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PAK-AFGHAN BORDER: AN INTERNATIONAL LAW PERSPECTIVE


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Executive Summary

The Durand Line is a 2,640 km (1,640 miles) international boundary separating Pakistan and Afghanistan in South Asia. This border has not only shaped the geopolitical landscape of South Asia but has also led to enduring tensions between Pakistan and Afghanistan. The historical backdrop of the Durand Line is crucial for understanding the complexities of current relations, as Afghanistan's refusal to recognize this boundary stems from claims that it was imposed under duress and lacks legitimacy.

The claim that the Durand Line is not an established international border is invalid under international law, as treaties entered into by predecessor states are binding on successor states unless explicitly annulled. This principle underscores Pakistan's position that it is legally entitled to uphold the Durand Line as an international border. Moreover, various United Nations Security Council resolutions have reinforced this legal framework, recognizing the Durand Line as a legitimate boundary.

Policy Recommendations

- **Regular Diplomatic Dialogue:** Regular high-level meetings between officials from both countries should be held to discuss border management issues, trade facilitation, and security concerns. Enhancing the frequency of these meetings and raising their level would help build trust and address grievances before they escalate.
- **Joint Border Management Commission:** Both Pakistan and Afghanistan should engage in collaborative border management strategies. The Joint Coordination Committee (JCC), responsible for addressing border issues, should convene regularly. It may consider establishing joint border patrols and sharing intelligence to combat cross-border terrorism, smuggling and illegal border crossing while respecting each other's sovereignty.
- **Economic Development Projects:** Invest in cross-border economic projects that benefit communities on both sides of the Border. By improving trade relations and providing economic incentives, both countries can reduce tensions and foster goodwill. More importantly, the trade should not be weaponized, ensuring that economic exchanges remain a tool for cooperation rather than conflict.

HISTORICAL BACKGROUND

First Anglo-Afghan War

While the Second and Third Anglo-Afghan Wars are generally considered more significant in the context of the historical development of the Durand Line and British-Afghan relations, it is important to acknowledge that the stage for conflicts between the British Empire and Afghanistan was set by the First Anglo-Afghan War.¹ This war, fought from 1839 to 1842, was characterized by a disastrous British invasion aimed at installing a ruler of their choice. The failure of this campaign resulted in a significant loss of life and resources for the British and thus became known in history as “Auckland’s Folly²”. This war established a legacy of mistrust and resentment towards British interference, which would influence Afghan sentiments leading into the second conflict.

Second Anglo Afghan War and Treaty of Gandamak

By the time of the Second Anglo-Afghan War, fears of Russian expansion in Central Asia and challenges in managing the frontier with Afghanistan had grown and the British has begun to view Afghanistan as a “buffer” region.³ The Second Anglo-Afghan War (1878-1880) began when British forces invaded Afghanistan following the failure of diplomatic negotiations. The war lead to the to the Treaty of Gandamak (May 1879), where Afghanistan ceded territories to Britain, establishing British influence⁴. Furthermore, the treaty mandated that Afghanistan should conduct its foreign relations under British advice and supervision. A permanent British mission was established in Kabul to oversee Afghan foreign policy.⁵ Reflecting on the treaty of Gandamak following the Second Anglo-Afghan War, Lord Lytton⁶ stated that the war was fought to achieve two main objectives: first, to eliminate any foreign influence from Afghanistan, and second, to adjust Afghanistan’s borders in a way that would

¹ W K Fraser Tytler, *Afghanistan: A Study of Political Developments in Central Asia* (Oxford University Press 1950) 120: “But as we look back on this period in the story of the Hindu Kush we can see that so great an upheaval as the First Afghan War could not pass and die down and disappear leaving no trace behind.”

² John William Kaye, *History of the War in Afghanistan*, vol 1 (Richard Bentley 1857) 385: “The failure of Mahomed Shah cut from under the feet of Lord Auckland all ground of justification, and rendered the expedition across the Indus at once a folly and a crime.” This passage contains the earliest known usage of the phrase “Auckland’s folly” by Kaye.

³ Omrani B, “The Durand Line: History and Problems of the Afghan-Pakistan Border” (2009) 40(2) *Asian Affairs* 177, 195 <https://doi.org/10.1080/03068370902871508> accessed 25 October 2024.

⁴ Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton University Press 2010) 141.

⁵ Ibid.

