FLAW – 3:** Another error and a crucial one is the Pakistani assumption that the Government of Afghanistan had merely recognized the Durand Line in the treaties of 1919 and 1921. As already explained in section 4.4, the subsequent treaties of 1919 and 1921, similar to the treaty of 1905, did not just accept or recognize the “original” Durand Line as proposed in the 1893 agreement.

To the contrary, these **treaties of 1919 and 1921 were concluded upon cancellation of all previous treaties made between British India and Afghanistan** (see Annexure attached with Appendix II). They were, in fact, negotiated in an attempt to resolve the territorial disputes associated with the “original” Durand Line, remove the anomalies that still remained, and thus, readjust the “original” Durand Line physically. It is this very reason why the “original” Durand Line of 1893 is territorially different from the “present” Durand Line.<sup>54</sup> This difference is crucial as it highlights that the Durand Line is, after all, not a sacrosanct boundary which has remained as it is for more than 100 years.

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<sup>54</sup> “Original” Durand Line refers to the Line proposed in the 1893 agreement and “present” Durand Line refers to the present Afghanistan - Pakistan International Border, as it was in the Treaty of Kabul in 1921.



Image 4 is an image produced by a CIA employee, and with permission from the Government of the US, it is in public domain. The image captures the Afghanistan-Pakistan International border and the 1893 Durand Line as two different lines. The added shading further highlights the territorial difference between the “original” and the “present” Durand Lines. Source – CIA, *Shading Added*.

**(d) FLAW – 4:** The Treaty of Kabul, signed on 22<sup>nd</sup> November 1921 is the last official treaty negotiated and signed between the two contracting parties concerning the Durand Line or “Indo-Afghan Frontier” as mentioned in the Treaty. The Treaty of Kabul was signed between the two Governments and thus, was not a personal treaty. However, the Treaty of Kabul signed in 1921 included a clause which gave either of the “High Contracting Parties” the right to unilaterally denounce the Treaty after giving one year’s notice.

The treaty, as discussed in section 4.4, again attempted to resolve the anomalies left over the Durand Line or the “Indo-Afghan Frontier” described in the Treaty of Peace, signed in 1919. Article II of the Treaty of Kabul further highlights the territorial adjustments that were made along the Indo-Afghan frontier in 1921:

The two High Contracting Parties mutually accept the Indo-Afghan Frontier as accepted by the Afghan Government under Article V. of the treaty concluded at Rawalpindi on the 8th August 1919, corresponding to the 11th Ziqada, 1337 Hijra, and also the boundary west of the Khyber laid down by the British Commission in the months of August and September' 1919, pursuant to the said Article; subject only to the realignment set forth in Schedule I. annexed, which has been agreed upon in order to include within the boundaries of Afghanistan the place known as Tor Kham, and the whole bed of the Kabul river between Shilman Khwala Banda and Palosai and which is shown on the said map by a red chain line.

However, not all pending anomalies were resolved and there remained yet more territorial disputes between the two Governments, along with other diplomatic issues of conflict. That is why they had kept a provision under Article XIV of the Treaty which had clarified that the Treaty was only a temporary arrangement and that

The provisions of this treaty shall come into force from the date of its signature, and shall remain in force for three years from that date. In case neither of the High Contracting Parties should have notified 12 months before the expiration of the said three years the intention to terminate it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it.<sup>55</sup>

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<sup>55</sup> National Archives of India (1921) ‘Texts of the Treaty of Kabul, 1921’, Foreign Department, Sec. F, 147/78, pp.1469.

National Archives of the UK (1922) ‘Afghan Treaty: Memorandum, Edwin S Montagu’, 11 January, Reference: CAB 24/132/6. Downloaded from <http://discovery.nationalarchives.gov.uk/SearchUI/image/Index/D7738128?isFullDescription=False> on 14 February 2013.

This clause did not even require the side choosing to annul the Treaty to state any reason and the Treaty “contained no other provisions indicating that any part of it was intended to be permanent or dealing with the question of succession”.<sup>56</sup> The treaty was initially made for three years. Thereafter, the treaty remained valid until 12 months from the date when either of the high contracting parties from the two Governments decided to denounce it. Lord Birkenhead in a memorandum circulated in June 1925 assessed the same when he mentioned that “the treaty was made for three years in the first instance, and is now subject to denunciation by either party with 12 months’ notice.”<sup>57</sup>

Thus, the Government of Afghanistan, as one of the contracting parties of the Treaty of Kabul, signed 22 November 1921, have always had the legal right to denounce the Treaty of Kabul and thereby cancel the temporary arrangements made under it concerning the Indo-Afghan Frontier (now Afghanistan-Pakistan International border).

