

# Kenya's Appeal To Effective Occupation And Acquiescence Thesis In Ilemi Triangle Territorial Claim

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*Abstract: Effective occupation and acquiescence are important basis for territorial claims. States embroiled in territorial claims do appeal to the arguments of effective occupation and acquiescence in advancing their claims. In propounding territorial claims based on effective occupation and acquiescence, states the must demonstrate the existence of evidence to support the same. It is not sufficient for the states to appeal to the two doctrines. One state must demonstrate that its acts meet the criteria of effective occupation and the actions of the rival claimant amounts to acquiescence. One relates to the demonstrations of acts a litre de souverain and the other the dereliction or failure to demonstrate the same. This article seeks to examine Kenya's claim in the Ilemi Triangle based on its demonstration of acts a litre de souverain over long period of time and Sudan's acquiescence. This article argues that Kenya has strong claim on the Ilemi Triangle on the basis of its continuous and peaceful occupation of the territory and the acquiescence Sudanese state of the same.*

**Keywords:** Territorial disputes, territorial claims, occupation, and acquiescence

## I. INTRODUCTION

There are several justifications that states involved in territorial disputes can stake their claims in pursuit of territorial claims. Whatever the justification a state propounds to advance claim over territory, the underlying question is the extent to which it could contribute to the establishment and maintenance of title. This is the case with the *Ilemi Triangle* border dispute between Kenya and South Sudan and previously Sudan where the parties have preferred various justifications in support of territorial claim. Kenya partly justifies its territorial claim in the *Ilemi Triangle* on the basis of its continuous occupation and control of the territory and the longstanding administrative neglect by Sudan and South Sudan of the disputed territory. Kenya has been keen to exploit the two justifications to transform its *de facto* control of the *Ilemi Triangle* into a *de jure* control. This contrasts the justification of South Sudan and its predecessor, Sudan which is premised on the argument of existence of colonial boundary. This article examines Kenya's appeal to *effective occupation* and the *acquiescence* thesis in its territorial claim

on the *Ilemi Triangle* based on its continuous occupation and Sudan and by implication, South Sudan's dereliction of its administrative responsibility in the disputed territory. More specifically, it examines the strengths and weaknesses of Kenya's claim on the *Ilemi Triangle* through the lenses of *effective occupation* and *acquiescence*. This article is divided into several thematic areas. The first part examines the mutually reinforcing concepts of state, territory and sovereignty. The second part explores the background and evolution of Kenya's *de facto* control of the *Ilemi Triangle*. The third part examines the theoretical importance of the principles of *effective occupation* and *acquiescence* as bases for territorial claims in territorial territories. The third section examines Kenya's appeal to *effective occupation* and *acquiescence* on its territorial claim in the *Ilemi Triangle*.

## II. STATE, TERRITORY AND SOVEREIGNTY

The state, sovereignty and territory are mutually reinforcing concepts in international relations (Biersteker,

2013 & Kuus & Agnew, 2008). Territory, however, occupies a pivotal place as it gives tangible meaning to state and sovereignty. As a state can only exercise sovereignty over territorial space it has legitimate control in terms of capacity to act and control, then territory assumes an important theoretical and empirical significance. The exercise of sovereignty by the state over its territory is an issue of critical concern (Sumner, 2004). As long as sovereignty continues to be defined on territorial basis, territory would continue to have strong legal and political basis (Beaulac, 2004). Likewise, as long as territory remains the foremost defining attribute of the state, disputes over them are bound to be a disruptive feature in international relations. Territorial disputes always reflect conflicting claims of state parties to the dispute. Disputes over territory bring to the fore the debate on how states justify their claims over territory. As territorial disputes would always exist, the critical issue is to understand the justifications that states put forth to advance territorial claims. This is central to the epistemological enquiry on how states stake and advance claims over disputed territory.

