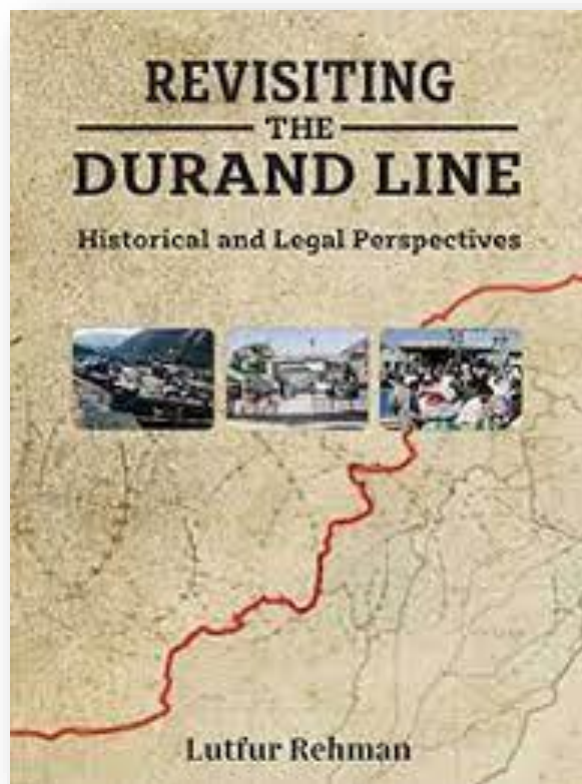


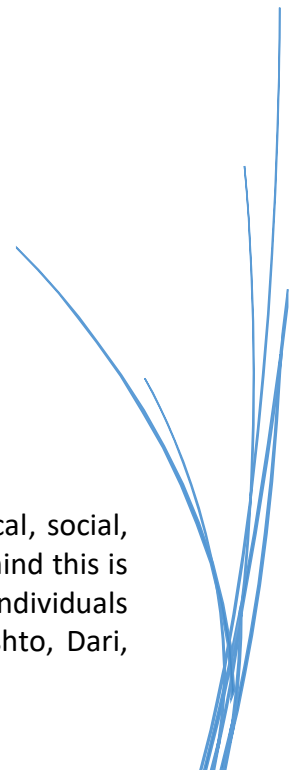
WEEKLY ANALYSIS

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An assessment of the legal arguments in the “Revisiting The Durand Line: Historical and Legal Perspectives”



Weekly Analysis is one of the CSRS publications analyzing significant weekly political, social, economic, and security events in Afghanistan and the region. The prime motive behind this is to provide strategic insights and policy solutions to decision-making institutions and individuals in order to help them design better policies. Weekly Analysis is published in Pashto, Dari, English and Arabic languages.



In this issue:

An assessment of the legal arguments in the “Revisiting The Durand Line: Historical and Legal Perspectives” 1

Introduction of the author and the book..... 4

Legal arguments brought to support the Durand Line 5

Conclusion and suggestion 10

Sources..... 10

Center for Strategic and Regional Studies (CSRS)



AN ASSESSMENT OF THE LEGAL ARGUMENTS IN THE “REVISITING THE DURAND LINE: HISTORICAL AND LEGAL PERSPECTIVES”

Introduction

Researcher Abdul Saboor Mubarez, a member of the Afghanistan Academy of Sciences, reviewed the “Revisiting The Durand Line: Historical and Legal Perspectives”, a publication discussing the Durand line newly published in Pakistan, and shared the results of his review in a meeting held at the Center for Strategic and Regional Studies in Kabul. “We chose this topic because recently the officials of the Islamic Emirate such as Mullah Yaqub Mujahid, the Defense Minister, Sher Muhammad Abbas Stanakzai, the Deputy Foreign Minister and others have discussed it through various media outlets,” Mubarez said. Mullah Yaqoob said that it is up to the people and they will decide, and Stanakzi said that he does not accept this line, that's why the discussions about this started and at the same time, this book was also published in Pakistan. CSRS facilitated the discussion about this topic so that the ambiguities about Durand line can be clarified and the positions and arguments of both sides can be put before the people.