**(e) FLAW – 5:** While analyzing the Treaty of Kabul 1921, Pakistani scholars come up with another defence by referring to the fact that the Government of Afghanistan, in exchange of notes and letters with the Government of India and Britain, in 1930 had accepted that the Treaty was in full force and that it remained valid and that they thereby have lost the right to denounce it, even though the provision remains in the treaty. This point of defence is based on Vienna Convention on the Law of Treaties (VCLT), 1969.

Article 45 (a) of the Convention on “Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty” states that:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46

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<sup>56</sup> UN (1972) ‘Summary Record of the 1192<sup>nd</sup> meeting: The question of Succession of State’, *Extract from the Yearbook of the International Law Commission 1972*, Document no: A/CN.4/SR.1192, Vol. 1, p. 249.

<sup>57</sup> National Archives of UK (1925) ‘Afghanistan’, Record Type: Memorandum, 9 June, Reference: CAB 24/173/88.

to 50 or articles 60 and 62 if, after becoming aware of the facts, (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be.<sup>58</sup>

Thus, Pakistani scholars base their defence on Article 45 (a) of the VCLT, and argue that the Afghanistan Government, having accepted in 1930 that the Treaty of Kabul was operating in full force, has by default lost the right to terminate the arrangements made under it.

However, this line of defence is not proclaimed and accepted globally for it contains an obvious flaw. Article 4 on “Non-retroactivity of the present Convention” in the VCLT clearly states that

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.<sup>59</sup>

The Convention, thus, only applies to (a) States which have signed and ratified it and (b) the treaties which have been signed after ratification of the Convention. In the case of Treaty of Kabul, both contending parties, i.e. Afghanistan and Pakistan, have not yet ratified the Convention and thus, the Convention has not yet entered in force into these two nations, and the Treaty in question was signed in 1921, long before 1969, when the Convention was opened for signature.

Therefore, Article 45(a) of the VCLT does not apply in the case of Treaty of Kabul and the dispute over it between Afghanistan and Pakistan. Thus, the Treaty of Kabul is subject to International Laws independently and therefore, Afghanistan had never lost the legal right to denounce and repudiate the arrangements made under Treaty of Kabul, as per Article XIV of the Treaty.

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<sup>58</sup> United Nations (1969) ‘Vienna Convention of Law of Treaties’, *Treaty Series*, vol. 1155, p.331. Available online at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf), accessed 18 February 2013.

<sup>59</sup> Ibid.

## **7. Conclusion**

As discussed above, to all the legal arguments given by Afghanistan while “refusing to recognize the Durand Line and all other imaginary lines, and cancelling all other treaties pertaining to them”, Pakistan has come up with counter-arguments which are primarily based on presumptions that: the Durand Line agreement was a binding bilateral agreement; it clearly defines the international border between Afghanistan and British India (now inherited by Pakistan); and that Afghanistan had merely recognized the Line in the subsequent treaties of 1905, 1919 and 1921.

However, the findings highlighted and analysed in this paper clarify that these presumptions are flawed. If we are to refer solely to the Durand Line agreement of 1893 defining the border, then, firstly, it was not a binding bilateral agreement to define a sovereign boundary. The idea behind the Line in Sir Mortimer Durand’s own words was not to form a sovereign boundary, but to separate the British sphere of influence from the rule of the Amir. The Free Tribes living on the Indian side of the Durand Line were never actually Indian citizens.

Secondly, the agreement was a personal one, signed between the Government of India and the Amir of Afghanistan, Abdur Rahman Khan. Personal arrangements were made between the Government of India and the Amir which also included a regular supply of arms, ammunitions and annual subsidies to the Amir. This question was raised by Abdur Rahman’s son, Habibullah Khan after the British refused to pay him the subsidies and ammunitions which were previously being provided to Abdur Rahman. Habibullah Khan had then warned the British that his rule would consequentially not recognize the Durand Line, if they did not give the concessions that have been promised to Abdur Rahman. Thus, new arrangements on the Durand Line were made under the Anglo-Afghan Treaty of 1905. But, even the Treaty of 1905 was a personal one. It was signed between the Amir and the Government of India, during a time when the British had complete control over the foreign affairs of Afghanistan. This was the reason why Amanullah Khan in 1919, along with demanding complete independence, asked for re-renegotiations on the arrangements for the frontiers.