The justifications that states advance in furtherance of territorial claims are important as they shape territorial conflicts (Murphy, 1990). Disputes between states over territory, whichever the cause, gives rise to international territorial claims. As these claims are conceived to exclude either party in part or in totality from a particular territory, they are always conflicting. McHugo (1998) posits that in propounding a territorial claim, a state is more concerned to demonstrate that its claim to a title to territory is better than that of the rival claimant. The basis of a country's claim in a disputed territory has direct correlation on the viability of the same. In other words, the strength of a country's claim on a particular territory depends on the potency of the justifications. This proposition is applicable to competing territorial claims in the *Ilemi Triangle*. It was observed above that are several justifications which states can rely on to advance their territorial claims. The *principle of effective occupation* and *doctrine of acquiescence* are important justifications (Simmons 2001 & Sumner 2004). In relation to the principle of *effective occupation*, Jennings (1963) observes that international law recognizes it as creating rights or conferring title to territorial sovereignty.

### III. THE ILEMI TRIANGLE BORDER DISPUTE

The dispute over the *Ilemi Triangle*, a territory that straddles Ethiopia to west, South Sudan to the south and Kenya to the north is a protracted international territorial dispute between Kenya and South Sudan. Ethiopia has on several occasions expressed territorial ambitions on the *Ilemi Triangle* (Mburu, 2003; Johannes, Zulu, & Kalipeni, 2015; Waithaka & Maluki, 2016 & Guo, 2007). There are however, several factors that undermine Ethiopia's claim to the *Ilemi Triangle*, in particular, its renunciation of the same following its acceptance of the *Gywnn Line* or the 1909 Boundary Line as its international boundary with Sudan. This leaves Kenya and South Sudan as the two state parties that have realistic territorial claims in the *Ilemi Triangle*. Prior to 2011, the dispute over the *Ilemi Triangle* pitted Kenya against

Sudan (Hornsby, 2013; Khadiagala, 2010; Collins 2005 & Mburu, 2003). Sudan's territorial claim over the *Ilemi Triangle* was however, extinguished in 2011 following the secession of South Sudan. South Sudan inherited Sudan's territorial claim on the *Ilemi Triangle*, hence the territory is currently contested by Kenya and South Sudan (Hornsby 2013). South Sudan's territorial claim on the *Ilemi Triangle* draws from the argument that the territory was part of Sudan. As in the case of Sudan, South Sudan insists that the 1914 *Uganda Line* is the *de jure* or the recognized international boundary. For South Sudan as was the case with Sudan Kenya's claim on the *Ilemi Triangle* violates its sovereignty.

Kenya on its part anchors its territorial claim on the *Ilemi Triangle* majorly on the Turkana grazing argument, which was the key consideration in the making of the boundary with Sudan. For Kenya the 1914 *Uganda Line*, which Sudan and South Sudan regards as the international boundary and provisional boundary was its permanence was conditioned on the determination of the northern extend of the traditional grazing grounds of the Turkana pastoralists. Kenya views all the successive boundary delineations north of the 1914 *Uganda Line* as part of deliberate efforts to define such grounds. In what appears to reinforce Kenya's claim to *Ilemi Triangle* Mutu (2017) refers to the disputed territory as constituting the northern Turkana areas. Also Oba (1992) views the *Ilemi Triangle* as constituting the northernmost limit of the Turkana grazing grounds. For Kenya, the *Sudan Patrol Line* represent the northern limit of the traditional grazing grounds of the Turkana. Kenya's claim on the *Ilemi Triangle* is further anchored on its sole occupation of the territory and the acquiescence of the same on the part of Sudan. Kenya has maintained its claim to *Ilemi Triangle* with what Akehurst (1976) claim to be actual exercise of sovereignty.