According to the Montevideo Convention on the Rights and Duties of States (1933), four criteria are important for recognizing the legitimacy of states, one of which is territory or territory.¹ Territory is determined by defining borders, and often disputes arise between states during the definition of borders.

During the rule of King Amir Abdur Rahman Khan, the border with Tsarist Russia was determined, and this border was established in 1917 once again. After the communist revolution in 1991, it was shared with the Soviet Union and then after the Cold War in 1991, this border was shared with Tajikistan, Uzbekistan, and Turkmenistan. Until today, both sides accept this line as an official border. During the rule of the same King, a conflict arose with Iran over Sistan, which was resolved through the mediation of British General Frederick Goldsmith. Subsequently, this area was divided between the two countries and the border was determined.

The agreement related to Durand line was also between Amir Abdur Rahman Khan and the Minister of Foreign Affairs of British India, Henry Mortimer Durand, in 1893. The Durand Agreement was signed on the 12th of November, 1947. With the establishment of a new state in the name of Pakistan,



Afghanistan announced the cancellation of the Durand Agreement and even voted against Pakistan's membership in the United Nations.² Since then, it is a disputed line between Afghanistan and Pakistan.

There have been many discussions and writings on this issue among the jurists, politicians, university professors, researchers, and the general public on both sides, and each side has given reasons for rejecting or confirming this line. Recently in January 2024, Pakistani author and researcher Dr. Lutfurahman published a book titled (Revisiting The Durand Line: Historical and Legal Perspectives), acknowledging the Durand line as a legal and formal known line and border.

This book has five chapters, the fourth chapter is dedicated to the legal reasons for the confirmation of Durand's hypothetical line, and it has brought some reasons for the confirmation of this line in the light of international law. In this analysis, an attempt has been made to analyze the legal arguments presented in the fourth chapter of this book and to show the validity and weakness of the arguments. Of course, some other historians may analyze and criticize the remaining four chapters of this book, but we have selected only the fourth chapter for this brief analysis.

Introduction of the author and the book

This book (Revisiting The Durand Line: Historical and Legal Perspectives) has been written in English with 229 pages and five chapters and has been published by the Institute of Policy Studies in Islamabad. The first chapter is on the history of Afghanistan, the second chapter is on the history of Khyber Pakhtunkhwa and Baluchistan, the third chapter is on the marking of Durand line, and the fourth chapter is on the legal reasons to confirm Durand's hypothetical line, and in the fifth chapter the complicated political relations between Afghanistan and Pakistan have been discussed. Professors from Italy, Norway, and some Pakistani universities have also written reviews on this book. The book has an introduction, appendices, and various maps.

The author of the book is Dr. Lutfurahman, who has a doctorate in international relations from the National Defense University of Islamabad and has worked in radio journalism for 30 years. He was also awarded a gold medal by the President of Pakistan, Mamnoon Hussain, for his good research work. The scope of the research is Afghanistan, Baluchistan, Khyber Pakhtunkhwa, Durand Line conflict, terrorism, and the related history of Chitral, Dir, and Swat.³



Legal arguments brought to support the Durand Line

In the fourth chapter of the book, the author brings some legal arguments and shows that Durand is an official line and border.

Uti Possidetis: The first reason brought to confirm the Durand line is a principle of international law called Uti Possidetis. This principle states that the borders that were determined during colonialism should be accepted even after the end of colonialism to prevent conflicts. The Durand line was also signed during the British colonial period and based on this principle, it should be accepted even now. The author argues that the International Court of Justice also relied on this principle and resolved some disputes, such as in 1986. The border conflict between Burkina Faso and Mali in 2007 and the border dispute between Nicaragua and Honduras have been resolved based on this principle.

This argument is worthy of criticism from three aspects:

This principle of international law is divided into two parts, the author of the book only brought one aspect and did not mention the second aspect, and the reason is that the second aspect of this principle is detrimental to Pakistan. The two parts of this principle are as follows:

Uti Possidetis Facto or de facto: This means that the lines that were drawn during the colonial period are only administrative lines and should not be accepted as international borders, but at the end of colonialism, the alienated land should be handed over to the original owner.⁴

Uti Possidetis Juris: This principle is the second part that the author has relied on in his book.