⁶ Edward Robert Lytton Bulwer-Lytton, 1st Earl of Lytton, commonly known as Lord Lytton, was an English politician who held the position of Viceroy of India from 1876 to 1880.

ensure that British influence could not be excluded in the future.⁷ Additionally, Lord Beaconsfield went so far as to claim that the treaty had secured a “scientific and adequate” frontier⁸ for the British Indian Empire. However, the treaty did not bring lasting peace. The assassination of the head of the British mission in Kabul, along with his staff, sparked renewed conflict and unrest.⁹ The war ultimately concluded with Abdur Rahman Khan emerging as the new Amir of Afghanistan. He was seen as a strong leader who could maintain a buffer state¹⁰ between British India and Russia. He accepted the provisions of the Treaty of Gandamak but negotiated for greater autonomy in domestic affairs, effectively redefining Afghanistan’s relationship with Britain.

Demarcation of the Boundary

In 1893, Abdur Rahman Khan engaged in negotiations with British representatives led by Sir Mortimer Durand that culminated in the Durand Line Agreement. The agreement of 1893 divided Afghanistan and British India (now Pakistan), allocating northeastern and southern territories to Afghanistan while designating northwest and southwest regions, including Khyber Pakhtunkhwa and Balochistan, to British India.¹¹ It was agreed that the Government of India would not interfere in Afghanistan, and the Amir would similarly refrain from interfering in India.¹² Additionally, a joint British and Afghan Commission was appointed to demarcate the boundary with as much accuracy as possible, based on the line shown in the map attached to the agreement.¹³

Some historians have argued that the Durand Line Agreement was signed under duress, suggesting that Abdur Rahman Khan had little choice in the face of British pressure.¹⁴ However, evidence suggests that this claim is not valid. In fact, it was the Amir himself who first proposed the boundary demarcation, indicating that he was an active participant in the negotiations rather than a passive figure under British pressure. In his autobiography Amir said:

“Having settled my boundaries with all my other neighbours, I thought it necessary to set out the boundaries between my country and India, so that the boundary line should be

⁷ Azmat Hayat Khan, *The Durand Line: Its Geo-Strategic Importance* (Oxford University Press 2000) 88.

⁸ William Flavelle Monypenny and George Earle Buckle, *The Life of Benjamin Disraeli, Earl of Beaconsfield*, vol 6 (The Macmillan Company 1920) 475.

⁹ Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton University Press 2010) 141-142.

¹⁰ Richard F Nyrop and Donald M Seekins (eds), *Afghanistan: A Country Study* (Foreign Area Studies, The American University 1986) 34.

¹¹ Durand Line Agreement 1893, arts 1, 3, 5.

¹² Durand Line Agreement 1893, art 2.

¹³ Durand Line Agreement 1893, art 5.

¹⁴ Louis Dupree, *Afghanistan* (Oxford University Press 2010) 426.

definitely marked out around my dominions, as a strong wall for protection. I requested the Marquis of Dufferin, and afterwards the Marquis of Ripon, to send some of their most experienced officials as a Mission to visit me at Kabul, for the purpose of discussing certain matters, and also I thought it better to exploit this question of the boundary with such a Mission.¹⁵”

This account indicates that there was no element of duress. The Amir’s satisfaction with the agreement was also evident in the speech he delivered at a public *Darbar* in Kabul on 13th November 1893, where he expressed that he had asked his “friend”, referring to the British government, to demarcate the boundary and that he aimed to maintain friendly relations with them in the future.¹⁶

Following the Durand Agreement, successive Afghan governments continued to acknowledge the Durand Line as an international boundary through various treaties, including the Dane-Habibullah Agreement in 1905 and the Rawalpindi Agreement after the Third Anglo-Afghan War in 1919. This recognition implies that the initial agreement was not viewed as illegitimate or under duress by subsequent Afghan leaders.

Dane-Habibullah Agreement

After the passing away of Amir Abdur Rahman, the British government sent British Minister Louis Dane to Kabul with a draft of a new agreement. King Habibullah presented his own version of the document, which confirmed¹⁷ and extended¹⁸ the previous Durand Agreement. This agreement was signed in March 1905 and became known as the Dane-Habibullah Agreement.

