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## The Durand Line: Analysis of the Legal Status of the Disputed Afghanistan-Pakistan Frontier

Bijan Omrani

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THE DURAND LINE: ANALYSIS OF THE LEGAL STATUS  
OF THE DISPUTED AFGHANISTAN-PAKISTAN  
FRONTIER

*Bijan Omrani*

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## I. INTRODUCTION

The Afghan/Pakistan frontier dispute is one of the most difficult and long-standing problems to face the international diplomatic and security community. The frontier dividing Afghanistan and Pakistan, (commonly known as the "Durand Line" after the British Foreign Secretary of India, Sir Mortimer Durand, who negotiated the creation of the frontier with Abdur Rahman, the Amir of Afghanistan, in 1893) has been a scene of tension and instability in the region since the time of British imperial rule in the 19th century. Before Indian Independence in 1947 the frontier suffered a series of violations at the hands of both sides. After 1947, Afghanistan declared that it would not recognize the validity of the line, a position which led to further stand-offs and armed conflicts between Afghanistan and the new state of Pakistan. The difficulty of governing the regions around the frontier and the lack of Afghan-Pakistan co-operation over the frontier (a result of the 1893 frontier settlement) was instrumental in incubating the Afghan civil war of the 1990s, the rise of the Taliban, and the continuing armed insurrections which have faced both Afghanistan and Pakistan since 2001. The failure of Afghanistan and Pakistan to come to an agreement over the legal status of the frontier has also been blamed for allowing the frontier regions to harbor international terrorist groups, not to mention hindering economic and social development in the regions and the maintenance of basic human rights and the rule of law.<sup>1</sup>

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<sup>1</sup> See Bijan Omrani, *The Durand Line: History and Problems of the Afghan-Pakistan Border*, 40 J. OF THE ROYAL SOC'Y FOR ASIAN AFF., 177-195, (2009)

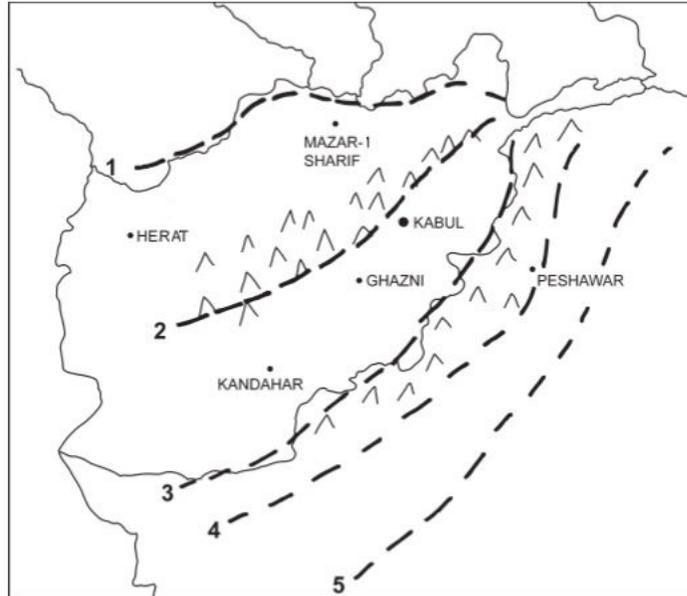
This article will attempt to analyze the merits of the competing claims of Afghanistan and Pakistan over the legal status of the Durand Line and frontier territories. It will also comment on what role a resolution of the legal dispute over the frontier might play in a wider settlement of the long-running problems of the Afghanistan-Pakistan frontier.

#### I. HISTORICAL AND GEOGRAPHICAL BACKGROUND

The difficult geography of the region surrounding the Afghanistan-Pakistan frontier [see map] made the area a scene of conflict between competing powers long before the development of any of the modern states. Historically, the region of Afghanistan has been a frontier territory situated between three competing centers of power – India, Persia (Iran) and Central Asia. Empires based in these regions extended their control into the region of Afghanistan and pushed their frontiers back and forth there depending on the waxing and waning of their relative strength. No stable frontier ever crystallized between these three centers of power because the geographical features available were never sufficient to act as concrete lines of defense.

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(where author has previously covered some historical and current affairs aspects of the question); See also Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. (2010) (discussing the problematic development and effects of international law over the history of the frontier).



This tendency is most clearly seen in the question of where the north-western frontier of India should be placed. The question was always on the mind of Indian rulers as India suffered frequent invasions from the north-west (the only viable land route for a hostile army to enter India). Geography offers five possible options for a frontier, starting from the furthest north [see map]:

- i. The River Oxus (Amu-Darya);
- ii. The Hindu Kush mountain range, from the Pamir Mountains down to Herat or the deserts in the south of Afghanistan;
- iii. The heights of the Suleiman-koh mountain range;
- iv. The base of the foothills of the Suleiman-koh mountain range;
- v. The Indus River.

Over the past 500 years, each of these options have served as the north-western frontier of India. The Mughal empire briefly attained the Oxus in the 16<sup>th</sup> century but then reverted to the Hindu Kush. After the emergence of the first incarnation of the Afghan state in 1747 – the Durrani Empire – the frontiers were for a time pushed back as far as Kashmir. By the beginning of the 1800s, when the Durrani Empire had fallen into decline, the Sikh Kingdom of the Punjab controlled much of the territory between the Indus River and the Suleiman-koh foothills.<sup>2</sup>

The Sikh Kingdom of the Punjab fell into British hands after the end of the Second Anglo-Sikh War in 1849, and the growing British Empire in India by then extended up to the base of Suleiman-Koh foothills, but not into the mountainous areas.<sup>3</sup>

The British in India after this point faced two geopolitical problems. The first was whether to maintain the frontier at that point, or whether to push it further north and west for the defense of the Empire. The activities of the Russian Empire at that period were causing concern to the British. Russian power was growing in Central Asia, and British officials feared that Russia in time would push its territorial control southwards far enough to threaten British India. These fears had originally led the British to attempt to put a puppet king on the throne in Kabul during the first Anglo-Afghan War (1839-42), an incident which ended in failure for the British. British concern mounted throughout the 19<sup>th</sup> century as Russia continued its advance through

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<sup>2</sup> See PERCY SYKES, *A History of Afghanistan* at 351-391 (1940).

<sup>3</sup> See generally AMARPAL SINGH, *The Second Anglo-Sikh War*, AMBERLEY, (2016).

Central Asia, annexing large tracts of territory and the cities of Tashkent (1869), Samarkand (1868), Bokhara (1869) and Khiva (1878).<sup>4</sup>

The second problem faced by the British was the question of policing. Broadly speaking, the region of southern Afghanistan and the Suleiman-koh Mountains and then to a certain extent the regions east of the Suleiman-koh foothills were (and still are) inhabited by the Pashtun tribal group. The Pashtuns were a fissiparous grouping, divided into clans, sub-clans and smaller units down to family groupings. The way of life and level of economic development of the Pashtuns at that time varied widely depending on the geography of their immediate habitat. Some, particularly those living around Kandahar were urbanized or involved in sedentary agriculture. Some were able to prosper as nomadic pastoralists who also oversaw the logistics of long-distance caravan trade. Others, particularly those without access to urban centers or scarce agricultural or grazing land, were particularly poor.<sup>5</sup>

This was especially the case for the Pashtun hill tribes living in the Suleiman-koh mountains. They were reliant on a combination of subsidies from outsiders – usually the Afghan government in Kabul – and raiding the more prosperous settled districts in the neighboring plains to make a living. The Pashtun Hill tribes by custom were extremely independent-

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<sup>4</sup> See MARTIN EWANS, *Afghanistan: A Short History of its People and Politics*, at 59-97, Harper Perennial, London, (2002).

