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**Analyzing the Legality of Afghan Objections on
Durand Line in the light of International law**

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Abstract:

In the following paper, there will be an attempt to analyze the Durand Line issue in the light of conventions under international law and provisions of customary international law. Many Afghan governments have objected the legality of Durand Line since the creation of Pakistan on various unrealistic grounds which will be



critically analyzed and addressed herein. This deliberate legal uncertainty initiated by Afghanistan has constantly damaged relations between the two countries since the creation of Pakistan and a clear answer to these allegations in light of historical and legal facts is the need of the hour.

Introduction:

For centuries, the area known as Khyber Pass today has been used for multiple purposes including cross-border raids and occupations by dominant forces of their time. After the disintegration of the Sikh Empire, British Indian forces raided and occupied parts of Afghanistan and reached as far as Ghazni.¹ A need was felt during the subsequent decades by both parties of this conflict to demarcate a border between Afghanistan and British India after persistent raids were conducted by both sides against each other during the latter half of the 19th century.

Therefore, after long negotiations between British India and Afghanistan, Durand Line was accepted as the legitimate border in 1893 before the partition of subcontinent. This demarcation was of great significance because



it was finalized and accepted under the political auspices of both governments, between delegations of Sir Mortimer Durand and Emir Abdur Rahman Khan and had an overriding effect on all previous border demarcations. However, once Pakistan came into existence on 14th August 1947, Afghan governments have since tried to unilaterally revoke this agreement which continues

¹ "Ghazni." Britannica.com. Accessed December 14, 2020. <https://www.britannica.com/place/Ghazni>

to this day. In the following lines, there will be an effort to critically analyze these objections under international laws to get a clear picture of this whole fiasco which continues to this day.

The legitimacy of the Durand Line according to Historical Facts:

Many Afghans object to Durand Line on the pretext that the Emir Abdur Rahman Khan who gave assent to this demarcation was pressurized to give his approval for Durand Line. This, however, can be put to rest by the fact that almost 400 tribal noblemen from Afghanistan attended the ceremony in which Durand Line was formally accepted as the international boundary between Afghanistan and British India in 1893. Furthermore, Emir Abdur Rahman proudly mentioned this event in his memoirs and cited it as a great achievement under his rule.²

There are many Afghans who foolishly try to claim Khyber Pakhtunkhwa province in Pakistan by saying that this area was conquered by multiple Afghan and Persian rulers in the past, and has ethnically Pukhtoon majority, therefore it historically belongs to Afghanistan. Unfortunately, some politicians in Pakistan also believe in such absurd notions and call KPK a part of Afghanistan in a historical context.³ To counter this argument, it is important to understand that although Afghans and Iranians invaded parts of modern-day Pakistan in the past, yet it is a fact that there was no comprehensive formal declaration or agreement for demarcation of borders like the one in the case of the Durand Line.

Before 1893, the Afghans claimed the areas around the Durand Line on the basis of the rule of ‘might is right’. This rule was prevalent for centuries regarding ownership of these lands and the only practical solution for ending this dispute was the enactment of an agreement between both States which was signed and implemented by both parties on 12th November 1893. Moreover, this logic of ownership of these lands on a historical basis can also be used by people of Punjab against Afghans because of conquests of Afghan areas during the reign of Maharaja Ranjit Singh during the first half of the 19th century.⁴ But as mentioned before, the era of ruling based on might is right

² Warraich, Ahmad Nazir. “Durand Line - A Binding International Border.” *Courting The Law*, February 23, 2016. <https://courtingthelaw.com/2016/02/19/commentary/durand-line-a-binding-international-border/>

³ Soofi, Mushtaq. "PUNJAB NOTES: Mr Achakzai, Mianwali, and Afghans." *DAWN.COM*, December 23, 2016. <https://www.dawn.com/news/1303965>

⁴ Simha, Rakesh Krishnan. “Winning in Afghanistan.” *Russia Beyond*, November 17, 2011. https://www.rbth.com/articles/2011/11/17/winning_in_afghanistan_what_the_west_can_learn_from_india_1

is long gone and a formal agreement for the legitimate division of boundaries in these areas in the form of the Durand Line has been in effect for more than a century now.

The Legality of Durand Line under International Law:

When it comes to such legal objections regarding the legality of the Durand Line, many international treaties and provisions of customary international law provide ample legal legitimacy to Durand Line.