Third Anglo-Afghan War and The Treaty of Rawalpindi

In 1919, the new Amir of Afghanistan declared a war of independence. Initially, Afghan forces had the upper hand, but the tide soon shifted. Despite the British army being weakened by World War I, they managed to fight back and maintain control of critical areas. The conflict concluded with an armistice on August 8, 1919, and resulted in a treaty that recognized Afghanistan’s independence. This conflict became known as the Third Anglo-Afghan War,

¹⁵ Abdur Rahman, *The Life of Abdur Rahman, Amir of Afghanistan*, vol 2 (John Murray 1900) 154-155.

¹⁶ S Fida Yunas (ed), *The Durand Line Border Agreement 1893*, Special Issue (2nd edn, Area Study Centre, University of Peshawar 2005) 73-76.

¹⁷ C U Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries*, vol 13 (Government of India, Foreign Department) 282-283.

¹⁸ Ahmad Shaye Qassem and HM Durand, “Pak-Afghan Relations: The Durand Line Issue” (2008) 5(2) *Policy Perspectives* 87, 90-91 <http://www.jstor.org/stable/42909535> accessed 25 October 2024.

and the agreement that concluded it was the Rawalpindi Agreement of 1919. While the treaty nullified¹⁹ Afghanistan's previous agreements with Britain, including the payment of aid to Afghanistan and the right of transit for military equipment between the two states, it reaffirmed the validity of the Indo-Afghan frontier through Article 5 of the agreement.²⁰

The Kabul Agreement of 1921

In 1921, the British government and the government of Afghanistan signed a treaty,²¹ also known as the Kabul Agreement, to establish neighborly relations between the two countries. Through Article 2, the treaty reaffirmed the Indo-Afghan frontier as the border between the two states, as previously accepted in the Rawalpindi Agreement.

Following the 1921 Kabul Agreement, the Durand Line remained the de facto border between Afghanistan and British India. However, the political landscape shifted with the independence of Pakistan in 1947. Upon Pakistan's creation, it inherited the territorial boundaries established by British India, including the Durand Line. As the partition approached, the Afghan government declared that all agreements related to the Indo-Afghan border, having been concluded with British Indian authorities, were now null and void.²² In 1949, the Afghan government convened a Loya Jirga (Grand Assembly), which officially repudiated the Durand Line and declared all related agreements void.²³ This stance has persisted, with Afghanistan continuously refusing to recognize the Durand Line. Meanwhile, international legal frameworks support the continuity of borders established by British era treaties, and Pakistan maintains that it is bound by the agreements made by British India, including the Durand Line Agreement.

INTERNATIONAL LAW PERSPECTIVE

To fully understand the legal standing of the Durand Line today, it is essential to examine the issue from the perspective of international law. The legal standing of this border

¹⁹ Ibid.

²⁰ Treaty of Peace between Great Britain and Afghanistan (signed 8 August 1919, Rawalpindi), in S Fida Yunas (ed), *The Durand Line Border Agreement 1893*, Special Issue (2nd edn, Area Study Centre, University of Peshawar 2005) 129-130.

²¹ Treaty between the British and Afghan Government (signed 22 November 1921, Kabul, ratifications exchanged 6 February 1922, registered with the League of Nations No. 367, 13 January 1928) 47-81 <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2014/v14.pdf> accessed 24 October 2024.

²² Ahmad Shaye Qassem and HM Durand, "Pak-Afghan Relations: The Durand Line Issue" (2008) 5(2) *Policy Perspectives* 87-102, 94 <http://www.jstor.org/stable/42909535> accessed 25 October 2024.

²³ Surendra Chopra, "Afghan Pakistan Relations: The Pakhtoonistan Issue" (1974) 35(4) *The Indian Journal of Political Science* 310-331, 314 <http://www.jstor.org/stable/41852102> accessed 26 October 2024.

under international law is supported by several key principles and treaties, which suggest that Afghanistan does not have a strong case against the Pak-Afghan Border.

Vienna Convention on the Law of Treaties

Article 62 of the Vienna Convention on the Law of Treaties²⁴ (VCLT) stipulates that a state is bound to uphold treaties made by its predecessor. When a new state emerges from a former colonial dominion, all international agreements and obligations of the previous ruling authority are transferred to the newly independent state. Consequently, upon gaining independence, Pakistan's government became responsible for all the international agreements and obligations of the British Indian government, including the Durand Line.²⁵

Vienna Convention on Succession of States in Respect of Treaties

Article 11 of the Vienna Convention on Succession of States in Respect of Treaties²⁶ (VCSSRT) states that the succession of states cannot affect the international borders established by an agreement, or the rights and obligations related to international borders created through such agreements. Therefore, as the successor state to British India, Pakistan's creation does not alter the legal status of the border, and it legally inherited²⁷ the Durand Line Agreement in accordance with international law.