Thirdly, the Durand Line agreement (1893), along with the Treaty of Gandamak (1879) and Anglo-Afghan Treaty of 1905 were cancelled after the end of the third Anglo-Afghan War and declaration of Afghanistan as an independent state in 1919 during the signing of the Treaty of Peace. There were these treaties of 1919 signed in Rawalpindi and of 1921 signed in Kabul which involved, for the first time, the Government of India and the “Government of Afghanistan”, as the two contracting parties.

The Treaty of Kabul, 1921 was the last official treaty concerning the Indo-Afghan Frontier (or originally the Durand Line) signed between the two Governments. And although Afghanistan had recognized the existence of the previously agreed frontiers for most of its lengths in the Treaty of Kabul, there were two critically important factors captured in the treaty which have not been given much importance yet.

Firstly, Article II of the treaty clearly highlights that changes were introduced in the territorial definition of the frontier even in 1921, as was done previously in 1905 and 1919. It also refers to the “Indo-Afghan Frontier” instead of the Durand Line under Article II of the Treaty, which captures the idea that, even then, it was recognized that “the Indo-Afghan frontier” then agreed upon, was territorially and politically different from “the Durand Line proposed in the 1893 agreement”. This fact resonates with the differentiation between the “original” Durand Line and the “present” Durand Line produced in this paper.

Secondly and most importantly, the treaty which introduced further changes, thereby redefining a sovereign international border between India and Afghanistan was merely a temporary arrangement, intended initially for three years and then, subject to denunciation by either party (Governments of Afghanistan and India) with 12 months’ notice, as mentioned in Article XIV of the treaty and as understood by Lord Birkenhead in 1925. While certain changes in the frontier were introduced under Article II of the treaty, the Indo-Afghan Frontier was yet *not satisfactory* to both the Governments and they had mutually accepted that there were numerous anomalies pertaining to the line still left to be resolved in 1921. The right to

unilateral denunciation given to both the parties under Article XIV of the treaty was not subject to any pre-requisites and the two contracting parties were free to denounce the arrangements anytime after three years from 1921 if and when they wished to do so, giving a 12 months' notice.

Numerous official letters were exchanged, including that in 1930, 1932 and 1934, but they were to only resolve and settle a few of the pending territorial disputes, reconsider monetary arrangements, and to confirm that the arrangements under Treaty of Kabul continued. However, no binding bilateral agreement was made which declared that there were no territorial disputes left or that the Government of Afghanistan accepted the Indo-Afghan Frontier described in the Treaty of Kabul as the permanent international border. After the formation of Pakistan in 1947, the process of diplomatic exchanges for the settlement of the yet pending territorial disputes along the Durand Line was completely discontinued. There has been no formal agreement or ratification of the agreement or treaties pertaining to the Durand Line between Islamabad and Kabul. The Government of Afghanistan in 1949 in a Loya Jirga announced the cancellation of all the previous arrangements and agreements made between their government and British India before 1947.

Thus, the Durand Line agreement and the Anglo-Afghan Treaties on Indo-Afghan Frontier have either been personal (the ones signed with the Amirs of Afghanistan) or temporary (the ones signed between the two Governments) in nature. The Afghanistan Government had in fact recognized, not the Durand Line, but the Indo-Afghan Frontier mentioned in the treaties of 1919 and 1921. The distinction between the two has already been highlighted in Section 6.2, FLAW (iii). These two treaties were also concluded only after the cancellation of all previous treaties and agreements made between Afghanistan and British India, including the Durand Line agreement of 1893. And, while the Treaty of Kabul still remained valid after the Independence of India and formation of Pakistan as the last official treaty on the Indo-Afghan Frontier, it remained a temporary arrangement, subject to unilateral denunciation. And thus, when Afghanistan Government reaffirmed the non-

recognition of the Durand Line and denounced all the treaties and agreements corresponding to its border with Pakistan, it had the full legal sanction to do so.