<sup>5</sup> See generally James W. Spain, *The Pathan Borderland*, THE HAGUE: MOUTON & CO., (1963); see also Leon B. Poullada, 'Pushtunistan: Afghan Domestic Politics and Relations with Pakistan', in A. T. Embree, *Pakistan's Western Borderlands*, at 131, NEW DELHI (1971).

spirited and egalitarian in their way of life and customs. They were unwilling to follow the laws and edicts of governments in the settled districts, whether India or Kabul, and maintained their own tribal customs, known as *Pashtunwali* ('The Way of the Pashtun') as a form of unwritten common law. Conspicuous parts of *Pashtunwali* included the obligation to pursue vendettas in return for injuries or insults against oneself or one's tribal grouping. It also included an absolute obligation to provide hospitality even for enemies or fugitives from justice in the settled regions. As such, the different hill tribes were frequently in conflict with each other, but on top of this their pursuit of such laws made it almost impossible for governments in the settled districts to reduce them to obedience.<sup>6</sup>

It should be noted that the subsidies from Kabul were in reality little more than protection money to keep open the trade routes into India; trade caravans were a particular target of the Pashtun hill tribes. It was difficult for the Kabul government ever to collect taxes from these regions, though they would sometimes be able to enlist the help of the tribes in support of the Kabul throne in times of difficulty. It should also be noted that the Afghan state initially came into being in 1747 as an Empire of Pashtuns, led by the Durrani tribal grouping based around Kandahar. Thus, even though the Pashtun Hill tribes behaved in an independent fashion, the Pashtun-led Kabul government maintained a nominal claim

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<sup>6</sup> See Abdur Rauf Khan Khattack, *Reforms to the Federally Administered Area of Pakistan (FATA)-An Unresolved Problem*, 48 *ASIAN AFF.* 529, 529-542 (2017); See also, W.K. FRASER-TYTLER, *AFGHANISTAN: A STUDY OF POLITICAL DEVELOPMENTS IN CENTRAL AND SOUTHERN ASIA* 181-191 (2nd ed., Oxford Univ. Press 1953) (for additional information of the Pashtun Hill tribes' history and customs).

of sovereignty over them, and considered their tribal kinship with the to be of considerable importance.<sup>7</sup>

The Suleiman-koh range was poorly mapped in the 19<sup>th</sup> century and extremely inaccessible. Any external forces who entered it, particularly those travelling in small numbers, were highly vulnerable. The British perception that the Pashtun Hill tribes were dangerous, hostile, difficult to govern and reduce to obedience, and bent on predation of the settled districts, continued to be one of the prime considerations in whether to advance the area deemed to be under direct British control further north-west.

Between 1849 to around the period of the Second Anglo-Afghan War (1878-1880), the British pursued a 'close-border' policy. They decided against any attempt to bring the Suleiman-koh Mountains and the Pashtun Hill tribes under their control or formal sovereignty. Instead, they attempted to prevent the hill-tribes raiding the settled districts by building fortifications, using locally-raised levies to repel attacks, and by paying the tribes subsidies to ensure good behavior: for example, to return fugitives, to restrain themselves from raiding and to keep the roads open to travelers and trade caravans. This approach was not especially successful, and the British mounted 23 full-scale expeditions into the territory of the Pashtun Hill tribes between 1857-1881 to chastise them for raids or other infringements of the peace.<sup>8</sup>

Around 1878, the close border policy began to change. The British fear of increasing Russian encroachment in Central Asia led to the argument that the frontier should be

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<sup>7</sup> See e.g. O. CAROE, *THE PATHANS XI-XV*, at 335-336, MACMILLAN & CO. LTD. (1958).

<sup>8</sup> *Id.* at 348-49.

pushed up to the Hindu Kush, to include Kabul and Kandahar as frontier cities: the so-called "forward policy". In 1878, there was an effective attempt to put this policy into practice. The British accused the Afghan King of communicating with the Russian government, thus endangering the security of India. The following dispute led to the Second Anglo-Afghan war (1878-1880). For a period, the British attempted to dismember Afghanistan and retain the areas south of the Hindu Kush but this was found to be unviable, and the occupation was ended with a return of troops and effective control to the base of the Suleiman-koh range. However, in the aftermath of the war the British made a treaty with the King of Afghanistan to take full control of Afghan policy and foreign relations in return for an annual subsidy, military assistance and a guarantee of security.

Despite the failure of the Second Afghan War, there were calls for the limit of British control to be pushed into the Suleiman-koh Mountains. Some officials argued that there should be 'peaceful penetration' into the areas of the hill tribes. Small areas of the tribal territory should be taken under occupation and control and fortified, and that tribesmen should be enlisted as members of irregular forces to keep the peace. Such employment would, they argued, would lead to economic development and greater pacification of the region. This policy, known as the 'Sandeman System' had been pursued with some success in the region of Baluchistan to the south-west of the Pashtun territories. It was not formally put into practice in the Pashtun regions after 1880, but there was greater penetration of the regions during this period. Following the Second Afghan War, British forces occupied the Khyber Pass. By 1892, the British had established local

outposts including the Samana Crest, the Southern Tirah, and the Kurram Valley.<sup>9</sup>

These British advances, given the uncertainty of how far an advance should be made into the tribal regions, gave rise to a desire on the part of the British to make a firm demarcation of the frontier between British India and Afghanistan. This desire was supplemented by a continuing fear of a Russian advance on India through the little-explored region of the Wakhan and Pamirs. The British aspiration for a frontier settlement with Kabul included the objective not only of setting a frontier between British India and Afghanistan, but also confirming Afghanistan's own frontier with the Russian Empire to the north, a frontier which still had not been fully agreed or demarcated.

In October 1893 the Foreign Secretary of India, Sir Mortimer Durand, travelled to Kabul to negotiate these matters with Abdur Rahman, the Amir of Afghanistan. The negotiations lasted a month, culminating in the signature of two separate treaties between the Governments of British India and Afghanistan on 12 November 1893, one of which dealt with the Indo-Afghan frontier and the other of which dealt with the Russo-Afghan frontier.<sup>10</sup>

The treaty which dealt with the Indo-Afghan frontier stated in its preamble that the intention of the two governments in signing it was to fix "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...".<sup>11</sup>

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<sup>9</sup> *Id.* at 378-79.

<sup>10</sup> See SIR PERCY SYKES, A HISTORY OF AFGHANISTAN VOL. II, at 173-77 (1940).

<sup>11</sup> *Id.* at 353.

A map was attached to the treaty with a line (the Durand Line) agreed by Durand and the Amir running from “the Wakhan to the Persian border”. The treaty provided that “the eastern and southern frontier of [the Amir’s] dominions” should follow the line shown on the map (article 1). Article 2 provided that:

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.

Articles 3 and 5 clarify some of the points of the division of territories and districts by the line. Article 4 provided that the line would be demarcated on the ground by a joint commission of British and Afghan officials, which should do its best to follow the line as shown on the map attached to the treaty, but that the commission should have “due regard to the existing local rights of villages adjoining the frontier”. Article 7 provided for annual financial and military subsidies to be paid to the Afghan government in token of their goodwill.

Article 6 provided that:

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...”

In addition, any differences in detail about the line should be referred to the boundary commission working on the ground.

The second agreement signed on the same day regarding the northern frontier of Afghanistan was differently worded, making no mention of spheres of influence. It describes its intention as the formation of "the northern boundary of Afghanistan".

The actual demarcation took place for the most part between 1893-1896. Tensions caused by the presence of the boundary commission in the hill areas led to a general uprising which led to British reprisals in the years following 1897, known as the Malakand Campaign<sup>12</sup>. Small sections near Chitral and also in the Mohmand territories on the routes to Kabul, on account of these difficulties, remained undermarketed until the 1920s.

In 1904, the Punjab, which was the province of India which predominantly faced the Afghan frontier was divided at the order of the British Viceroy, Lord Curzon. A new province made up of the areas closest to the frontier, named the North Western Frontier Province (NWFP, recently renamed Khyber-Pakhtunkwa) was created. There was a return to the close border policy, but in the tribal districts in the hills the Frontier Crimes Regulation was promulgated, which remains in force today (for further discussion, see below). Each of the tribal regions (known as agencies), then five in number, were treated as quasi-autonomous but were put under the responsibility of a British resident agent who

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<sup>12</sup> See generally Winston S. Churchill, *The Story of the Malakand Field Force*, London (1898).

answered directly to the Viceroy. During this period there was a low level of practical penetration of the tribal areas, thanks to the maintenance of the close border policy. The British government stated that they had not assumed sovereignty over the Tribal areas beyond the foothills but viewed itself in the position of a suzerain power (see below).<sup>13</sup>

The 1893 treaty regarding the Durand Line was confirmed in a 1905 Anglo-Afghan treaty signed by Abdur Rahman's successor as ruler of Afghanistan, Amir Habibullah.