As this principle has two parts, if Pakistan relies on it in the second way, Afghanistan may rely on it in the second way.

The second reason for criticizing the above principle is that there are two types of schools of thought regarding the lines drawn by colonialism after colonization at the international level:

Revisionists: This group of scholars say that after colonialism, the lines drawn during colonialism should be reviewed to resolve conflicts.

Another criticism of the principle mentioned in this book is that this principle (Uti Possidetis) conflicts with another important principle of international law (Self Determination). The principle of self-determination gives people the right to determine their destiny, especially after colonialism, so if we accept the lines drawn during colonialism, it will conflict with the principle of self-determination,



because people's struggle and resistance against colonialism will be meaningless until the successful nations are not given the right to their destiny.

Anti Revisionists: They accept the lines drawn during the colonial period and refuse to revise them.

⁵Afghanistan can rely on the opinion of the first group of scholars and request a review on this line. Therefore, the Pashtuns in Khyber Pakhtunkhwa separated the British colonies from Afghanistan, and then the Pashtuns on both sides waged resistance against colonialism. ⁶ After the success of the fight for freedom, they should be given the right to decide their destiny. Accept and return to the original state.

2- Signed agreements cannot be canceled by themselves. The author of this book brings the second legal reason that according to the Vienna Convention on the Rights of Treaties (1969), no treaty can be abrogated on its own. The author says that a contract is terminated when the conditions are specified in the contract itself, a certain date is set or it is terminated with the consent of both parties. This argument of the author about Durand line is also worthy of criticism because the same was mentioned in 1969. It is clear from the various articles of the Vienna Convention on the Rights of Treaties that the contract can be terminated by itself. Article 49 of this convention states: If fraud is proven in a contract, then the contract is terminated. It is also mentioned in the 50th article: If it is proven in an agreement that the representative of a state that signed the agreement took a bribe, then the agreement is void.

It comes in Article 51: If it is proven that pressure was put on the representative signing the agreement and the agreement was signed by force, the agreement is still void. It has been said that if the agreement is not signed, then economic sanctions will be imposed on it, so the agreement will be canceled.⁷

Based on the above materials, many documents show that the Durand Agreement was imposed on Afghanistan and pressure was put on Amir Abdul Rahman Khan and he signed this agreement based on pressure, for example:

Dupree writes in his book (Afghanistan): Amir was pressured several times to sign this agreement⁸ Julian Schofield writes in his book (Diversionary Wars: Pashtun Unrest and the Source of Pakistan-Afghan Confrontation) that the Durand Agreement has been imposed on Afghanistan.⁹



Daveed Gartenstein Ross and Tara Vassefi write in their book (The Forgotten History of Afghanistan-Pakistan Relations): that Britain threatened Kabul with economic sanctions if it did not sign the Durand Agreement.¹⁰

Also, a member of the Academy of Sciences and a historian, researcher Muhammad Sharif Zadran, according to Arnold Fletcher, says: Amir Abdul Rahman Khan, the first viceroy of British India, rejected the proposal in which Durand was sent to Kabul for a treaty. After this, Naib-ul-Hokuma became very angry and threatened the Amir that if he did not do this, he would send 10,000 soldiers to Kabul.

Afghan researchers also argue about this line that pressure was put on Amir during Durand's signing and based on Articles 51 and 52 of the Vienna Convention on the Law of Treaties (1969), this agreement is annulled.

3- Pacta Sunt Servanda: This is a bill of international law that the author has brought for argument, the short meaning of this principle is that (Agreements must be kept). This principle was also included in Article 26 of the Vienna Convention on the Law of Treaties. The author argues that based on this principle, Afghanistan should honor its agreement and accept the Durand line as the official border.

The argument on this principle is also worthy of criticism, because the Afghan side argues that Afghanistan does not accept this agreement at all, and the issue of loyalty to the covenant is discussed when both sides are convinced of the existence of an agreement and one of them does not implement his obligations. Then, when it can be argued on this principle, Afghanistan is not a party to the Durand Agreement for the following reasons:

This agreement was not originally a border agreement, but an agreement to determine the sphere of influence of Britain and the Amir, because at that time Britain was disturbed by the attacks from Afghanistan side in Lahore, Dir, Swat, Chitral, and Chaman, it was narrowed down and for that reason, Britain had found out the sphere of influence of the Amir and satisfied himself with these attacks.