It will now be crucial to also raise the question as to where and what should the border between Afghanistan and Pakistan be, if it is realized that the Durand Line does not exist and that the Afghanistan-Pakistan frontier as defined in the Treaty of Kabul 1921 is accepted to have been legally repudiated in 1949. The period of 12 months' notice before denunciation of the treaty was given specifically to offer the two contracting parties (then the Government of Afghanistan and British India) a time period to renegotiate the terms and subjects of the treaty, including the definitions of the frontier. However, with discontinuation of the practice of diplomatic exchanges and negotiations by Pakistan, which the British previously had employed, and understanding the state of affairs between the Afghanistan and Pakistan over the past six decades, it is highly unlikely that the 12 months' time will be sufficient for them to renegotiate the arrangements. Although for the negotiations to even begin, the state of Pakistan has to first recognize the legal right that Afghanistan had in unilaterally denouncing the arrangements concerning the Indo-Afghan frontier (or after 1947, the Afghan-Pakistan frontier).

The international community, including the US, the UK, China and other nations and international organizations have backed the legal position of Pakistan, even without bothering to study the original agreements and treaties concerning the Durand Line, which explains why Afghanistan and its Government had all the legal rights to not recognize the Durand Line and cancel all the previously made agreements and arrangements concerning the frontier. Their lack of will to face the problem head on today will only complicate the situation further in the future.

Today, having never received legal support from the international community, the government of Afghanistan justifies its decision to not recognize the Durand Line based on the argument that it is not a matter of the Government but that of the people of Afghanistan, especially those living near the frontiers, although it has always been a matter of people. In response to a recent effort to enforce the Durand

line as the border and its early demarcation by the US, Aimal Faizi, official spokesperson of the Afghan President Hamid Karzai, had mentioned that “the comments of foreigners on the Durand Line will not have any effect on the verdict of the Afghan people, *to whom the decision belongs*”.<sup>60</sup>

While this paper provides legal justification for the position of the Government of Afghanistan in not recognizing “the Durand Line or any other imaginary lines” based on raw facts, it also considers it important to understand the view of the Afghans, principally ethnic Pashtuns and Baluchis on how they view the Durand Line issue and understand their relations and affinity towards fellow ethnic people living on the other side of the Line. Durand Line and the frontier regions have been the hotbed of immense tension, violence and terrorism. A solution to deal with all of them would be to resolve the issues pertaining to the Line. While this paper analyzed the legal aspect of the Durand line issue, concluding that the Durand Line does not exist and the present border is subject to denunciation (infact already denounced), it will be important to visualize how the region will then be defined in order for us to finally solve all the issues encircling the Durand Line problem.

What is clear is that all stripes of Pashtuns, including the Taliban during their rule in 1996-2001, refuse to recognise the Durand Line, and this problem will continue to fester so long as Pakistan refuses to even discuss the issue. In order to understand the implications of this sentiment among the Pashtun and the Baluch, especially as the Western draw-down is due to begin in 2014, an ethnic and political study of the people, principally the Pashtun and Baluch, who got divided by the Line, is imperative.

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<sup>60</sup> Arian, A. W. (2012) ‘Decision on Durand Line Belongs to Afghans, Says Faizi’, *Tolo News*, 24 October, available online at <http://www.tolonews.com/en/afghanistan/8087-decision-on-durand-line-belongs-to-afghans-faizi-says>, accessed on 23 July 2013, emphasis added.

## **Appendices**

### **Appendix I**

#### **Durand Line Agreement-1893**

Agreement between His Highness Amir Abdur Rahman Khan, G.C.S.I., Amir of Afghanistan and its Dependencies on the one part, and Sir Henry Mortimer Durand, KCIE, CSI, Foreign Secretary to the Government of India, representing the Government of India on the other part,-1893.

Whereas certain questions have arisen regarding the frontier of Afghanistan on the side of India, and whereas both, His Highness the Amir and the Government of India, are desirous of settling these questions by a friendly understanding, and of fixing the limit of their respective spheres of influence, so that for the future, there may be no difference of opinion on the subject between the allied Governments, it is hereby agreed as follows:

- (1) The eastern and southern frontier of His Highness's dominions, from Wakhan to the Persian border, shall follow the line shown in the map [not reproduced] attached to this agreement.
- (2) The Government of India will at no time exercise interference in the territories lying beyond this line on the side of Afghanistan, and His Highness the Amir will at no time exercise interference in the territories lying beyond this line on the side of India.
- (3) The British Government thus agrees to His Highness, the Amir retaining Asmar and the valley above it, as far as Chanak. His Highness agrees on the other hand, that, he will at no time exercise interference in Swat, Bajawar or Chitral including the Arnawai or Bashgal Valley. The British Government also agrees to leave to His Highness the Birmal tract as shown in the detailed map already given to His Highness, who

relinquishes his claim to the rest of the Wazir country and Dawar. His Highness also relinquishes his claim to Chageh.