To understand the dispute over the *Ilemi Triangle*, one has to examine its evolution into a major international territorial dispute that it is today. The *Ilemi Triangle* became a territorial reality following the Kitgum Conference held between the representatives of Kenya, Sudan, and Uganda in 1924 (Collins, 2004). Since the *Ilemi Triangle* became a territorial reality, Kenya has exercised continuous jurisdiction (Hornsby, 2013; Khadiagala, 2010; Collins, 2005; Mburu, 2003 & Tungo, 2008). Some have, however, described Kenya's *de facto* control and exercise of sovereignty in the *Ilemi Triangle* as lacking the force of international law (Tungo, 2008 & Collins, 2005). In fact Collins (2005) argues that as long as the dispute over the *Ilemi Triangle* remains unresolved, the territory is of administrative convenience to Kenya. Those who subscribe to this position insist that the 1914 boundary line is the recognized international boundary between Kenya and South Sudan as it is backed by an international boundary treaty. This is despite the fact that the treaty delimiting the 1914 *Boundary Line* conceived the line as a provisional boundary, pending the determination of the northern limit of the traditional grazing grounds of the Turkana. Thus, the proponents of the 1914 line regarded the *Ilemi Triangle* as Sudanese territory (Nur, 1971; Collins, 2005 & Tungo, 2008). In what draws from the mutual understanding of the nature of their unsettled boundary, Kenya and Sudan have always delineated the *Ilemi Triangle* by a dotted line marked 'Provisional Administrative Boundary' in their official maps

(Collins, 2005). Since 1978, however, the 1914 line disappeared in the Kenyan official maps and the dotted line representing the *Red Line* has become a continuous line (Collins, 2005 & Oduntan, 2015: 158). This suggests that Kenya regards the territory bounded by the *1914 Line* and the *Red Line* as its territory (Oduntan, 2015). The effect of Kenya's actions was to legitimize the *Red Line* as the international boundary with Sudan and South Sudan and thus transform its *de facto* control into *de jure* sovereignty. This has not been without effect as several maps show the *Red Line* as the international boundary (Collins, 2005). Sudan and South Sudan have never administered the *Ilemi Triangle* (Guo, 2007). This article examined who Kenya's *de facto* control of the *Ilemi Triangle* and Sudan's failure to administer the territory may have combined to confer Kenya the title to the disputed territory or extinguished Sudan's and by implication, South Sudan's claim.

#### IV. EVOLUTION OF KENYA DE FACTO SOVEREIGNTY IN THE ILEMI TRIANGLE

Kenya's occupation of the *Ilemi Triangle* is sometimes thought to have been by default (Oduntan, 2015:157). Kenya's presence in the *Ilemi Triangle* was a consequence of dereliction of responsibility or what Mburu (2003) viewed as abrogation of state responsibility on the part of the colonial administration in Sudan of a territory in which it had no interest in governing. This argument, however, needs to be viewed alongside the question of the traditional grazing grounds of the Turkana tribe, which was not only central to Kenya's northward territorial expansion beyond the *1914 Line* but also in the making of the Kenya-Sudan boundary.

In order to understand Kenya's current *de facto* control of the *Ilemi Triangle* an appraisal of the many boundary adjustments and alterations of the Kenya and Sudan boundary over the period 1902 to 1950, their rationale and resultant consequences are crucial. The first such change on the Kenya-Sudan boundary was the transfer of the Rudolf Province from the Uganda Protectorate to British East Africa Protectorate (Kenya) in 1902. Whereas the actual territorial transfer of the Rudolf Province took place in 1926, the 1902 Uganda Order in Council that legalized the move did set the stage for Kenya's ultimate northward territorial expansion into the *Ilemi Triangle*. All the subsequent boundary delineations made prior to 1926 on the Uganda-Sudan boundary revolved around the central issue of the traditional grazing grounds of the Turkana. The *1914 Line* for instance was conceived with the question of the customary grazing ground of the Turkana as a key consideration. The boundary was conceived so as to leave to Uganda all the territory that constituted the traditional grazing ground of the Turkana (Collins, 2005; Mburu, 2003 & Tungo, 2008). The 1914 Uganda Agreement provided for future rectification of the Uganda-Sudan boundary based on the determination of the northern limit of the traditional grazing grounds of the Turkana. This, would, thus imply that the *1914 Line* was a provisional boundary as its permanence was dependent on the determination of the northern extent of the Turkana customary grazing grounds (Browlie & Burns, 1979).