In 1919, the Amir Habibullah was assassinated and was succeeded by the Amir Amanullah. Amanullah, motivated by radical elements hostile to the British, launched an invasion of British India across the Durand Line. This action led to the Third Anglo-Afghan War, which only lasted for two months; it was swiftly brought to an end by the first use of western air power against Afghanistan<sup>14</sup>. In the Peace Treaty which followed the end of the War, the Treaty of Rawalpindi (8 August 1919), it was agreed that "The Afghan Government accept the Indo-Afghan frontier accepted by the late Amir." (Article 5). A letter from the British Government representative, Sir Hamilton Grant, to the Government of Afghanistan following the signing of the Treaty, stated that the Third Anglo-Afghan War "cancelled all previous treaties". The 1919 Treaty also returned control of Afghan foreign policy to the Afghan government, making Afghanistan fully independent in the conduct of its external affairs.

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<sup>13</sup> See Caroe, *supra* note 8, at 413-420.

<sup>14</sup> See Sykes, *supra* note 11, at 270-294.

A more extensive treaty to regulate Anglo-Afghan relations in the wake of Afghanistan's independence was signed between the two countries in 1921 (the Treaty of Kabul, 22 November 1921). Article 2 provided that "The two high contracting parties mutually accept the Indo-Afghan frontier as accepted by the Afghan Government under Article V of the Treaty concluded on August 8, 1919...". Also of relevance to the frontier was article 11, which provided that each side would "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". It is to be noted that the word "sphere" rather than "territory" was used in this treaty.

The 1921 treaty, unlike those previous to it, provided a repudiation clause (article 14):

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 expiration of one year from the day on which either of the High Contracting Parties shall have denounced it..

As a rider to the 1921 Treaty, the British Government acknowledged in a note to the Government of Afghanistan that the "conditions of the frontier tribes of the two Governments are of interest to the Government of Afghanistan". However, there was no attempt to define in

concrete terms the nature of this interest or how such an interest should manifest itself in the rights and obligations of either party to the treaty. As such, the interest as mentioned in this rider remained inchoate.

In the 1920s and early 1930s, Afghanistan faced several periods of instability, including the overthrow of Amanullah, a civil war which saw the brief elevation of a non-Pashtun (known as Bacha-i Saqao) to the Afghan throne, and the assassination of Bacha-i Saqao's royal Pashtun successor, Nadir Shah. At this time, the Kabul government used its influence with the Pashtun tribes on the Indian side of the Durand line to enlist their support in the periods of internal armed conflict which took place. Agents of the Kabul government also agitated amongst the tribes on the Indian side of the Durand Line to cause difficulties for the British administration in India. The British returned to a forward policy in the Pashtun tribal areas on their side of the Durand Line with some attempts to increase penetration and permanent control. However, these attempts were unsuccessful. There were over 200 recorded raids from the tribal areas during the 1930s, as well as a full-scale uprising led by a charismatic religious leader, the Fakir of Ipi, which led to the engagement of 32,000 regular troops from British India.<sup>15</sup>

In May 1930, an exchange of notes between the Afghan Minister in London, His Highness General Shah Wali Khan, and the British Foreign Secretary Arthur Henderson, confirmed that the 1921 Kabul Treaty continued to have full force and effect.

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<sup>15</sup> *Id.* at 295-336.

In 1944, following the British announcement of impending Indian independence, the Afghan government wrote to the Viceroy of India, Lord Mountbatten, to request discussions on the future of the Pashtun frontier tribes, with a view to bringing them back under Afghan control and sovereignty. The government of India refused to open discussions, stating that Afghanistan should negotiate the matter with the successor authority.<sup>16</sup>

During the process of Indian partition, the settled parts of the NWFP voted in a plebiscite to join Pakistan rather than India. The turnout was low on account of a boycott; many Pashtuns in the settled district were more sympathetic to the Congress party than the Muslim league on account of local political conditions. However, an absolute majority of the population still voted to join Pakistan. In the tribal territories, British officials held *jirgas* (traditional assemblies) with tribal elders in which the frontier hill tribes were only offered the option of establishing the same relationship of suzerainty with Pakistan as they had previously had with the British Crown. A number of these *jirgas* were only held in the months after independence.<sup>17</sup>

Afghanistan's initial reaction to Pakistan's maintenance of the Durand Line and continuing claim of the tribal lands on Pakistan's side was mixed. The first ambassador of Afghanistan to Pakistan stated that Afghanistan had no claims on the frontier territory, and that all claims to the contrary in the Afghan press should be

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<sup>16</sup> See generally Louis Dupree, *Afghanistan*, at 485-499, PRINCETON UNIVERSITY PRESS (1973).

<sup>17</sup> Dorothea S. Franck, *Disputed Disposition of a Tribal Land*, 6 MIDDLE EAST J. 49, 49-68 (1952).

disregarded. Nevertheless, many Afghan media outlets called for the restoration of the Pashtun tribal areas to Afghan control, putting forward a vision of a return to a greater Afghan empire similar to that which had existed during the 18<sup>th</sup> century. Some of these calls put forward the notion of "Pashtunistan" - an independent homeland for the Pashtun tribes on the Pakistani side of the Durand Line which would be kept under Afghan protection.

The relations between Afghanistan and Pakistan quickly deteriorated after 1947. In 1948, Afghanistan voted against the admission of Pakistan to the United Nations on account of its continuing control of the Tribal areas. In 1949, following an inadvertent attack by Pakistan on the Afghanistan in the Tribal areas, a *loya jirga* (grand tribal council) was convened in Kabul which repudiated all frontier treaties and gave support to the notion of Pashtunistan. It made a formal call for a plebiscite in the frontier areas on the now-Pakistani side to offer Pashtun the Pashtun tribes the opportunity of joining a new entity of Pashtunistan.

Pakistan and Afghanistan both made a number of incursions or staged interference across the Durand Line over the following years. In 1949, Pakistan made an accidental incursion across the Durand Line at Moughlai, one-and-a-half miles into Afghan territory. Shortly afterwards, on 12 August 1949, groups of Pashtuns met on the Pakistan side of the line at Tirah Bagh and Razmak to establish a Pashtunistan assembly. In 1950 and 1951, there were incursions led by large columns of irregular Afghan forces principally composed of Pashtun tribesmen and under the leadership of Pashtun chiefs across the Durand Line with the avowed intention of planting a Pashtunistan flag on the Indus River. The Government of Afghanistan denied any connection with the incursions, and stated that they were freedom fighters. Pakistan retaliated by

preventing or slowing imports across the line. In 1960, the Prime Minister of Afghanistan, Sardar Mohammed Daoud Khan, ordered several thousand troops dressed as tribesmen to cross the Durand Line into the Tribal Agency of Bajaur on the Pakistan side of the line, but the column was repelled by the Bajauris. There were two further Afghan incursions in 1961, and Pashtuns on the Pakistan side were encouraged and armed by Afghans to launch attacks on Pakistani military units and blow up bridges.<sup>18</sup>

In 1950, the British Foreign Secretary stated in the House of Commons that it was the official view of the British Government that the Durand Line was the boundary demarcating the sovereign territories of Afghanistan and Pakistan.<sup>19</sup>

In 1955, the Establishment of West Pakistan Act was passed to unify all the provinces which then made up West Pakistan (it should be remembered that Bangladesh was then part of Pakistan, known as "East Pakistan"). Under the Act, 2 (iv), the Tribal Territories were formally integrated into West Pakistan. Under Article 1(2) of the new 1956 Constitution of Pakistan, which replaced the Government of India Act 1935 as the constitutional framework for Pakistan, all of West Pakistan as defined in the West Pakistan Act 1955 was declared to be a territory of Pakistan. The constitution makes no distinction regarding sovereignty between the Tribal areas on the Pakistani side of the Durand Line and any other part of Pakistan. The special legal framework for the government of the Tribal Territories (The Frontier Crimes Regulation 1901) remained in force in the Tribal Territories. The West Pakistan

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<sup>18</sup> Dupree, *supra* note 17, at 538-40.

<sup>19</sup> See Caroe, *supra* note 8, at 485.

Act was rescinded in 1970 and the individual provinces reinstated.

Pakistan maintained the framework of governance for the Tribal territories left behind by the British, including the hierarchy of Tribal Agents. From independence in 1947 to the mid-1970s Pakistan kept its military presence in the Tribal regions to a minimum. The Government of Pakistan assumed responsibility for the development of the region, although the level of development was extremely low (e.g. a \$40,000 budget for the whole of FATA in 1971-2).