It might be argued that both the VCLT and the VCSSRT are non-retroactive and do not apply to the Durand Line Agreement. However, the preamble of both conventions states that customary international law will continue to govern matters not regulated by the provisions of the conventions. Since customary international law is a recognized source of international treaty law, the argument that the Durand Line issue predates the VCLT and VCSSRT, and is thus beyond their scope, still leads to the same conclusion: international law does not support Afghanistan's claim that the Durand Line became invalid following the creation of Pakistan.²⁸

²⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS 1155, 331 https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed 24 October 2024.

²⁵ Ahmer Bilal Soofi, "Pakistan-Afghanistan Border Management: A Legal Perspective" (PILDAT, March 2015) 11 <https://rsilpak.org/project/pakistan-afghanistan-border-management-a-legal-perspective-pildat/> accessed 20 October 2024.

²⁶ Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) UNTS 1946, 3 https://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf accessed 24 October 2024.

²⁷ Ahmer Bilal Soofi, "Pakistan-Afghanistan Border Management: A Legal Perspective" (PILDAT, March 2015) 12 <https://rsilpak.org/project/pakistan-afghanistan-border-management-a-legal-perspective-pildat/> accessed 20 October 2024.

²⁸ Ahmad Shaye Qassem and HM Durand, "Pak-Afghan Relations: The Durand Line Issue" (2008) 5(2) *Policy Perspectives* 87-102, 94 <http://www.jstor.org/stable/42909535> accessed 25 October 2024.

Principle of *Uti Possidetis Juris*

The principle of *uti possidetis juris* provides that that newly independent states should retain the same borders their territories had prior to independence,²⁹ thereby ensuring continuity in territorial sovereignty.³⁰ The Vienna Convention on Succession of States in Respect of Treaties (VCSST) affirms the principle of *uti possidetis juris*, which stipulates that binding bilateral agreements are inherited by successor states. Therefore, even though Pakistan was founded in 1947, several decades after the original Durand Line Agreement, it is still bound by that agreement.³¹ In case concerning the frontier dispute, The ICJ held that the essence of the *uti possidetis juris* principle lies in ensuring that the territorial boundaries in place at the moment of a state's independence are respected. When a new state gains independence, the existing internal borders are transformed into official international borders.³²

The Court further affirmed:

“International law - and consequently the principle of uti possidetis - applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the “photograph” of the territorial situation then existing.”³³

International Recognition

The legitimacy of the Durand Line has been recognized in various international contexts, reaffirming its status as the official border between Pakistan and Afghanistan. Pakistan's admission to the United Nations (UN) and the acceptance of its boundaries by the UN provide a strong argument. For instance, in the case of Jammu and Kashmir, the UN has issued a map designating the region as disputed. This designation does not apply to the Pakistan-Afghanistan border. In 1949 the British House of Commons, officially reconfirmed their original position of 1893 on the Durand Line as the legal border between Afghanistan and

²⁹ Ahmer Bilal Soofi, “Pakistan-Afghanistan Border Management: A Legal Perspective” (PILDAT, March 2015) 12 <https://rsilpak.org/project/pakistan-afghanistan-border-management-a-legal-perspective-pildat/> accessed 20 October 2024.

³⁰ Malcolm N Shaw, “The Heritage of States: The Principle of Uti Possidetis Juris Today” (1996) 67(1) *British Yearbook of International Law* 75-154, 76 <https://academic.oup.com/bybil/article/67/1/75/281947> accessed 23 October 2024.

³¹ Brad L Brasseur, “Recognizing the Durand Line - A Way Forward for Afghanistan and Pakistan?” (EastWest Institute, 7 November 2011) 7 <https://www.eastwest.ngo/idea/recognizing-durand-line-way-forward-afghanistan-and-pakistan> accessed 20 October 2024.

³² Frontier Dispute (Burkina Faso/Republic of Mali) (Judgment) [1986] ICJ Rep 554, 566 <https://www.icj-cij.org/case/69/judgments> accessed 26 October 2024.

³³ *Ibid.*, 568.