The issue of the customary grazing grounds of the Turkana was the single most important determinant in the making of the Kenya-Sudan boundary and this is evident in its centrality in all post-1914 delimitations (Collins, 2005; Amutabi, 2010; Khadiagala, 2010 & Mburu, 2003). The first of such efforts was the 1924 Kitgum Conference. One of the key boundary recommendation of the conference was the need for future adjustment of the *1914 Line* northwards to reflect the limit of the traditional grazing grounds of the Turkana (Collins, 2005). Sudan was to cede such a territory north of the *1914 Line* corresponding to the northern limit of the customary grazing grounds of the Turkana to either Kenya or Uganda as per the 1914 agreement (Lovell-Hoare, Ibbotson, & Lovell-Hoare, 2013). The colonial authorities in Sudan were not opposed to ceding such a territory as they were not interested in administering the area due to its remoteness (Nur, 1971; Mburu, 2003; Collins, 2005 & Tungo, 2008). The proposal was however, not actualized due to the complexities surrounding the Anglo-Egyptian rule in the Sudan (Collins, 2005). This notwithstanding, the determination of the customary grazing of the Turkana was to remain central in the making of the Kenya-Sudan boundary.

Following the transfer of the Rudolf Province from Uganda to Kenya in 1926, the former ceased to have a contiguous boundary with the *Ilemi Triangle* and could not assume control over the Turkana grazing grounds as provided for in the 1914 agreement and Kitgum Conference. The responsibility fell on the Kenyan Colony, which by now shared a boundary with Sudan that was contiguous to the *Ilemi* area by virtue of assumption of sovereignty over the Rudolf Province. Kenya's presence north of the *1914 Line* was however, not as a result of the implementation of the resolutions of the 1914 agreement or Kitgum Conference relating to the assumption of control of areas that constituted the customary grazing grounds of the Turkana. It was as a result of acts of omission and commission on the part of Sudanese authorities. These acts were to combine to bestow Kenya with the *de facto* control and possession of the *Ilemi Triangle*. In 1928, the Kenya colonial administration deployed security forces north of the *1914 Line* following authorization by Sudan as part of hot pursuit measures to protect the Turkana (Collins, 2005; Tungo, 2008 & Oduntan, 2015). The move was to mark the beginning of Kenya's official presence in the *Ilemi* area and the commencement of its *de facto* control. In 1929, another milestone in Kenya's presence in *Ilemi Triangle* was realized. This time, Sudan in what appeared to reflect its open dis-interest in the *Ilemi Triangle*, proposed that Kenya establish a military post in the area. In return, the Sudanese government was to meet part of the cost of Kenya's occupation of the area. This arrangement was operationalized in 1931 with Sudan contributing £15500 towards Kenya's administration and development of infrastructure in the *Ilemi Triangle* (Collins, 2005).

The other attempt at delimiting the northern limit of the customary grazing grounds of the Turkana was in 1931 when the District Commissioner of Turkana District and his counterpart from Mongalla Province of Sudan met to discuss boundary issues. Top in the agenda of the meeting was the question of the traditional grazing ground of the Turkana. The meeting reached an informal agreement on the northern extent