Following are the key points which defend Pakistan's legal standing regarding Durand Line;

a. Effect of Succession of State on Boundary Regime:

Since 1947, various Afghan governments have attempted to unilaterally revoke the Durand Line agreement on the pretext that Indian subcontinent has ceased to be a British colony, therefore the legitimacy of the Durand Line between Pakistan and Afghanistan has ended.



However, according to article 11 of the Vienna Convention on Succession of States in respect of Treaties, 1978, the succession of a State can neither affect boundary established by a treaty nor obligations and rights established by such treaty. Furthermore, article 62 (2) of the Vienna Convention on the Law of Treaties also ascertains that any fundamental change of circumstances cannot be used to legitimize any termination of a treaty that established a boundary in the past.

b. Stability of Boundaries under ICJ precedents:

In the border dispute between Chad and Libya, it was decided by the ICJ that this dispute was to be resolved under the Treaty of Friendship and Good Neighborliness concluded on 10 August 1955 between the French Republic and the Kingdom of Libya. It was held by the Honorable Court that:

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“Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the court.”⁵

It is important to note here that Chad was not an independent state when this treaty was signed but has never objected to this decision after gaining independence.

c. Respect of Colonial Borders:

State practices under international law also confirm continuance in force of the boundary established in conformity with a treaty before the occurrence of a succession.⁶ This state practice has been accepted in different parts of the world since the middle of the 20th century. For example, this principle was accepted under Resolution 16 of the meeting of Heads of State and Government of the Organization of African Union, under the terms of which all member states pledged themselves to respect colonial borders after their independence and accepted that these borders cannot be changed without mutual consent.⁷

d. Applicability of Principle of Uti Posseditis Juris:

The principle of *uti posseditis juris* (i.e. as you possess under the law) under customary international law also provides validity to the Durand Line agreement.⁸ According to this principle, after a State is decolonized and becomes independent, its boundaries will be preserved under previous treaties and agreements which were signed before its independence. The rationale behind this principle was explained by ICJ in Frontier Dispute (Burkina Faso/Mali) case as:

[UPJ is a] general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States from being endangered by fratricidal struggles

⁵ “CASE CONCERNING THE TERRITORIAL DISPUTE (LIBYAN ARAB JAMAHIRIYA/CHAD),” paras 72-73. February 3, 1994. <https://www.un.org/law/icjsum/9404.htm>

⁶ “Yearbook of the International Law Commission 1968 Volume 1, Page, 109, Para 51,” 1969. https://legal.un.org/ilc/publications/yearbooks/english/ilc_1968_v1.pdf

⁷ Shaw, Malcolm. “The Protection of Human Rights.” Essay. In *INTERNATIONAL LAW, Sixth Edition*, 290. Cambridge, United Kingdom: Cambridge University Press, 2008. <http://euglobe.ru/wp-content/uploads/2017/01/Malcolm-N.-Shaw.-International-Law-6th-edition-2008.pdf>

⁸ Chaudhary, Asad Ameer. “The Durand Saga - An Account of International Law.” *Courting The Law*, February 12, 2018. <https://courtingthelaw.com/2018/02/05/commentary/the-durand-saga-an-account-of-international-law/>

provoked by the challenging of frontiers following the withdrawal of the administering power.⁹

e. **The stance of the British Government on Durand Line Agreement:**

When the issue of the legality of Durand Line was raised by the Afghan government after the partition of India, Mr. Noel-Baker, the British Secretary of State for the Commonwealth Relations said in the House of Commons on 30th June 1950:

"It is his Majesty's Government's view that Pakistan is in international law the inheritor of the rights and duties of the old Government of India and of His Majesty's Government in the United Kingdom, in these territories, and that the Durand Line as the international frontier."¹⁰

Conclusion:

To sum it up, any idea of owning a certain part of the land based on conquests conducted centuries ago cannot withstand the provisions of modern international law which have been mentioned hereinabove. Furthermore, a close critical analysis of Afghan objections to the Durand Line Agreement since the creation of Pakistan reveal that their past conduct of accepting the Durand Line as the de facto border between British India and Afghanistan leaves no room for any objection to this treaty as per valid provisions of international law.

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⁹ "Uti Possidetis Juris." Law.cornell.edu. Accessed October 31, 2020. https://www.law.cornell.edu/wex/uti_possidetis_juris

¹⁰ Warraich, Ahmad Nazir. "Durand Line - A Binding International Border." Courting The Law, February 23, 2016. <https://courtingthelaw.com/2016/02/19/commentary/durand-line-a-binding-international-border/>