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Preface

In a primary investigative report, the International Criminal Court disclosed the crimes of the US forces in Afghanistan but in that report only the torture of the prisoners were pointed out as examples.

Now, once again, this court has spoken about the commencement of an investigation in Afghanistan. The Afghan government have not yet announced its official stance in this regard; but if the investigations of this court was allowed, the court will investigate the war crimes committed by the Afghan forces, armed oppositions of the government and foreign forces. The question is which crimes will be investigated by this court? Is there any political agendas behind these investigations? These and other similar questions are analyzed in the first part of the Weekly Analysis of the Center for Strategic and Regional Studies (CSRS).

In the Second part of the analyzed, you would read about the Durand Line and its impact on the Pak-Afghan ties. The British Ambassador to Afghanistan said last week that the Durand Line was the officially recognized border between the two countries. It comes at a time that Pakistan is building barbed wire fences along the border with Afghanistan, which has sparked various reactions in Afghanistan. These remarks by the British Ambassador have also triggered reactions in the country.

For the settlement of the issue of the Durand Line, which has divided the Pashtun ethnicity group into two parts, the deputy head of the European Parliament had said in his article that then it was the time to review the Durand Line and restore Afghanistan's historic right.

The issue of Durand Line is a major issue in the relations between Afghanistan and Pakistan and it is always said that Pakistan intervenes in Afghanistan in order to make Afghanistan recognized this line. Is this issue going to be settled at current circumstances? What are the historic evidences in this regard? What are the impacts of the issue on the relations between the two countries these are the questions that are analyzed in the second part of the analysis.

The ICC and the war crimes of the international and national forces in Afghanistan



Head of the International Criminal Court of Hague Fatou Bensouda said last week that the court was seeking allowance to investigate war crimes in Afghanistan. She said that there was enough evidence of war crimes in Afghanistan and after the primary investigation it reached the conclusion that all legal standards and circumstances were present in Afghanistan to start an investigation. If the Afghan government grants permission to this court, it will investigate the war crimes of the government's armed opposition, the Afghan security forces, the US soldiers and CIA in Afghanistan since 2003. Afghanistan gained the membership of this court in 2003.

It is not the first time that the International Criminal Court makes such remarks. In one of its report last year, this court had said that between 2003 and 2014, the US forces and CIA have committed many war crimes on the prisoners in Afghanistan. Although the US Senate had also published a report about tortures in Guantanamo in 2014, it will be the first time that an International Court investigates the crimes of the international and national forces in Afghanistan.

The background of the International Criminal Court in Hague, the probable areas of war crimes in Afghanistan and the remarks of Bensouda are issues that are analyzed here.

The International Court of Hague

The International Criminal Court (ICC) is established in 2002 in Hague, Netherland. The main duty of this organization is to investigate war crimes, genocides and crimes against humanity in the member countries since the formation of this court. This court investigates the crimes of those individuals who are older than 18-years old and the position of the accused person does not affect the authorities of court.

This court has 122 members including Afghanistan. The most important countries of the world which are China, Russia, and the US, with the permanent members of the UN Security Council, even though signed the charter of the court in 1998 in Rome, they have not gained the membership of the court yet.

This court have conducted 10 investigations until now; works on nine others; and has accused 39 people of war crimes including the Sudan's President Omar Al Bashir, the leader Everria Laurent Goba, the leader of Libya Moamar al Qadafi and the President of Kenya Ohero Kyniata.

The probable cases of war crimes

Since 2001, many incidents have occurred that could be investigated by the International Court of war crimes for instance:

First; war crimes by the US forces:

The US directly involved in the Afghan war and with its military, economic and diplomatic power has kept the war going until now. Therefore, there are war crimes in all the aspects of the war in the country; however, we have outlined those incidents that have a higher probability of being investigated. For instance, the case of the Bagram prison, bombings particularly the airstrike on the MSF hospital in Kunduz and some others.

Second; the war crimes committed by the Afghan militias:

Since ever the Afghan Taliban were forced to leave Kabul, unofficial Afghan militias and Afghan forces undertook some actions that showed as if the war continues against a particular ethnic group. Starting from the bloody incident of Qala-e-Jangi until the recent collapse of Kunduz many incidents could come under this list.

Third; war crimes committed by the armed oppositions of the government:

In the ongoing war with the Afghan and US forces, the armed oppositions, particularly the Taliban, are engaged in a bloody war. The Afghan Taliban have carried out many explosions in the rural and urban areas killing many civilians. Based on the international reports, between 2007 and 2017, more than 17000 civilians are killed in the explosions and attacks of the Taliban. However, it should be noted that the Taliban have not claimed the responsibility of every explosions that entailed great civilians casualties.