For this reason, the name of this agreement is (Durand Line Agreement). If this agreement is about determining the border, then the name of this agreement should be (the Durand Border Agreement). When the British left, the area of Amir's influence also ended.



B- Another is that if the Durand Agreement is a final agreement to recognize the formality of the borders, then why the British signed again the agreement in 1905 with Amir Habibullah Khan and in 1919 and 1921 with Amir Amanullah Khan. Why didn't both emirs accept the treaty? It was only an agreement with Amir Abdul Rahman Khan, which did not apply to other emirs, and therefore the Britishers confirmed this matter to other emirs as well.

C- Another important issue is that if the border of 1921 between Amir Amanullah Khan and British India was accepted, so based on this agreement, other previous agreements about the border were canceled, including Durand, and Pakistan in 1921. The agreement is based on the year, so it comes in the 14th article of this agreement: This agreement will be valid for three years and after three years if each side wants to cancel it, it will inform the other side 12 months in advance.¹¹

Based on the same article, the Grand Jirga of Afghanistan in 1949. In 1950, the agreement was canceled. In 2008, this agreement was legally invalidated and all border agreements with Pakistan were canceled.

D- Afghanistan was under British protection until between 1838-1919. The 18-point agreement of the Lahore Triangle was signed between the British, Shah Shuja, and Maharaja Ranjit Singh, and among other promises, a commitment was taken from Shah Shuja that without the consent and advice of the British, no king can establish relations with foreign governments. Article 18 of the Treaty of Lahore stated: "Shah Shuja and the entire family of the Sadhus shall not enter into any dealings with other kings without the permission of the East India Company [British Indian Government] and Maharaja Ranjit Singh."

Also in 1855, on the 30th of March, in the first agreement of Jamrud, which was signed between the Crown Prince of Afghanistan, Ghulam Haider Khan, and the British, the Governor of Punjab, Sarjan Lawrence, the British still took unilateral concessions from Afghanistan. In the fourth article of the second treaty of Jamrud, it was clearly stated that the Emir of Afghanistan was independent in internal affairs, but he should handle foreign affairs according to the will of the British.

At the Ambala and Shimla (1873) negotiations, the main demand of the British was to gain independence from the Afghan government in foreign policy. The effort of Amir Sher Ali Khan, who took the advice of the British in the election of his youngest son, shows the commitment of Afghanistan. After Amir Sher Ali Khan, Amir Yaqoob Khan signed the Gandumak Treaty, Amir



Abdul Rahman Khan signed the Durand Treaty and Amir Habibullah Khan re-agreed on the commitments made by Amir Abdul Rahman, due to the influence of the British. It had severely affected the political independence of Afghanistan and Afghanistan was practically a protectorate of Britain, making its foreign policy according to the will of the British.

In 1893, Afghanistan's foreign policy was in the hands of the British and agreements with other countries are part of foreign policy, so Afghan researchers argue that Afghanistan signed the Durand Treaty when its foreign policy was in the hands of the British. Therefore, this agreement loses its legal nature and status.¹²

4- Vienna Convention on Succession of States in respect of Treaties 1978: The author in his book brought another reason about the successor state of Vienna 1978. The Convention argues on Article 34 and says: Pakistan is the successor state of British India and based on the above convention, all the agreements, rights, and obligations of the former state are referred to the successor state, so on this basis, the Durand Agreement that Britain made remains with Pakistan and Pakistan He is responsible for his rights and positions.

This legal argument is worthy of criticism for two reasons:

Based on Article 49 of this convention, this agreement is enforceable when at least 15 countries have signed and ratified it. Also, this convention applies only to those states that have signed and ratified this convention.

Two things are worth mentioning about this article.

First: This convention was so weak that in 1978. It was created in 1996, but it took 18 years for 15 countries to complete it. They waited for a year and after 18 years of waiting, 15 countries were able to sign and ratify this convention. Until 2019 Until this year, only 23 countries have ratified it, so if this convention is so important, after 41 years, not only 23 countries will have ratified it, but most of the countries of the world will have accepted it.