- (4) The frontier line will hereafter be laid down in detail and demarcated wherever this may be practicable and desirable by Joint British and Afghan Commissioners, whose object will be to arrive by mutual understanding at a boundary which shall adhere with the greatest possible exactness to the line shown in the map (not reproduced) attached to this agreement, having due regard to the existing local rights of villages adjoining the frontier.
- (5) With reference to the question of Chaman, the Amir withdraws his objection to the new British Cantonment and concedes to the British Government, the rights purchased by him in the Sirkai Tilerai water. At this part of the frontier, the line will be drawn as follows:

"From the crest of the Khwaja Amran range near the Psha Kotal, which remains in British territory, the line will run in such a direction as to leave Murgha Chaman and the Sharobo spring to Afghanistan, and to pass half way between the New Chaman Fort and the Afghan outpost, known locally, as Lashkar Dand. The line will then pass half way between the railway station and the hill known as the Mian Baldak, and turning southward, will rejoin the Khwaja Amran range, leaving the Gwasha Post in British territory, and the road to Shorawak to the west and south of Gwasha in Afghanistan. The British Government will not exercise any interference within half a mile of the road."

- (6) The above articles of agreement are regarded by the Government of India and His Highness the Amir of Afghanistan, as a full and satisfactory *settlement* of all the principal differences of opinion which have arisen between them in regard to the frontier, and both the Governments of India and His Highness the Amir, undertake that any

differences of detail such as those which will have to be considered hereafter by the officers appointed to demarcate the boundary line, shall be settled in a friendly spirit, so as to remove for the future as far as possible, all causes of doubt and misunderstanding between the two Governments.

(7) Being fully satisfied of His Highness's good will to the British Government, and wishing to see Afghanistan independent and strong, the Government of India will raise no objection to the purchase and import by His Highness of amunitions of war, and they will themselves grant him some help in this respect. Further, in order to mark their sense of the friendly spirit, in which His Highness the Amir has entered into these negotiations, the Government of India undertake to increase by the sum of six lakhs of rupees a year the subsidy of twelve lakhs now granted to His highness.

**(Sd.) H. M. Durand**

**Kabul;**

**12<sup>th</sup> November, 1893**

**(Sd.) Abdur Rahman Khan**

*Source: National Archives of India (1893)*

## Appendix II

### THE TREATY OF PEACE OF AUGUST 8, 1919

*The following articles for the restoration of peace have been agreed upon by the British Government and the Afghan Government:*

#### **Article 1**

From the date of the signing of this Treaty there shall be peace between the British Government, on the one part, and the Government of Afghanistan on the other.

#### **Article 2**

In view of the circumstances which have brought about the present war between the British Government and the Government of Afghanistan, the British Government, to mark their displeasure, withdraw the privilege enjoyed by former Amirs of importing arms, ammunition and warlike munitions through India to Afghanistan.

#### **Article 3**

The arrears of the late Amir's subsidy are furthermore confiscated, and no subsidy is granted to the present Amir.

#### **Article 4**

At the same time, the British Government are desirous of the re-establishment of the old friendship, that has so long existed between Afghanistan and Great Britain, provided they have guarantees that the Afghan Government are, on their part, sincerely anxious to regain the friendship of the British Government. The British Government are prepared, therefore, provided the Afghan Government prove this by their acts and conduct, to receive another Afghan mission after six months, for the discussion and settlement of matters of common interest to the two Governments, and the re-establishment of the old friendship on a satisfactory basis.

#### **Article 5**

The Afghan Government accepts the Indo-Afghan frontier accepted by the late Amir. They further agree to the early demarcation by a British Commission of the

undemarcated portion of the line west of the Khyber, where the recent Afghan aggression took place, and to accept such boundary as the British Commission may lay down. The British troops on this side will remain in their positions until such demarcation has been effected.