Pakistan. Subsequently, In 1950, the Queen of England recognized that, under international law, Pakistan inherited the rights and obligations of British India, including the Durand Line as its western border.³⁴ The Geneva Accords of 1988, a significant diplomatic agreement aimed at resolving the conflict in Afghanistan, included a bilateral agreement between Afghanistan and Pakistan that emphasized principles of mutual relations, particularly non-interference and non-intervention in each other's internal affairs.³⁵ Similarly, UNSC Resolution 1267, reaffirm the de jure recognition of the Durand Line as an international border, where the principle of non-intervention fully applies, thereby reinforcing Pakistan's authority over its borders.³⁶ Moreover, Afghanistan itself has consistently treated the border as the de facto international boundary when it comes to transit, trade, and issuing visas for international travelers.

The Durand Line, established in 1893, remains a critical point of contention between Pakistan and Afghanistan. Afghanistan's longstanding refusal to recognize the border, despite its legal basis in the 1893 agreement and the subsequent reaffirmations, continues to fuel diplomatic and security challenges. International law principles, such as *uti possidetis juris*, support Pakistan's claim as the successor state, inheriting pre-independence boundaries. The historical context and ongoing implications highlight the complexities of regional relations, underscoring the need for dialogue and cooperation. A solution grounded in international law, respecting the sovereignty and territorial integrity of both states, is essential to ensure long-term regional stability and peace.

POLICY RECOMMENDATIONS

- **Regular Diplomatic Dialogue:** Regular high-level meetings between officials from both countries should be held to discuss border management issues, trade facilitation, and security concerns. Enhancing the frequency of these meetings and raising their level would help build trust and address grievances before they escalate.
- **Collaborative Border Management:** Both Pakistan and Afghanistan should engage in collaborative border management strategies. The Joint Coordination Committee (JCC), responsible for addressing border issues, should convene regularly. It may consider establishing joint border patrols and sharing intelligence to combat cross-

³⁴ Brad L Brasseur, "Recognizing the Durand Line - A Way Forward for Afghanistan and Pakistan?" (EastWest Institute, 7 November 2011) 7 <https://www.eastwest.ngo/idea/recognizing-durand-line-way-forward-afghanistan-and-pakistan> accessed 20 October 2024.

³⁵ Agha Shahi, "The Geneva Accords" (2008) 61(1/2) Pakistan Horizon 143 <http://www.jstor.org/stable/23726021> accessed 27 October 2024.

³⁶ UN Security Council Resolution 1267 (15 October 1999) UN Doc S/RES/1267 <http://unscr.com/en/resolutions/doc/1267> accessed 21 October 2024.

border terrorism, smuggling and illegal border crossing while respecting each other's sovereignty.

- **Economic Development Projects:** Invest in cross-border economic projects that benefit communities on both sides of the Border. By improving trade relations and providing economic incentives, both countries can reduce tensions and foster goodwill. More importantly, the trade should not be weaponized, ensuring that economic exchanges remain a tool for cooperation rather than conflict.

Action Matrix				
Options for Pakistan				
Option	Pathways to Solution	Implementation of Solution	Actors Responsible	Implementation Timelines
Regular Diplomatic Dialogues	Establish periodic high-level meetings between Pakistan and Afghanistan to address grievances and ensure transparent discussions on border management and security.	Implement a structured framework for dialogue between both nations, focusing on trust-building, trade facilitation, and security.	<ul style="list-style-type: none"> Ministry of Foreign Affairs of Pakistan Ministry of Foreign Affairs of Afghanistan 	6-12 months
Collaborative Border Management	Both countries should adopt joint strategies, convene the Joint Coordination Committee (JCC) regularly, and explore initiatives like joint border patrols.	Develop and sign a Memorandum of Understanding (MoU) to define the terms of collaboration. Organize regular JCC meetings and establish cross-border communication channels for joint actions.	<ul style="list-style-type: none"> Joint Coordination Committee (JCC). Ministry of Interior Border Security Forces Intelligence Agencies 	3-6 months for MoU development. Regular quarterly JCC meetings starting thereafter.
Economic Development Projects	Invest in cross-border infrastructure and trade, focusing on economic development to ease tensions and provide tangible benefits to both sides of the border.	Launch joint economic zones and infrastructure projects, focusing on trade facilitation, health, and education. Create mechanisms to monitor fair trade practices and ensure economic transparency	<ul style="list-style-type: none"> Ministry of Finance Ministry of Commerce Trade Development Authority of Pakistan (TDAP) 	18-36 months