of the traditional grazing grounds of the Turkana in the *Ilemi Triangle* (Brownlie & Burns, 1979:917 & McEwen, 1971). The line defining the new limit was denoted as a *Red Line* on existing maps (Collins 2005; Mburu 2003; Tungo 2008 & Nur 1971). While the line may not have been conceived to be official, it could be interpreted as a truer reflection of the northern limit of the Turkana grazing, which both the *1914 Agreement* and the *Kitgum Conference* had attempted to establish but failed. This had the effect of inadvertently creating a *de facto* boundary between Kenya and Sudan that represented an attempt at resolving the puzzle of the northern limit of the traditional grazing grounds of the Turkana, the determination of which would be crucial in the ratification of the *1914 Line* as a permanent boundary. Under the *1914 Agreement* and the *Kitgum Agreement*, Uganda was to assume sovereign control of the Turkana grazing grounds north of the *1914 Line*. Thus, the 1931 informal agreement had implications on the ownership of the territory to the north of the *1914 Line*. Kenya having assumed Uganda's responsibility of protecting the Turkana, its authority was by implication to extend to the *Red Line*. Henceforth, Kenya regarded the *Red Line* as marking the northern limit of the customary grazing ground of the Turkana. The assumption is that the *Red Line* rectified the *1914 Line*. The presumption was that the *Red Line* marked the northern limits of the customary grazing grounds of the Turkana and therefore the authority of the Kenyan government (Collins, 2005:7). Henceforth, Kenya needed no permission to deploy security forces in the area of the *Ilemi Triangle* below the *Red Line* boundary delineation.

The Sudanese authorities, in what appeared to reinforce Kenya's position, ceased to police the area between the *1914 line* and the *Red Line*. Kenya took over the policing of the area as part of measures to protect the Turkana from frequent raids by the Nyangatom and Desso of Ethiopia (Amutabi, 2010; Mburu 2003 & Collins, 2005). The Sudanese authorities saw it as an opportunity to disengage from such a responsibility. The Sudanese authorities also stopped contribution to the cost of Kenya's administration and security presence in the *Ilemi* area sandwiched between the *1914 line* and the *Red Line* only few years into the arrangement. This move by Sudan reinforced the perception about its open and outright dis-interest in the territory, which it regarded as a burden. One wonders whether the move by Sudan to disengage was a tacit recognition of boundary shift or as Mburu, (2003) posits, a question of abrogation of responsibility. These questions are at the core of this study as they are central to *effective occupation* and *acquiescence*, which are important basis for territorial claims.

Further modifications were made to the *Red Line* in 1931 on north easterly trajectory to allow for equitable access to the grazing grounds of the eastern *Ilemi Triangle*. The adjustment, which was reflected in official maps as the *Green Line* was conceived to allow the Turkana shared access to water points and grazing grounds (Mburu, 2003). It is important to note that the adjustment was accompanied by further northward penetration of Kenya's administration into the *Ilemi Triangle*. In 1938, a Joint Kenya-Sudan survey team agreed on the northern limit of the customary grazing grounds of the Turkana north of the *Red Line*. The team demarcated an administrative boundary extending the *Red Line* in a northeasterly direction (Mburu, 2003). The objective of the

boundary delimitation was to incorporate within Kenya, the hilly grounds of northern *Ilemi* so as to afford the Turkana natural protection from raiders from Sudan (Mburu, 2003). The modified *Red Line* was named as the *Provisional Administrative Boundary* and was depicted as such in the maps of Kenya and Sudan. The British colonial administration in Kenya regarded the provisional administrative boundary as an important step not only in the determination of northern limit of the traditional grazing grounds of the Turkana but also in the search for a more strategic boundary. The *Provisional Administrative Boundary* marked a further northward penetration of Kenya's authority into the *Ilemi Triangle* (Mburu, 2003 & Yntiso, 2014.) As in the case of the *Red Line*, the *Provisional Administrative Boundary* was another effort to establish the actual northern limit of the traditional grazing grounds of the Turkana. This was to affect Kenya's northward territorial expansion as the custodian of such grounds in the *Ilemi* area.