**ALI AHMAD KHAN,**

*Commissary for Home Affairs and Chief of the Peace Delegation of the Afghan Government.*

**A. H. GRANT**

*Foreign Secretary to the Government of India and Chief of the Peace Delegation of the British Government.*

## **Annexure**

No. 7-P.O., dated Rawalpindi, the 8th August 1919.

From-The Chief British Representative, Indo-Afghan Peace Conference,

To-The Chief Afghan Representative.

*After compliments*-You asked me for some further assurance that the Peace Treaty which the British Government now offer, contains nothing that interfered with the complete liberty of Afghanistan in internal or external matters.

My friend, if you will read the Treaty carefully you will see that there is no such interference with the liberty of Afghanistan. You have told me that the Afghan Government is unwilling to renew the arrangement whereby the late Amir agreed to follow unreservedly the advice of the British Government in regard to his external relations. I have not, therefore, pressed this matter: and no mention of it is made in the Treaty. Therefore, the said Treaty and this letter leave Afghanistan officially free and independent in its internal and external affairs.

Moreover, this war has cancelled all previous Treaties.-*Usual conclusion.*

## **Appendix III**

### **AFGHAN TREATY, 1921**

#### **Preamble**

The British Government and the Government of Afghanistan, with a view to the establishment of neighbourly relations between them, have agreed to the Articles written hereunder, whereto the undersigned, duly authorised to that effect, have set their seals: -

#### **Article I**

The British Government and the Government of Afghanistan mutually certify and respect each with regard to the other, all rights of internal and external independence.

#### **Article II**

The two High Contracting Parties mutually accept the Indo- Afghan Frontier, as accepted by the Afghan Government under Article V of the treaty concluded at Rawalpindi on the 8th August 1919, corresponding to the 11th Ziqada, 1337 Hijra, and also the boundary west of the Khyber laid down by the British Commission in the months of August and September 1919, pursuant to the said Article, and shown on the map attached to this treaty by a black chain line; subject only to the realignment set forth in Schedule I annexed, which has been agreed upon in order to include within the boundaries of Afghanistan the place known as Tor Kham, and the whole bed of the Kabul river between Shilman Khwala Banda and Palosai, and which is shown on the said map by a red chain line. The British Government agrees that the Afghan authorities shall be permitted to draw water in reasonable quantities through a pipe, which shall be provided by the British Government, from Landi Khana for the use of Afghan subjects at Tor Kham, and the Government of Afghanistan agrees that British officers and tribesmen living on the British side of the boundary shall be permitted, without let or hindrance, to use the aforesaid portion of the Kabul river for purposes of navigation, and that all existing rights of

irrigation from the aforesaid portion of the river shall be continued to British subjects.

### **Article III**

The British Government agrees that a Minister from His Majesty the Amir of Afghanistan shall be received at the Royal Court of London, like the Envoys of all other Powers, and to permit the establishment of an Afghan Legation in London, and the Government of Afghanistan likewise agrees to receive in Kabul a Minister from His Britannic Majesty the Emperor of India, and to permit the establishment of a British Legation at Kabul. Both party shall have the right of appointing a Military Attache to its Legation.

### **Article IV**

The Government of Afghanistan agrees to the establishment of British Consulates at Kandahar and Jalalabad, and the British Government agrees to the establishment of an Afghan Consul- General at the headquarters of the Government of India, and three Afghan Consulates at Calcutta, Karachi and Bombay. In the event of the Afghan Government desiring at any time to appoint Consular officers in any British territories other than India, a separate agreement shall be drawn up to provide for such appointments, if they are approved by the British Government.

### **Article V**

The two High Contracting Parties mutually guarantee the personal safety and honourable treatment each of the representatives of the other, whether Minister, Consul-General, or Consuls, within their own boundaries, and they agree that the said representatives shall be subject in the discharge of their duties to the provisions set forth in the second Schedule annexed to this treaty. The British Government further agrees that the Minister, Consul-General, and Consuls of Afghanistan shall, within the territorial limits within which they are permitted to reside or to exercise their functions, notwithstanding the provisions of the said Schedule, receive and enjoy any rights or privileges which are or may hereafter be granted to or enjoyed by the Minister, Consul-General, or Consuls of any other Government in the countries in which the places of residence of the said Minister, Consul-General and Consuls of Afghanistan are fixed ; and the Government of

Afghanistan likewise agrees that the Minister and Consuls of Great Britain shall, within the territorial limits within which they are permitted to reside or to exercise their functions, notwithstanding the provisions of the said Schedule, receive and enjoy any rights or privileges which are or may hereafter be granted to or enjoyed by the Minister or Consuls of any other Government, in the countries in which the places of residence of the said Minister and Consuls of Great Britain are fixed.