An attempted rapprochement between Afghanistan and Pakistan in the mid-1970s intended to settle the dispute over the Durand Line failed. From 1977, the President of Pakistan, Zia ul-Haq, pursued a policy of Islamisation as a counterweight to Pashtun nationalism. The Tribal areas were used to radicalize and train Islamist fighters in isolation away from the public gaze for use in attacking Indian interests in Kashmir as well as with the intention of establishing influence in Afghanistan. At this period Afghanistan was prey to serious instability. Afghanistan suffered a coup in 1973 which put an end to the monarchy, followed by a series of extreme left-wing coups at the end of the decade which plunged the country into chaos and encouraged the Soviet invasion of 1979. Pakistan harbored Islamist fighters in the Tribal areas during this period, intending to use them to repel any attack by the USSR, and also to establish Pakistani influence across the Durand Line in southern Afghanistan. Pakistan developed at this time a doctrine of "strategic depth", which held that in the event of any full-scale military conflict with India, southern Afghanistan should be used as a strategic hinterland and safe haven, and that Pakistan should project

its influence there in order to secure the region for its purpose.<sup>20</sup>

The use of the Tribal territories by Pakistan for the purpose of harboring militants to cross the frontier and project influence on behalf of Pakistan continued throughout the war between Afghanistan and the Soviet Union (1979-1989) the Afghan Civil War (1989-2001), notably with the establishment of the Taliban, a Pakistani proxy intended to govern southern Afghanistan, and also in the period following the Allied invasion of Afghanistan (2001-date). It should be noted that despite its Pakistani backing, the Taliban government in Afghanistan refused to give any formal recognition to the Durand Line.

Since 2001, Pakistan has waged a number of offensive campaigns in the Tribal territories to attack a number of radical Islamic militant groups which spiraled out of control of the Pakistani intelligence community which had originally cultivated them. The United States also has crossed the Durand Line from the Afghan side to launch aerial military attacks on militants on the Pakistani side of the line, often without the consent or knowledge of the Government of Pakistan.<sup>21</sup>

Several reports have been made after 2001 of Pakistani military forces moving the border pillars of the Durand Line demarcation in certain areas and pushing the areas of

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<sup>20</sup> See generally Christian Wagner & Amina Khan, *The Changing Character of the Durand Line*, 44 *INTERNATIONALES ASIENFORUM* 71 (2013).

<sup>21</sup> See Amit Ranjan, *Drone Attacks In Afghanistan And The Af-Pak Region: Is There Any Other Option?*, 45, *J. OF THE ROYAL SOC'Y FOR ASIAN AFF.* 456, 456-466 (2014).

effective control a number of miles into Afghan territory. It is difficult to verify these reports independently.<sup>22</sup>

In March 2017, Pakistan approved a plan to incorporate the Tribal territories fully into the province of Khyber Pakhtunkhwa, removing the 1901 Frontier Crimes Regulation and putting all inhabitants of the Tribal Territories on the same legal-rights footing as other citizens of Pakistan. This policy has been denounced by the Government of Afghanistan, with a renewed statement that Afghanistan will refuse to accept such an incorporation of the Tribal territories into Khyber Pakhtunkhwa, and that Afghanistan still does not accept the Durand Line as an international frontier.<sup>23</sup>

## II. 1893: POLITICAL AND LEGAL CONCEPTION OF THE DURAND LINE AND FATA

For an analysis of the legal conception of the Durand Line at the time of its establishment in the late 19<sup>th</sup> century, it will be useful to start with remarks made on the matter by officials in the Government of India. These provide clear guidance on the British understanding of the line at this period, and, in addition to the black-letter text of the treaties and the geographical circumstances, allow the Line to be put in the international law context of the period.

Sir Mortimer Durand wrote after the negotiations that:

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<sup>22</sup> See SARAH CHAYES, *The Punishment of Virtue: Inside Afghanistan after the Taliban*, at 132, LONDON: PENGUIN, (2006).

<sup>23</sup> See Khattak, *supra* note 7, at 531-42 (explaining the structure and purpose of FCR and the reaction to the reform).

[. . .] 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>24</sup>

Lord Elgin, Viceroy of India, wrote in 1896:

The Durand Line was an agreement to define the respective spheres of influence of the British Government and of the Amir. Its object was to preserve and to obtain the Amir's acceptance of the status quo.<sup>25</sup>

Sir Denis Fitzpatrick, Lieutenant-Governor of the Punjab, wrote in a Government memorandum on the Durand Line in 1896 (a document which clearly purports to state the official understanding of the Government of India):

I think it is of the highest importance that it should simply be understood to be a line on our side of which the Amir's [Abdur Rahman] interference except when we allow him to chastise a tribe, shall be absolutely excluded[. . .]. I think if the agreement

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<sup>24</sup> G.W. Leitner, *The Amir, the Frontier Tribes, and the Sultan*, 4 IMPERIAL AND ASIATIC Q. REV. AND ORIENTAL AND COLONIAL REC. 237 (1897) (Eng.).

<sup>25</sup> Letter from Elgin, Priv. and Secret letter and enclosures received from India, to Hamilton, 85 (1896) (on file with the Asia, Pac., and Afr. Collections at the Brit. Lib.).

between us and the Amir were treated to be anything like a partition of territory, it would have a bad effect, and although I see it must practically involve something like a partition of... the 'Sphere of influence' I think it would be unwise to put it expressly that way [. . .] <sup>26</sup>

He went on to state that the intention of the British in establishing the frontier was not to annex new territory or increase the physical extent of British sovereignty, but to "obviate the need for necessity for effective occupation as a bar to annexation or encroachment by a competing state." Furthermore, the Government wished to avoid the appearance of a partition of territory since it might "at some points of the line, cast on us obligations of a very onerous nature without any commensurate advantage; and 2nd, because it might alarm the tribes and set them against us." The Tribal Areas, beyond the boundary of the settled districts, was to be regarded as nothing more than a "possible protectorate". This area might, in the fullness of time, become an area over which the British held full sovereignty, but this would only be possible when "full and close control" could be exercised by the Government of India over the whole territory all the way up to the Indian side of the Line.

In 1907, Lord Curzon, who served as Viceroy of India from 1899-1905, described the north-western frontier of India as a "three-fold frontier" which comprised of:

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<sup>26</sup> See 'Note by Sir Denis Fitzpatrick' in IOR/PS/5265, p. 61, Asia, Pacific and Africa Collections British Library.

- i. "The administrative border of British India", i.e. the boundary between the settled districts of the plains and the tribal districts of the foothills. Up to this boundary on the settled side the ordinary laws of British India were in force;
- ii. "The Durand Line, or frontier of active protection";
- iii. "The Afghan Border [i.e. the northern border of Afghanistan on the River Oxus] which is the outer or advanced strategical frontier".<sup>27</sup>

Taking these descriptions altogether, the following characteristics can be attributed to the Line in the official British understanding of it in the 1890s:

- i. The Durand Line was intended to demarcate the spheres of influence of Afghanistan and British India in the Pashtun tribal hill territories. It was not such an arrangement as to go so far as being a protectorate;
- ii. The Tribal hill territories themselves on the Indian side of the line (FATA) were not seen as part of British sovereign territory. These territories were not governed by the normal laws of British India. The British government exercised a suzerainty over them by direct arrangements between the tribal chiefs and the British Crown;
- iii. The British government had it in mind that they might advance claims for sovereignty of the Tribal

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<sup>27</sup> George Nathaniel Curzon, Lord Curzon of Kedleston, Address at the Romanes Lecture, (Nov. 2, 1907) in Oxford: Clarendon Press, 1907, at 41.

hill territories in time, but only when they were in a position to control the area more fully;

This treatment of the Durand Line was consistent with the contemporary trends of International Law regarding the acquisition of territory. The notion of 'spheres of influence' can be traced back to agreements between Spain and Portugal in the 15<sup>th</sup> century for the pursuit of colonizing activity in Africa, but it found its modern definition and came into vogue with the agreement between Great Britain and Germany in May 1885 for defining the parties' relative 'spheres of action'. A number of agreements to delimit spheres of influence in the race to acquire new colonial territories were made between various powers following the 1885 agreement. The international jurist M.F. Lindley, writing in 1926, divides these arrangements into four categories, of which the Durand Agreement falls most comfortably into the first, 'Spheres of influence over large unorganized areas by agreements between colonial powers'.<sup>28</sup> Although the third category, 'Spheres of Influence in the Territory of a single State by direct agreement with its Sovereign' might at first sight seem more appropriate, the first is preferable in this instance as the substance of the latter category appears to have been an agreement not to alienate the territory in the sphere of influence to any other party except the contracting party; the 1893 agreement was about the exercise of influence. Moreover, although Afghanistan maintained a claim of sovereignty over the entire tribal hill territory, this was not recognized by the British. The Afghan claim to sovereignty of

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<sup>28</sup> M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, at 208, LONGMANS, GREENE & CO., LTD. (1969).

the region had been weakened by the failure of the government of Kabul to express any practical control or exercise any of the functions of government in the Tribal hill territories for a number of decades before 1893. Indeed, sections of the hill territories had been conquered by the Sikh Kingdom of the Punjab under Maharajah Ranjit Singh after the 1820s and had been under Sikh administration until the end of the Sikh Kingdom in 1849. Afghanistan, as a sovereign power (though itself after 1880 under the protection of Britain as regards its foreign policy), was therefore for all practical purposes in the position of a colonial power attempting to establish control of contiguous territories.