The push by the British colonial administration in Kenya for a more strategic boundary did not stop with the *Provisional Administrative Boundary*. The British viewed the line as unsuitable as a strategic boundary. The massacre of 250 Turkana in 1939 following a raid by the Nyangatom and the Dassanech was a turning point in Kenya's northwards territorial expansion (Mburu, 2003). The massacre prompted the colonial government in Kenya to seriously consider a much more strategic line north of the *Provisional Administrative Boundary* that could afford better protection for the Turkana. In 1944, Britain's Foreign Office established a new line of demarcation north of the provisional administrative boundary that was only known to them as the *Blue Line* (Mburu, 2003). The British Foreign Office and colonial administration in Kenya viewed the *Blue Line* as suitable for a strategic boundary and hence, could serve as an international boundary with Sudan. The *Blue Line* was adopted in 1947 as boundary consideration and assumed some official recognition as evidenced in its reference in post-war communications. The British colonial administration determined to ensure the protection of the Turkana, deployed the King's African Rifles (KAR) and established security posts in the whole area of the *Ilemi Triangle* south of the *Blue Line*. As in the case of the *Red Line* and the *Provisional Administrative Boundary*, the *Blue Line* represented further northward penetration of Kenya's administration into the *Ilemi Triangle*. By 1947, Kenya had seven police posts in the *Ilemi Triangle* (Oduntan, 2015).

Kenya not only actively administered the area up to *Blue Line*, but showed the intention to patrol the area adjacent to it in the north. In 1950, in what could be interpreted as a response to the establishment of the *Blue Line* by the British colonial government in Kenya; Sudan demarcated its own administrative line, north of the *Blue Line*. The new line was named the *Sudan Patrol Line* (Collins, 2005; Mburu, 2003 & Tungo, 2008). Sudan, henceforth, could not allow Kenyan and Ethiopian pastoralists beyond the patrol line. It also ceased to have any administrative presence or exercise governmental role in the area south of the patrol line. The administrative vacuum between the *Blue Line* and the *Sudan Patrol Line* occasioned by Sudan was filled by Kenya. Thus, Sudan's actions in 1950 unwittingly, facilitated further northward

extension of Kenya's administration deep into the *Ilemi Triangle* beyond the *Blue Line*. Since 1950, Kenya has solely controlled and administered the whole of the *Ilemi Triangle* stretching from the *1914 Line* to the *Sudan Patrol Line* (Oduntan, 2015:158).

#### V. JUSTIFICATION IN COMPETING TERRITORIAL CLAIMS

Miller (2012) identifies rights over jurisdiction, territory's resources and control borders as the three categories of rights, which states can claim in relation to territory. While not all these rights constitute or manifest claim to sovereignty, some have that effect. Rights over a geographic territory or generally rights over territory are one such category of rights that states claim (Simmons, 2001). The difference between rights to territory and the two other rights is that the former has direct significance to sovereignty. This draws from the argument that states cannot exercise political authority in a territory over which it has no legitimate claim. Drawing from this assumption, the claim by a state to rights over territory brings to the fore debate on issues surrounding sovereignty. Likewise, the existence of competing territorial claims presupposes the existence of a territorial dispute between contending parties. What is at stake in competing territorial claims is the interest of the adversary that holds the territory to retain possession and have its ownership recognized and the interest of the challenger state to take possession and gain ownership (Chanotis, 2004:191). This raises the issue of claims and counter claims in territorial disputes. The justifications that state parties to territorial disputes propound to advance their claims, thus, becomes important. The salience of a claim or a counter claim depends on the validity of the claims in conferring title to territory. The state in possession of territory must demonstrate its lawful acquisition. The adversary or challenger state on its part, must demonstrate the justification for the termination of what it considers as an unlawful state and a return to the presumed lawful situation (Chanotis, 2004:191).

Murphy (1990) observes that the justifications that states put forward to further their territorial claims are critical as they shape the trajectory of territorial conflicts between state parties to the dispute. There are several justifications that states can appealed to advance their territorial claims. Sumner (2004) identifies treaties and conventions, geography, culture, history, effective control and the principle of *Uti Possidetis* as some of such justifications. Jennings (1963) on the other hand, identifies occupation, prescription, cession and accession or accretion as some of the methods by which states can acquire or stake claim to a given territory. Murphy (1990) in the *exposé* on the centrality of historical justifications in territorial claims, refers to other basis of territorial claims among them; ethnic, strategic and economic imperatives. Some of the basis of territorial claims can be explained on the nature of possession. Possessions can be factual or lawful ownership. According to Chanotis (2004) there exists fundamental differences between the factual possession of territory and lawful ownership of the same. The lawful ownership of territory on law. The legal status of territory draws from the