#### **Article VI**

As it is for the benefit of the British Government and the Government of Afghanistan that the Government of Afghanistan shall be strong and prosperous, the British Government agrees that, whatever quantity of material is required for the strength and welfare of Afghanistan, such as all kinds of factory machinery, engines and materials and instruments for telegraph, telephones, etc., which Afghanistan may be able to buy from Britain or the British dominions or from other countries of the world, shall ordinarily be imported without let or hindrance by Afghanistan into its own territories from the ports of the British Isles and British India. Similarly the Government of Afghanistan agrees that every kind of goods, the export of which is not against the internal law of the Government of Afghanistan, and which may in the judgment of the Government of Afghanistan be in excess of the internal needs and requirements of Afghanistan, and is required by the British Government, can be purchased and exported to India with the permission of the Government of Afghanistan. With regard to arms and munitions, the British Government agrees that, as long as it is assured that the intentions of the Government of Afghanistan are friendly, and that there is no immediate danger to India from such importation in Afghanistan, permission shall be given without let or hindrance for such importation. If, however, the Arms Traffic Convention is hereafter ratified by the Great Powers of the world and comes into force, the right of importation of arms and munitions by the Afghan Government shall be subject to the proviso that the Afghan Government shall first have signed the Arms Traffic Convention, and that such importation shall only be made in accordance with the provisions of that Convention. Should the Arms Traffic Convention not be ratified or lapse, the Government of Afghanistan, subject to the foregoing assurance, can from time to

time import into its own territory the arms and munitions mentioned above through the ports of the British Isles and British India.

### **Article VII**

No Customs duties shall be levied at British Indian ports on goods imported under the provisions of Article VI on behalf of the Government of Afghanistan, for immediate transport to Afghanistan, provided that a certificate, signed by such Afghan authority or representative as may from time to time be determined by the two Governments, shall be presented at the time of importation to the Chief Customs Officer at the port of import, setting forth that the goods in question are the property of the Government of Afghanistan and are being sent under its orders to Afghanistan, and showing the description, number and value of the goods in respect of which exemption is claimed; provided, secondly, that the goods are required for the public services of Afghanistan and not for the purposes of any State monopoly or State trade, and provided, thirdly, that the goods are, unless of a clearly distinguishable nature, transported through India in sealed packages, which shall not be opened or sub-divided before their export from India. And also the British Government agrees to the grant, in respect of all trade goods imported into India at British ports for re-export to Afghanistan and exported to Afghanistan by routes to be agreed upon between the two Governments, of a rebate at the time and place of export of the full amount of Customs duty levied upon such goods, provided that such goods shall be transported through India in sealed packages, which shall not be opened or sub-divided before their export from India. And also the British Government declares that it has no present intention of levying Customs duty on goods or livestock of Afghan origin or manufacture, imported by land or by river into India or exported from Afghanistan to other countries of the world through India, and the import of which into India is not prohibited by law. In the event, however, of the British Government, deciding in the future to levy Customs duties on goods and livestock imported into India by land or by river from neighbouring States it will, if necessary, levy such duties on imports from Afghanistan; but in that event it agrees that it will not levy higher duties on imports from Afghanistan than those levied on imports from such neighbouring States. Nothing in this Article shall

prevent the levy on imports from Afghanistan of the present Khyber tolls and of octroi in any town of India in which octroi is or may be hereafter levied, provided that there shall be no enhancement over the present rate of the Khyber tolls.

#### **Article VIII**

The British Government agrees to the establishment of trade agents by the Afghan Government at Peshawar, Quetta, and Parachinar, provided that the personnel and the property of the said agencies shall be subject to the operations of all British laws and orders and to the jurisdiction of British Courts; and that they shall not be recognized by the British authorities as having any official or special privileged position.

#### **Article IX**

The trade goods coming to (imported to) Afghanistan under the provisions of Article VII from Europe, etc., can be opened at the railway terminuses at Jamrud, in the Kurram, and at Chaman, for packing and arranging to suit the capacity of baggage animals without this being the cause of re-imposition of Customs duties; and the carrying out of this will be arranged by the trade representatives mentioned in Article XII.