The obligations on the parties under such agreements for the delimitation of spheres of influence, according to Lindley, were not onerous.<sup>29</sup> Each party was obliged not to interfere "where it has promised to leave the other a free hand. The obligation is to abstain from political action which might be regarded as a step towards the acquisition of sovereignty." Such agreements did not preclude either party establishing commercial or trading interests in the other party's sphere. The agreement had no binding force on any third power outside the affected area. The rights of native sovereigns within the spheres of influence were not affected. Any attempt by one of the parties to increase its power within its sphere could be made by agreements with the native sovereigns. The party could acquire legal title over the area of influence by such agreements and the assumption of duties of administration. In this way, states Lindley, "the shadowy privileges pertaining to a sphere of influence have been transformed into a title which is valid by International Law".

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<sup>29</sup> *Id.* At 211.

The black-letter text of the 1893 Durand treaty appears to be thoroughly in accord with the contemporary international law practice as described by Lindley, and written with the other many recent agreements for the delimitation of spheres of influence in mind. As such, it seems safe to conclude that this was the intention certainly of the British in signing the 1893 treaty, and the treaty should be understood as one providing for the delimitation of spheres of influence.

As there was no substantive change in the British practice of administering FATA between the 1893 Treaty and Indian independence in 1947, it is submitted that the inchoate possibility of British sovereignty over FATA never hardened into legal title.

### III. POSITION OF PAKISTAN REGARDING THE DURAND LINE AND FATA SOVEREIGNTY

The official position of Pakistan regarding the status of the Durand Line and FATA is that FATA forms a part of the sovereign territory of Afghanistan, and that the Durand Line is the international boundary which divides the sovereign territories of Afghanistan and Pakistan. This position is expressed in the Constitution of Pakistan.<sup>30</sup>

### IV. POSITION OF AFGHANISTAN REGARDING THE DURAND LINE AND FATA, AND THE OBJECTIONS TO THE POSITION OF PAKISTAN

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<sup>30</sup> PAKISTAN CONST. art. 1, § 2, cl. c.

The official position of Afghanistan regarding the Durand Line is that Afghanistan does not recognize the Durand Line as an international boundary. Afghanistan's claims regarding the territory of FATA have been various and not clearly articulated, but they do not accept that Pakistan has a right to possess the territories.<sup>31</sup>

The objections which have been or could be made by Afghanistan to the position of Pakistan recognizing the Durand Line as an international boundary demarcating the sovereign territories of Afghanistan and Pakistan are as follows:

- i. That the original treaties between the Governments of India and Afghanistan did not intend a division of sovereignty between the two powers;
- ii. That the agreement was capable of repudiation under the terms of the 1921 Treaty, and that Afghanistan had invoked this clause in 1949;
- iii. That under the doctrine of *rebus sic stantibus* the treaties establishing the Durand Line were invalidated by the Independence of India;
- iv. That the state practice of Pakistan and Afghanistan over the course of time has prevented the Durand Line from acquiring the status of an international

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<sup>31</sup> See M. HASSAN KAKAR, A POLITICAL AND DIPLOMATIC HISTORY OF AFGHANISTAN 1863-1901, BRILL, (2006) (summarizing the Afghan position and interpretation of history); see also Naveed Siddiqui, *Afghanistan Will Never Recognise the Durand Line: Hamid Karzai*, DAWN (updated Mar. 5, 2017), <https://www.dawn.com/news/1318594>.

- boundary demarcating sovereign territories (estoppel);
- v. That the tribes on the Pakistan side of the line were not given a full right of self-determination by being offered the right to join Afghanistan at the time of Indian independence in 1947;
  - vi. That the 1893 treaty was obtained under duress and that it was thereby invalid;
  - vii. That the 1893 treaty was not properly ratified by the Government of Afghanistan;
  - viii. That Pakistan is not a successor state to British India, and thus not an inheritor of the rights and obligations imposed by earlier treaties made by British India.

## V. DISCUSSION OF AFGHAN OBJECTIONS

### a. INTENTION OF TREATIES

Afghanistan has objected to the position that the Durand Line is a sovereign boundary on the grounds that it never consented in any of the treaties for the Line to assume such a status. Afghanistan contends that the original 1893 Treaty was not intended to divide sovereignty over the region, but was rather to divide spheres of influence. The arrangement was not to be viewed as permanently fixed. The contrast in language between the 1893 treaties dealing with the northern boundaries of Afghanistan and the Durand Line (see below) should be viewed as indicative of their different natures. Afghanistan also contends that the successive treaties and exchanges of letters touching on the matter of the Durand Line did not alter the position as regarding the nature of the line or indicate any assent on the part of Afghanistan towards

the Line developing into an international sovereign boundary.

Afghanistan has a convincing case for claiming that there was never any consent for the Durand Line to be an international sovereign boundary. However, despite the absence of Afghan consent, the circumstances are such that a claim by Pakistan on the grounds of effective possession could overcome any case by Afghanistan based on an argument of entitlement through original lack of consent (see below).

b. TREATY CAPABLE OF REPUDIATION

As stated above, the 1921 Treaty, unlike those before it, had a repudiation clause (article 14). This provided for the termination of the treaty one year after either party gave notice, and that no other conditions were required for the clause to be triggered. Afghanistan contends that the repudiation clause of the treaty was invoked by the declaration of the *Loya Jirga* in 1949 and hence that under the terms of the treaty the repudiation came into effect in 1950.

Afghanistan would be able to contend that if the nature of the Durand Line was that of a sphere of influence rather than that which was intended to divide sovereign territories, then it would be able to obviate the rule regarding "executed clauses". Treaty clauses which are intended to demarcate sovereign boundaries are regarded as having been "executed" on the ratification of the treaty. When the division of territory has been "executed", the work of the clauses has been completed and they cannot be repudiated or revoked. The treaty clauses are equivalent to title deeds in a conveyance, which once they have been enacted have no force other than to memorialize the transfer of the relevant property. In this case, since the treaty did not intend a

sovereign boundary to be created, the clauses had not been executed but were in fact “executory”. They had a contractual force which placed a continuing obligation on the parties, not to interfere in the sphere of influence of the other party. As such, Afghanistan may contend that the clause was capable of extinction on the repudiation of the treaty.<sup>32</sup>

However, although Afghanistan may validly be able to contend that the 1921 treaty and the clause concerning the Durand Line had been repudiated, the response to this objection is the same as that to that regarding the original intention of the treaties above. A claim by Pakistan based on effective possession also overcomes this objection.

#### VI. *REBUS SIC STANTIBUS*

Afghanistan may attempt to rely on the doctrine of *rebus sic stantibus* to argue that the sections of the 1921 treaty providing for the maintenance of the Durand Line should be invalidated on the grounds that the fundamental circumstances surrounding the conclusion of the treaty – i.e. India as one entity under British rule – had come to an end with Indian independence in 1947 and the partition of British India into the then Dominions of India and Pakistan. It should be noted that the dissolution of the direct agreements between the Pashtun Chiefs and the British crown at the moment of Indian independence also generated a period when the Pashtun tribes on the Pakistani side were *de jure* independent and without any allegiance to Pakistan, until they re-

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<sup>32</sup> See Letter from Sir Dan Lascelles, British Ambassador to Afghanistan, to Foreign and Commonwealth Office (1950) (raising his concerns over this possibility).

established similar connections with the Government of Pakistan over the months following Indian independence.<sup>33</sup>

The doctrine of *rebus sic stantibus* is well recognized in international law. It was accepted as an article of the Vienna Convention of the Law of Treaties in 1969, but before that in the relevant period, that is 1947, the doctrine was already still recognized as valid by international jurists.