Political aims in starting the investigation

Although the Court has not said who will be the target of the investigation, it is expected that all parties engaged in Afghanistan including the Afghan government, foreign forces and the armed oppositions of the government will be included in the investigations.

This debates raises at a time that the Afghan government is under pressure by the some former and current government officials and people who played a major role in the security sector after the collapse of the Taliban. On the other hand, compared to the years between 1990 and 2008, the US have lost its hegemony.

Due to internal affairs, the Afghan government may use such investigation; however due to some factors, the probability of such a utilization will reduce.

First, the US is not yet a member of this court. Nevertheless, Afghanistan is a member and; therefore, the crimes committed by the US forces in this country are within the jurisdiction of this court. **Second,** since ever the beginning the US has termed the commencement of such an investigation in Afghanistan as

contrary to the security and stability in this country. **Third**, from the Afghan government's perspective, granting permission for such an investigation may demoralize the Afghan forces. Therefore, the Afghan government may not allow such an investigation but its rejection seems impossible as well because, on the one hand, Afghanistan is a member of this court and, on the other hand, the Afghan President Ashraf Ghani met head of this court in the US in September 2017.

The Durand Line and its impact on Pak-Afghan ties



While Pakistan's move to construct a border wall across the imaginary Durand Line was highly opposed in Afghanistan, Recently the British Ambassador to Afghanistan Nicholas Kay has said that "From the British and International Community's point of view, the Durand line is the official border between Afghanistan and Pakistan and Pakistan reserves the right to manage its borders any way it wishes."

In response to the remarks of the British Ambassador, the Afghan Ministry of Border and Tribal Affairs said: "There exists no official document proving the credibility of the Durand Line and such remarks are against the diplomatic norms." Issuing a statement, the Afghan National Security Council has also called on all foreign Ambassadors and political representatives resident in Afghanistan to respect the rights and the historical and national values of Afghanistan-including the Durand Line. Condemning the comments of the British Ambassador, the Afghan Senate has termed it the evident interference in the internal affairs of Afghanistan and British conspiracy in the region. The Afghan Senate also accused the Afghan government of being silent against Pakistan's act to fence the border with barbed wire.

Here you would read about the background of the Durand Line, the impact of the issue on Kabul-Islamabad ties, and the outcomes of fueling this issue at current circumstances.

The Durand Line

The Durand Line was drawn in 1893 with the signature of an agreement between Henry Mortimore Durand, the Foreign Minister of Indian British and the Afghan King Amir Abdurrahman Khan. Based on this agreement, part of the Afghan territory was ceded to the Indian British as part of their sphere of influence.

After Pakistan's Independence in 1947, the areas on that side of the Duran Line was came under the control of Pakistan as Tribal Administered Areas. However, this line is never recognized by the Afghan government and some reputable parties on that side of the border. That is why in September 1947 when Pakistan intended to gain the UN membership, Afghanistan was the only country that opposed it.

After the formation of Pakistan, the issue remained as a permanent issue between the two countries and has always affected Pakistan's policy towards Afghanistan. The Durand Line is also the reason why Pakistan seeks to gain "strategic depth" in Afghanistan.

Why the Durand Line is not acceptable for Afghanistan?

The Durand Line, drawn when India was a British colony, is not yet recognized by Afghanistan. Afghanistan has reasons for with convincing answers are not given:

First; based on the researches of Hassan Kakar, the known Afghan historian, in the archives of Delhi, London and Kabul, there is no document in English or Persian proving the line signed by Amir Abdul Rahman Khan.

Second; the historical evidences show that Amir Abdul Rahman Khan has edited a map of the Duran Line but still he has not signed it.

Third; sending several letters to British between 1895 and 1897, Amir has expressed his opposition about some of the areas that the Durand Line passed from.

Fourth; at that time, Afghanistan had a weak government that could not represent the entire Afghanistan; therefore, in this regard even if any document was signed by the Amir, it did not represent the will of the people.

Fifth; based on the Gandamak Treaty, between the second Anglo-Afghan War and the Independence war, Afghanistan was a protected state and its foreign policy was controlled by the British. Therefore, the Afghan government did not possess the authority to sign such an agreement at the time.

Sixth; if the Durand Line Agreement was eligible as an “agreement”, why was it not approved by the British Parliament or the Afghan Loya Jirga?