#### **Article X**

The two High Contracting Parties agree to afford facilities of every description for the exchange of postal matter between their two countries, provided that neither shall be authorised to establish Post Offices within the territory of the other. In order to give effect to this Article, a separate Postal Convention shall be concluded, for the preparation of which such number of special officers as the Afghan Government may appoint shall meet the officers of the British Government and consult with them.

#### **Article XI**

The two High Contracting Parties having mutually satisfied themselves each regarding the good will of the other, and especially regarding their benevolent intentions towards the tribes residing close to their respective boundaries, hereby undertake each to inform the other in future of any military operations of major importance, which may appear necessary for the maintenance of order among the

frontier tribes residing within their respective spheres, before the commencement of such operations.

#### **Article XII**

The two High Contracting Parties agree that representatives of the Government of Afghanistan and of the British Government shall be appointed to discuss the conclusion of a Trade Convention and the convention shall in the first place be regarding the measures (necessary) for carrying out the purposes mentioned in Article IX or this treaty. Secondly, (they) shall arrange regarding commercial matters not now mentioned in this treaty, which may appear desirable for the benefit of the two Governments. The trade relations between the two Governments shall continue until the Trade Convention mentioned above comes into force.

#### **Article XIII**

The two High Contracting Parties agree that the first and second schedules attached to this treaty shall have the same binding force as the Articles contained in this treaty.

#### **Article XIV**

The provisions of this treaty shall come into force from the date of its signature, and shall remain in force for three years from that date. In case neither of the High Contracting Parties should have notified, twelve months before the expiration of the said three years, the intention to terminate it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it. This treaty shall come into force after the signatures of the Missions of the two Parties, and the two ratified copies of this shall be exchanged in Kabul within 2½ months after the signatures.

**(Sd.) MAHMUD TARZI**

*Chief of the Delegation of  
the Afghan Government  
for the conclusion of the  
Treaty*

**(Sd.) HENRY R. C. DOBBS**

*Envoy Extraordinary and  
Chief of the British  
Mission to Kabul*



## **Appendix IV**

### **Formation of The North West Frontier Province Government of India Home Department Proclamation Public**

No. 5780

Simla, the 25th October, 1901.

Whereas the following territories, that is to say the districts of Peshawar, Kohat and Hazara (as altered by the Notification of the Punjab Government No. 994, dated the 17th October, 1901) the Bannu and Marwat Tehsils of the district of Bannu and the Tank, Dera Ismail Khan and Kulachi Tehsils of the district of Dera Ismail Khan (as altered by the Notification of the Punjab Government No. 993, dated the 17th October, 1901) are part of the dominions of His Majesty the King, Emperor of India;

And whereas it is expedient that the said territories, which are not under the administration of the Lieutenant Governor of the Punjab should be formed into a separate Province and constitute a Chief Commissioner-ship under the administration of a Chief Commissioner.

Know all Men, and it is hereby proclaimed, that His Excellency, the Viceroy and Governor-General of India in Council, in exercise of the powers conferred by Section 3 of the Government of India Act. 1854 (17 & 18 Vict., c. 77) and with the sanction and approbation of the Secretary of State for India, is pleased hereby to take the said territories under his immediate authority and management on and with effect from the ninth day of November, 1901, and further to direct that, on and with effect from the said ninth day of November, 1901, the said territories shall be formed into a separate Province and constituted a Chief Commissionership, to be called, the Chief Commissionership of the North West Frontier Province and to be administered by a Chief Commissioner.

**By order of His Excellency the Viceroy  
and Governor-General of India in Council,  
J.P. NEWETT.**

**Secretary to Government of India**

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# About the VIVEKANANDA INTERNATIONAL FOUNDATION

The Vivekananda International Foundation is an independent non- partisan institution that conducts research and analysis on domestic and international issues, and offers a platform for dialogue and conflict resolution. Some of India's leading practitioners from the fields of security, military, diplomacy, government, academia and media fields have come together to generate ideas and stimulate action on national security issues.

The defining feature of VIF lies in its provision of core institutional support which enables the organization to be flexible in its approach and proactive in changing circumstances, with a long-term focus on India's strategic, developmental and civilisational interests. The VIF aims to channelize fresh insights and decades of experience harnessed from its faculty into fostering actionable ideas for the nation's stakeholders.

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