However, at the time of Indian independence, as Oppenheim notes "in almost all cases in which the doctrine... has been invoked before an international tribunal, the latter, while not rejecting it as a principle, has refused to admit that it could be applied to the case before it".<sup>34</sup> The bar to admitting a claim based on *rebus sic stantibus* is high on the grounds that "it is a function of the law to enforce contracts or treaties even if they become burdensome for the party bound by them." Hence, jurists are reluctant to allow *rebus sic stantibus* to be a get-out clause for a treaty obligation which has become onerous.

The use of the doctrine would be complicated since at the relevant time, particularly on account of the scarcity of international case law, there was no agreed test for invoking the doctrine. *Rebus sic stantibus* was invoked without success by the claimant in *Free Zones of Upper Savoy and the District of Gex*<sup>35</sup>. The court at various times articulated the doctrine as being applicable "when the situations have so changed that the reason which caused the rules to be imposed no longer

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<sup>33</sup> See Franck, *supra* note 18, at 61.

<sup>34</sup> LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW, PARTS 2 TO 4, 1307, Robert Jennings & Arthur Watts eds., 9th ed. (1992).

<sup>35</sup> *Free Zones of Upper Savoy and District of Gex* (Fr. v. Switz.), 1929 P.C.I.J. (ser. A) No. 22, at 5 (Aug. 19).

exists", and later that there had to have been "an essential change in the circumstances for which the treaty has been concluded".

The 1928 supplement to the American Journal of International Law offered three alternative approaches to the doctrine. The first posits that a treaty continues in force when "a relation between the binding force of the treaty and a continuance of a state of facts [remains] essentially unchanged because the parties intended that the continuance of the state of facts should be a condition of the binding force of the treaty". The second looks not to the intention of the parties, but whether the changes complained of are "essential", "fundamental", or "vital". L.H. Woolsey discussed what could be described as vital in these circumstances:

Changes which are regarded by authorities as fundamental or vital are those which: take away the very foundation of the engagement, that is, its *raison d'etre*; threaten or cause the sacrifice of a state's development or its vital requirements for political or economic existence to the execution of the treaty, that is, make performance impracticable except at an unreasonable sacrifice; are inconsistent with the right of self-preservation, or incompatible with the independence of the state; modify essentially the political relations which produced political treaties, as for example treaties of alliance; make a treaty really

inapplicable, or actually impossible of fulfilment.<sup>36</sup>

The third approach would be that the doctrine could be invoked if "a change in the state of facts would be so injurious to one of the parties that such party has a right under the law or right of necessity to terminate the treaty."

The high bar to the invocation of the doctrine means that regardless of which test would be applicable, it is unlikely that Afghanistan could successfully invoke it. As regards the first approach, although it is unlikely in 1921 that Indian independence and partition would have been envisaged by either party, with Independence and partition there had not been any essential change in the geographical, ethnographical or security situation of the Tribal Areas. A successor to British India had emerged in the region, but the successor, Pakistan, had the same security concerns and moved quickly to reconstitute and reaffirm the relationship which the British Crown had with the Tribal areas. As such, there had not been any essential change. As regards the second approach, the re-acquisition of the Tribal territories with the independence of Pakistan could by no means be seen as vital for the continuance of Afghanistan or its political or economic continuance. As for the third test, likewise, the failure to re-acquire the Tribal territories with the new circumstances of the emergence of Pakistan cannot be seen as so injurious that the treaty should have been terminated. Although, touching on the second and third tests, Pakistan's use of the territories to unsettle Afghanistan from the 1970s did injure

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<sup>36</sup> L.H. Woolsey, *The Unilateral Termination of Treaties*, 20 AM. J. INT. LAW, 346, 349-350 (1926).

Afghanistan. However, it was not the loss of the territories in themselves which caused the injury, but Pakistan's behavior towards Afghanistan, which could have been pursued regardless of whether Afghanistan possessed the territories or not.

It should be noted that the change of circumstances in itself does not give a party a right unilaterally to withdraw from a treaty, but that the party should make representations to the other party that the obligations of the treaty should be changed, and that if this is turned down there should be an application to the court to have the terms varied. The refusal to submit the matter to adjudication is taken as prima facie evidence that the doctrine is being invoked as a cover for an intended breach of the law<sup>37</sup>. The failure of Afghanistan to make the point to Pakistan or any tribunal soon after 1947 may invalidate it, and also count against the notion that its failure to regain the tribal territories were inconsistent with Afghanistan's self-preservation.

Any appeal to the doctrine of *rebus sic stantibus* is likely to be overcome by the doctrine of *uti possidetis* if pleaded by Pakistan (see below).

## VII. STATE PRACTICE – ESTOPPEL

Afghanistan may attempt to argue that the conduct of Pakistan following 1947, in particular its frequent failure to adhere to the requirement of the treaties not to interfere with the territories on the Afghan side of the Durand Line, invalidates the Durand Line as an international sovereign boundary, or has at least prevented the frontier from

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<sup>37</sup> OPPENHEIM, *supra* note 35, at 539.

hardening into such a boundary from a line demarcating spheres of influence. Pakistan, by its conduct, has failed to treat the Durand Line as an international sovereign boundary, and hence it cannot have acquired such a status in practice. Such an argument would essentially be that of an estoppel raised by Afghanistan against Pakistan based on its state practice.

The leading case from the International Court of Justice on the use of estoppel in territorial claims is the *Temple of Preah Vihear Case*<sup>38</sup>. It is important to note in the first instance that the language of the *Temple* case suggests that the estoppel is a procedural doctrine rather than a substantive doctrine. It does not generate any rights on the part of the claimant, but can only serve as a defense to a claim. Thus, if Afghanistan were to bring a claim it would not be able to plead the argument as part of its claim. However, if Pakistan were to bring a case seeking a declaration of the status of the Durand Line as the international sovereign boundary then Afghanistan would be able to raise the estoppel in defense against Pakistan's claim. In principal, there are three elements for the assertion of an estoppel: first, the statement creating the estoppel must be clear and unambiguous; second, the statement must be voluntary, unconditional and authorized; third, the party claiming an estoppel must have relied in good faith on the statement of the other party, either to their own detriment or else the advantage of the other party. Applying these elements derived from the *Temple* case to the dispute between

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<sup>38</sup> *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. REP. 6 (June 15); see also Sally Tyler, *Of Temples and Territory: The ICJ's Preah Vihear Decision and Implications for Regional Dispute Resolution*, 19 U. D.C. L. REV. 133, 147-48 (2016).

Afghanistan and Pakistan, Afghanistan would have to show that the conduct of Pakistan in its transgressions of the Durand Line had to be directly related to the question of territorial possession, that it was attributable to the state of Pakistan, that it had to be sufficiently consistent and of a sufficiently long duration to be able to give rise to legitimate expectations on the part of Afghanistan that Pakistan no longer sustained its position that the Durand Line was an international sovereign boundary. Afghanistan would also have to show that to frustrate these expectations would create an unjustifiable detriment to itself or an unjustifiable benefit to Pakistan.

Aside from Pakistan's brief incursion across the Durand Line in 1949, the conduct in disregard of the line began in the mid-1970s following the coup against the monarchy in 1973. There is no doubt that following this period, from the presidency of Zia ul-Haq onwards, Pakistan has attempted to project its influence beyond the Durand Line into southern and eastern Afghanistan in particular. However, aside from the reports after 2001 of frontier posts being moved several miles forward on certain spots along the Durand Line (see above) Pakistan's conduct has not been aimed at the outright possession of territory beyond the Durand Line, but only the projection of influence. As such, the assertion of estoppel appears to fail, since the conduct of Pakistan in this regard is not related to territorial possession, and Pakistan has not conceded any territory on its side of the Durand Line in its own conduct. It is also questionable as to whether there was any clear and unambiguous statement on the part of Pakistan that it no longer recognized the line as the international boundary. Its own official statements asserted the Durand Line as being the international boundary throughout the period, despite its conduct of projecting

power beyond the line, most often by the assistance of militants and other proxies. Moreover, it may also be difficult to attribute the conduct of the militants which interfered in Afghanistan from behind the Pakistani side of the line to the Government of Pakistan. Although in some periods, notably in the mid-1990s with the period of Taliban rule, Pakistan actively assisted militants to take power in Afghanistan, in more recent years the militants have behaved as non-state actors out of the control of the Government of Pakistan, and have launched attacks on Afghanistan on their own volition. On top of this, it would be difficult for Afghanistan to show that it had acted on the conduct of Pakistan to its own detriment. With all of these arguments taken together, it would be difficult for Afghanistan to raise the estoppel.