Second: Based on Article 49 of this convention, this convention applies only to those countries that have ratified this convention, but neither Afghanistan nor Pakistan has yet ratified this convention, so why does the author rely on such a convention that is not acceptable for both countries?



B- For this reason, another criticism can be that the United Nations Secretariat in 1962 published a document with the number (A/CN.4/149 and Add.1) and the title (Succession of States and Governments) and it appears on page 101 of this document:

(From the viewpoint of international law, the situation is one in which a part of an existing State breaks off and becomes a new State. On this analysis, there is no change in the international status of India; it continues as a State with all the treaty rights and obligations, and consequently, with all the rights and obligations of membership in the United Nations. The territory that breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and it will not, of course, have membership in the United Nations.)¹³

The concept is that after the withdrawal of Britain, the international legal status of India and its membership in the United Nations will remain in place and the rights and obligations related to the agreements will also revert to them. Also, Pakistan will be a new state The previous state (British India) does not refer to the rights and obligations of the treaties and will not have membership in the United Nations.

Based on this document of the United Nations, Afghan researchers can argue and say that Pakistan is not the successor of Britain.

Conclusion and suggestion

The Durand Agreement has created a conflict between Pakistan and Afghanistan, and researchers and politicians from both sides argue in favor of their country, Pakistan gives reasons to approve the Durand Agreement and accept this border as an official border. Afghan researchers give reasons for not accepting it.

In this last published book written by Dr. Lutfurahman, the legal arguments presented in it were criticized through this meeting, and as a result, it was found that the arguments presented are weak and there is no strength of reasoning based on these arguments, Durand line can never be accepted as an official border.

It is suggested to both sides to resolve this issue amicably so that both neighboring countries can live with each other in an atmosphere of peace.

Sources



¹ Montevideo Convention on the Rights and Duties of States, Dec 26, 1933.

² Hameed Hakimi and Zalmai Nishat. Pakistan-Afghanistan Relations: Emergence of New Nation States and the Search for Identity, Friedrich-Ebert-Stiftung (FES), September 2021, P. 7. Access link: <https://library.fes.de/pdf-files/bueros/pakistan/18346.pdf>

³ Lutfurahman. Revisiting The Durand Line: Historical and Legal Perspectives, Institute of Policy Studies, January 2024.

⁴ Abraham Bell and Eugene Kontorovich. Palestine, UTI Possidetis Juris, and the Borders of Israel, Arizona Law Review, Vol 58, March 8, 2016, P. 641. Access

link:https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745094#:~:text=The%20doctrine%20provides%20that%20emerging%20states%20presumptively%20inherit,of%20Palestine%20as%20they%20existed%20in%20May%2C%201948.

⁵ Lutfurahman. Revisiting The Durand Line: Historical and Legal Perspectives, Op. Cit., P.

⁶ Ibid, P. 635.

⁷ Vienna Convention on the Law of Treaties 1969, United Nations- Office of Legal Affairs, 2005, Access link:

https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

⁸ Louis Dupree. Afghanistan, New Jersey: Princeton University Press, 1980, P. 426.

⁹ Julian Schofield. Diversionary Wars: Pashtun Unrest and the Source of Pakistan- Afghan Confrontation, Canadian Foreign Policy Journal 17, no. 1, March 2011, P. 39

¹⁰ Daveed Gartenstein Ross and Tara Vassefi. The Forged History of Afghanistan -Pakistan Relations, Yale Journal of International Affairs 7, no. 1, March 2012, P. 40

¹¹ Treaty between British and Afghan Government, November 22 1921, London: His Majesty's Stationery office, Article 14.

¹² تنظيم سمون. افغانستان د بریتانیا مستعمره او که تحت الحمايه و؟ د افغانستان د سياسي خپلواکۍ يوه ارزونه، دعوت وپيپاڼه، ۲۰۱۸ ز. کال، د

لاسرسی وړ لېنک: <https://dawatmedia24.com/?p=97872>

¹³ United Nations Secretariat. SUCCESSION OF STATES AND GOVERNMENTS, International Law Commission, 3 DEC, 1962, Access link: <https://www.un.org/law/ilc/index.htm>

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