Seventh; if it was a permanent agreement, why did the British renew it with every new king coming to power in Afghanistan. In the research of Hassan Kakar as well, the agreement is termed a temporary agreement.

Eighth; During the signature of the Durand Line agreement, there was no country by the name of Pakistan and after the withdrawal of Britannia from India, the Indian Subcontinent was divided into two parts, India and Pakistan; therefore, Pakistan is not the eligible successor of British and its legal rights, even if signed by Amir Abdul Rahman Khan, does not transfer to Pakistan.

Ninth; at that time, the British was concerned about a Russia invasion on the one hand, and Abdul Rahman Khan’s interventions on the other hand. Therefore, this agreement was signed to specify the spheres of influence of the British and Amir and not as an official border.

Tenth; the referendum conducted in the Khyber Pashtunkhwa after the creation of Pakistan is presumed invalid for the following reasons; first, only 51% of the voters had participated and the valid and invalid ballots were not distinguished. Second, most of the Hindus who were eligible to vote had migrated to India. Third, in the elections in 1939 and 1945, the movement of “Congress and Khudayi

Servants” under the leadership of Doctor Khan had won the election and Muslim League with the agenda of forming Pakistan lost the elections.

The Kabul-Islamabad ties under the influence of the Durand Line

The border disputes between Afghanistan and Pakistan in the past several decades has raised tensions between the two countries, which still prevails.

Mohammad Dauod Khan was the first Afghan President who opposed the acceptance of the Durand Line as the official border between the two countries. He insisted on the annexation of the people and land on that side of the border with Afghanistan and this issue raised tension between the two countries and even let to clashes between them.

After the collapse of Dauod Khan’s government and with the formation of the Khalq regime and later-on with the Soviet invasion of Afghanistan, the country was weakened in every aspect; during the Jihad against the Soviet Union; the Mujahidin government; civil war and the Taliban regime, no Afghan government recognized the Durand Line.

After 2001, in both terms of the Karzai’s Presidency, the issue of the Duran Line hand influenced the relations between the two countries. Karzai repeatedly announced that he does not recognize the Durand Line.

After the formation of the National Unity Government (NUG), tensions between the two countries escalated to a scale that even led to border clashes. The construction of the iron fences and barbed wire across the Durand Line, which has, in some areas, divided the villages into two parts have also escalated tensions between the two countries. Last week, the Afghan President Ashraf Ghani said in response to this act of Pakistan: “those who want to divide our people with barbed wire, must rethink about what they are doing.”

Is the issue of the Durand Line solvable?

Pakistan is using every means to force the Afghan government to accept the Durand Line. During the NUG, some of the Afghan politicians and civil activists in Afghanistan has spoken about the secret agreements of the government about the issue, particularly when Afghanistan and Pakistan reached an agreement to conduct a joint operation on the two sides of the border. Recently, some members of the Afghan Senate have accused the government of making deals with Islamabad about building fences across the border. However, the government has always rejected such allegations and has said that it was above their authority.

On the other hand, some countries are also making efforts for the line to be recognized. For instance, the Special Representative of the US for Afghanistan and Pakistan had said in 1391 that, "Durand Line is the official border between the two countries." The US Ambassador to Afghanistan had confirmed his remarks and had said that "not only the US but also most of the countries know the Durand Line as the official border between the two countries." Now, once again, the British Ambassador to Kabul has made the same comments.

Besides the continued efforts of Pakistan and the remarks of the foreign diplomats, some individuals and political circles within the country have also raised the issue of the recognition of the Durand Line. These individuals and circles believe unless this issue is settled, Afghanistan's issue with Pakistan would not be resolved.

Given these efforts, one can say that the recognition of the Durand Line will not solve Afghanistan's problem with Pakistan. First, although the recognition of the Durand Line by Afghanistan will end Pakistan's concerns for ever, since Pakistan practically controls these lands, this issue is not that important for Pakistan. Second, the main problem of is to have a pro-Pakistan government in Afghanistan, in other words "strategic depth" in Afghanistan in order to control Afghanistan's relations with India or at least the Kabul-Delhi ties must be more tenuous than the Kabul-Islamabad ties.

Therefore, given the circumstances in the region and the situation of the Afghan government, the settlement of this issue does not seem feasible. On the other hand, raising this issue will further escalate tensions in the relations between the two countries.

The End

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Note: Please let us know your feedback and suggestions for the improvement of Weekly analysis.