#### VIII. SELF-DETERMINATION

It has been a complaint of the Government of Afghanistan that the Pashtun tribal peoples, not just those in FATA but also those of the North Western Frontier Province in 1947 were not given the option of opting for union with Afghanistan or of forming an independent nation of "Pashtunistan". In the Tribal hill territories, there were no secret ballots or attempts at international oversight. Afghanistan argues on this ground that it was illegitimate for Pakistan to retain the Tribal territories and areas inhabited by Pashtuns, since they were denied the full right to self-determination.

However, at the time of the partition there was no established law on how the right of self-determination should be exercised in practice. The first legal rules that directly dealt with this issue began to be crystallized in the 1950s, and in the form in which these rules were finally articulated – the text of the UN General Assembly's Resolution 1541 (XV) (1960) – the

rules only applied to the administering power ('colonial master') and the basic requirement was that the administering power had to organize some form of a plebiscite in which the colonial people would be given a choice of three options: go independent (have their own state), merge with another state/people, or remain part of the colonial empire. There were no other substantively relevant requirements. Since this was not a recognized requirement under international law at the time of Indian independence in 1947, the limited access of the Pashtun peoples to self-determination cannot call into question the legality of Pakistan's control over the Tribal areas. Moreover, as with *rebus sic stantibus*, the international law doctrine of *uti possidetis* stands powerfully in the way of any right to self-determination for peoples next to colonial borders during this period in history.

#### IX. 1893 TREATY OBTAINED UNDER DURESS

It has been a complaint of Afghanistan that the 1893 treaty was obtained under duress. Britain, argues Afghanistan had recently invaded Afghanistan. It had also taken control of the country's foreign relations, and was giving the country military assistance and financial subsidies on which the Amir of Afghanistan was dependent for his power. As such, there was a degree of duress or level of inequality between the parties which rendered the 1893 treaty invalid.

On the question of fact, it would be difficult to show that there was a high degree of coercion in the negotiation of the 1893 treaty. The negotiations lasted a month, and a stream of correspondence between Sir Mortimer Durand and the Government of India shows that there was a genuine process of negotiation over this period: the British conceded to the Government of Afghanistan that a number of areas should fall

on the Afghan side of the Durand Line which they had originally wished to fall on the Indian side. Contemporary accounts suggest that, even if Abdur Rahman had mixed feelings about the agreement, his assent was not brought about by duress.<sup>39</sup>

In legal terms, even if there had been coercion as regarding the state of Afghanistan, international law of the time did not recognize a treaty as being invalid on this account. As Oppenheim observes, coercion in the signing of peace treaties "was a necessary corollary of the admissibility of war as an instrument for changing the existing law."<sup>40</sup>

On top of this, the validity of the 1893 treaty is a moot point in this regard, as it was finally superseded by the 1921 treaty. This having been concluded when Afghanistan was independent, and when Afghanistan was pursuing treaties on its own account with other powers having freed itself from British control of its foreign relations in the 1919 Third Anglo-Afghan War (which was initiated by Afghanistan), cannot be seen as a treaty obtained under duress.

#### X. 1893 TREATY NOT PROPERLY RATIFIED BY AFGHANISTAN

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<sup>39</sup> Sultan Mohamed Khan, *The Life of Abdur Rahman, Amir of Afghanistan* 146, Munshi Sultan ed., vol. II (1900) ("At the same time when I was occupied in breaking down the feudal system of Afghanistan and molding the country into a strong consolidated kingdom, I was not unaware nor neglectful of the necessity of defining my boundaries with the neighboring countries. I well knew that it was necessary to mark out the boundary lines between my dominions and those of my neighbors, for the safety and protection of my kingdom, and for the purpose of putting a check on their advances, and getting rid of misunderstandings and disputes.").

<sup>40</sup> OPPENHEIM, *supra* note 35, at 499.

Some commentators have said that the 1893 treaty should be regarded as invalid on the grounds that it was not properly ratified. They argue that as the ruler of Afghanistan, the Amir Abdur Rahman, approved it unilaterally and did not offer a proper discussion or free vote on the matter in the legislature, the 1893 treaty should be regarded as void.

This objection, however, is founded on an anachronism. On Abdur Rahman's accession to power in 1880 following the Second Anglo-Afghan War, he re-established the monarchy as being absolute. The contemporary constitutional theory, approved by religious scholars in Afghanistan, was that the power of the Amir was derived from God (Allah) and that he was the final arbiter in wielding executive, legislative and judicial power, as well as in determining matters of religious doctrine. He was not, as had previously been the case, fettered by any traditional Afghan tribal authorities or customs. As such, he had an absolute right to negotiate and conclude treaties on behalf of the state of Afghanistan.

Even if it were the case that he did not have such a right, as Oppenheim states, if a treaty "has been entered into in disregard of the limitations of [a state's] constitutional law and practice, that State must be deemed to have waived its right to assert the invalidity of the treaty if for a prolonged period it has failed to do so, or if it has acted upon it, or has obtained advantage from it."<sup>41</sup> Afghanistan, having reaffirmed the treaty under Habibullah in 1905 as well as Amanullah in 1919 and 1921 (see above), must be seen as having waived its right to assert that the treaty is void.

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<sup>41</sup> OPPENHEIM, *supra* note 35, at 497.

Besides this, the validity of the 1921 treaty has not been called into question in this fashion.

#### XI. PAKISTAN A SUCCESSOR STATE TO BRITISH INDIA

Afghanistan has argued that Pakistan is not a valid successor state to British India, and as such the treaties made between Afghanistan and the former British authorities are void.

However, this position is not accepted by the rest of the international community. It was agreed between India and Pakistan in 1947 that British India's treaty rights and obligations "having... exclusive territorial application" to either the new India or new Pakistan would devolve upon the new individual countries alone.<sup>42</sup> In 1949, it was stated by the British Government 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 of the United Kingdom in these territories." In 1956, all members of the South East Asia Treaty Organization (SEATO) recognized Pakistan as the inheritor of British India's treaty rights and obligations as regards the exclusive territory of Pakistan.

In view of the substantial body of legal scholarship on this point, not to mention the view of the international community and state practice, it is unlikely to be accepted that the 1921 Treaty is voided on account of Pakistan's succession to British India.

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<sup>42</sup> *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, Judgement, 2000 I.C.J. 12 (June 21).

a. PAKISTAN'S CASE FOR THE VALIDITY OF THE DURAND LINE AND SOVEREIGNTY OVER FATA

Pakistan's case for the Durand Line being a valid international boundary line and possessing sovereignty over FATA is likely to consist in the following arguments:

- i. Effective possession of the territories by occupation or prescription;
- ii. The application of *uti possidetis*;
- iii. The state practice of Afghanistan since 1947 (estoppel).
- iv.

b. DISCUSSION OF PAKISTAN'S CASE

i. EFFECTIVE POSSESSION

It is a principle of international law that effective possession of a territory rather than any nominal entitlement is the main factor that counts in determining questions of sovereignty (*ex facto ius oritur*).

The *Island of Palmas* case (1928)<sup>43</sup> established the basic rule that "a continuous and peaceful possession" of a piece of territory, "manifested in the actual display of state activities" will generally override every other claim to the same territory whatever may be its basis. The current exceptions to the rule are the prohibition of annexations (acquisition of title by conquest) and the prohibition of any other acquisition carried out in violation of the principle of self-determination. The former is not applicable in this case, as the division and

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<sup>43</sup> *Island of Palmas Case (or Miangas)*, (U.S v Nds.), Judgment, (1928) II RIAA 829.

occupation of the territory took place by treaty rather than by the illegal use of force. The latter, as stated above only became applicable in the 1960s with the development of a doctrine of self-determination in international law.

According to the *Clipperton Island* case (1931)<sup>44</sup>, the meaning of “effective possession” is that the state in question has to display a convincing *animus occupandi*, and also has to take steps to exercise “exclusive authority” within the relevant territory, which “strictly speaking, and in ordinary cases [can] only take... place when the state establishes in the territory itself an organization capable of making its laws respected”.

In the *Minquiers and Erechos* case (1953)<sup>45</sup>, the decisive factors in the Court’s decision related to the administration of law enforcement, including the exercise of criminal jurisdiction, the holding of inquests, and the collection of taxes. In this case, the administration of these functions by Jersey pointed to British sovereignty over the territory, ousting a French claim based on ownership of the territory by the Duchy of Normandy in the 11<sup>th</sup> century and the use of the territorial waters by the French fishing fleet.

During the time of British rule, as expressed in the statements made by British officials (see above) the Government of India had no *animus occupandi* as regards FATA. However, it arguably did have a sufficient presence in the region to exercise an exclusive authority, the second limb of the requirement for sovereignty. The circumstances regarding FATA, particularly the customs and beliefs of many of the Pashtuns as to an acceptable government and

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<sup>44</sup> *Clipperton Island Case*, (Fr. v. Mex.), Judgment, (1931) 2 RIAA 1105.

<sup>45</sup> *Minquiers and Erechos* (Fr. v. U.K.), Judgment, 1953 I.C.J. 47 (Nov. 17).

way of life were singular, such that what would have been seen as a desirable government which safeguarded the life and liberty of the subject in the settled areas would have been seen as unacceptable in FATA. With this in mind, the British administration exercised such organs of government in FATA as could practically have been established and maintained during the period.

The position is complicated by the fact that FATA territory was divided into two classes: administered and unadministered. The former was garrisoned and protected by military forces and levies, and subject to the FCR. As mentioned above, the latter was left to Pashtun tribal jurisdiction. However, throughout the time of British rule, all parts of the Tribal territories, administered and unadministered, were subject to military incursions and periodic occupation. Moreover, the British authorities would make arrangements with the chiefs as regarding specific matters and requirements from time to time in the unadministered districts. Such a presence, suggests Oppenheim, is sufficient for the expression of effective control in distant areas.<sup>46</sup> Thus, it could be argued that the British Government of India had, by the time of partition, satisfied the test of effective control, although not possessing *animus*.

Pakistan continued the British regime in FATA, such that it also satisfied the test of effective control. However, Pakistan not only satisfied the test of effective control, but also the requirement for *animus*. Such is certainly clear from the statement made by the British Government at the prompting of Pakistan in 1950 that the Durand Line should be regarded as the international sovereign boundary, as well as the 1954

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<sup>46</sup> OPPENHEIM, *supra* note 35, at 560.

West Pakistan Act and the 1955 Constitution of Pakistan. The decision made by the Government of Pakistan in March 2017 to abolish the special status of FATA and to incorporate FATA into the mainstream territory of Khyber-Pakhtunkhwa on the same basis as any other part of ordinary Pakistani territory puts the point beyond any doubt in the contemporary sphere.

Thus, Pakistan appears to have fulfilled the requirements for FATA to be under its effective possession. It can be argued, depending on whether the tribal organization of the territory in the mid-20<sup>th</sup> century was sufficiently definite, that Pakistan has effective possession of the territory either by occupation, or else if the tribes had a sufficient level of organization to be capable such that the land should not have been seen as *terra nullius*, that Pakistan took it by right of prescription, where an acquiescence to the effective control of Pakistan over a prolonged period made good Pakistan's claim to sovereignty. Possession by occupation or prescription would also overcome any claim based on nominal entitlement by Afghanistan.

## XII. THE APPLICATION OF *UTI POSSIDETIS*

The doctrine of *uti possidetis* was developed in the 19<sup>th</sup> century to deal with the decolonization of Latin America. It provided that the boundaries as fixed at the time of decolonization should be preserved in order to prevent further conflict as colonizing powers departed.

In *Burkina Faso v Mali*<sup>47</sup> it was held that the principle of *uti possidetis* was of general application, "logically connected

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<sup>47</sup> *Frontier Dispute (Burk. Faso v. Mali.)*, Judgement, 1986 I.C.J. 554, 565 ¶ 20 (Dec. 22).

with the phenomenon of the obtaining of independence wherever it occurs." The principle was not restricted just to ordinary international boundaries: "The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality"<sup>48</sup>. Given the wide application of the principle, and its expressed intention of "securing respect for the territorial boundaries at the moment when independence is achieved"<sup>49</sup> to prevent "fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power"<sup>50</sup>, it is submitted that the principle is applicable to the Durand Line, even if at 1947 it still in legal terms was intended only to demarcate a sphere of influence.

*Burkina Faso v Mali* also provides that *uti possidetis* was not overridden by any claims to self-determination. Whenever the two were in conflict, *uti possidetis* prevailed. This was also confirmed in 1992 by the EC Commission for Yugoslavia (the Badinter Commission). In its Opinion No. 2 it extended the same reasoning beyond the colonial context: "it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise".

As such, the doctrine as the effect of preserving the Durand Line as constituted in 1947 and overrides any

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<sup>48</sup> *Id.* at ¶ 24.

<sup>49</sup> *Id.* at ¶ 23.

<sup>50</sup> *Id.* at ¶ 22.

objection which may be had on the grounds of self-determination.

### XIII. THE STATE PRACTICE OF AFGHANISTAN (ESTOPPEL)

The doctrine of estoppel has already been discussed above in regard of Afghanistan's objections to the Durand Line. Likewise, it should be remembered that Pakistan could not use the doctrine in any positive case, but it would be a defense against any action that Afghanistan might bring against it.

Pakistan may cogently argue that Afghanistan should be estopped from bringing any action against it in regard of the Durand Line and FATA on account of its inconsistent behavior and statements over a long period of time. In 1947, as stated above, the Afghan government declared that it had no claims over the tribal areas. However, in 1949 this position was changed to a repudiation of the clauses of the treaties establishing the Durand Line. Although this repudiation has been maintained, there has been no consistent statement of position from the Government of Afghanistan regarding its position on the status of the FATA. The calls made by the Afghan Government or official media have ranged from seeking to incorporate territory as extensive as Balochistan and Khyber-Pakhtunkhwa into Afghanistan, to calls for these areas merely to have referendums for self-determination and the possibility of independence or incorporation into Afghanistan, to calls for just FATA to be incorporated into Afghanistan. As such, given the inconsistency of the Afghan position over a long period of time, such an estoppel would have a good chance of success.

## XIV. CONCLUSIONS

Afghanistan may put forward a number of arguments against the Durand Line as it is currently constituted based on the original intention of the frontier treaties and the circumstances in which they came to be made. However, under the terms of customary international law it appears that Pakistan, by means of its long-standing effective possession of FATA and the operation of the doctrine of *uti possidetis*, has a stronger case by far for sovereignty over FATA and for maintaining that the Durand Line should be seen as the international sovereign boundary between Afghanistan and Pakistan.

However, although an international law analysis of the problem may reach a simple and clear solution, it is not necessarily one which is satisfactory in the long-term politically, diplomatically or for international security. It is understandable that Afghanistan may continue to foster a grievance over the tribal regions, particularly given that it gave no active assent to a partition of sovereignty, that the British Government acknowledged an undefined Afghan "interest" in the tribes on the Indian side of the Durand Line, that the Afghan Government had no genuine opportunity to renegotiate the frontier at the time of Indian independence, and that the operation of *uti possidetis* and the lack of force in the doctrine of self-determination worked against Afghanistan at the time of Indian independence also.<sup>51</sup> The current configuration of the border has proved, on account of geography and ethnography, difficult to govern and inherently unstable. It has encouraged interference both ways

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<sup>51</sup> Mahmud, *supra* note 2, at 29 n.147.

across the frontier, not to mention encouraging Afghanistan to fall into the Soviet sphere in the 1960s, the first step to the war of the 1980s. It has given rise to the problems of drone strikes and “hot pursuit” in the last decade.<sup>52</sup>

A better solution to the problem of the Durand Line would not consist of the parties standing on their rights under international law or looking to a strict division of sovereignty, but to a regime of co-operation across the frontier so that the Pashtun Hill tribes on both the Afghan and Pakistan side of the Durand Line could be governed coherently as a single entity for their own benefit. Such cross-border co-operation could be granted in return for an acknowledgement by Afghanistan of Pakistan’s formal sovereignty. The arrangement would benefit not only Afghanistan and Pakistan by removing one of the greatest stumbling blocks to good diplomatic relations between the two countries, but also the international community by allowing the establishment of a coherent approach to development and security.

A settlement of the Durand Line problem might also assist Pakistan in coming to a settlement of the Kashmir conflict with India. Were Pakistan to feel less threatened on account of its border with Afghanistan, it might give it the confidence to make peace with India on its eastern frontier. It should be noted that such an arrangement was suggested by the US State department in the 1930s and again in the 1950s, but officials did not persist with the idea. Beyond this, a pooling of sovereignty or a cross-border arrangement would be more suited to the history and traditions of the region, where frontiers traditionally have been fluid and porous, and the Westphalian vision of frontiers and the nation state is a

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<sup>52</sup> Ranjan, *supra* 22, at 457.

recent import which does not sit easily with the history and realities of the locale.