basis of lawful claim. Likewise, the determination of territorial claim can be based on who have control of the territory at the time as opposed to the issue of legal and lawful ownership. In other words, *terminus a quo* can be important basis of claim (Chanotis 2004). Occupation as the basis of territorial claim goes beyond mere occupation to include the nature and the context of the same. In propounding the occupation thesis as the basis of territorial claim, a distinction between lawful and unlawful occupation and the corresponding effects on territorial claims are imperative. Lawful occupation is central to territorial claims and has strong historical antecedents.

Some acts of states in relation to territorial disputes, whether unilateral or not, manifest evidence to claim to title or generally, the intention to claim title. These acts could be explicit or implied in the actions and behaviour of the states. *Effective occupation* or *effective possession* as the former is sometimes referred and *acquiescence* are important justifications in territorial claims. The two doctrines, which operate in theory and practice at cross purposes have different resultant outcomes. *Effective occupation* or *possession* is a manifestation of intention to claim sovereignty over territory (Enabulele & Bazuaye, 2014). Its application in pursuit of territorial claims is however not without pre-conditions. It is not sufficient to show that *effective occupation* over territory has been exercised. There must be evidence to show that possession was carried out with the intention and will to act as the sovereign (Enabulele & Bazuaye, 2014). *Effectivitiés* that accompany *effective occupation* must manifest acts of state authority over territory. In other words, for *effectivitiés* to hold, they must constitute acts *a litre de souverain* (Sharma 1997). The *effectivitiés* must also be acts performed by organs of the state (Kohen & Hébié, 2017). The activities of private individuals and groups does not have an impact. Thus, as Jennings (1963) states, whatever the activity, it must be unambiguously *a litre de souverain*. The acts must also indicate or manifest intention and the will of the state to act in that capacity (Enabulele & Bazuaye, 2014:501). Any evidence to the contrary undermines a state's appeal to *effective occupation* or *possession* argument in territorial claim.

The acquisition of title to territory is one thing but upholding and sustenance of the same is another (Enabulele & Bazuaye, 2014:506). While the principle of *effective occupation* are acts that confer and support territorial claim, the *doctrine of acquiescence* works to undermine title or sovereignty. *Acquiescence* operates in situations where the maxim of *ex injuria jus non oritur* or where vindication of a claim or course of action depends on the consent of the states affected (MacGibbon, 1954). The unilateral acts of *acquiescence* have the effect of transferring sovereignty from one state to another (Kohen & Hébié, 2017). No matter how a title to territory was acquired, the same can be invalidated by *acquiescence* or *abandonment*. The presumption of consent, which may be attributed to silence or other acts is inseparably linked to the question of duration. The longer the duration that has elapsed without the state lodging opposition, the stronger the claim based on *acquiescence*. The centrality of duration in territorial claims based on *acquiescence* is aptly captured by the following statement:

'The lack of demonstration of effectivitiés by the state with legal title over territory for a considerable length of time

extinguishes that state title over the territory in favour of the state, which to the knowledge of the first state, has maintained effectivitiès over a long length of time'(Enabulele & Bazuaye, 2014:506).

Consent as a technical term assumes many dimensions. It can be tacit, implied or even construed (Kohen & Hébié, 2017). It is however, important to note that the absence or lack of protest does not always imply consent. Silence or lack of protest is only relevant in circumstances that would demand a response expressing objection in relation to conduct of another state (Antunes, 2000). Further, the state that is thought to have acquiesced should have constructive knowledge of the acts being accomplished by the other state and must be duty-bound to react (Kohen & Hébié, 2017). From the aforementioned, the justifications of territorial claims on the basis of *acquiescence* is more complicated than it would appear. *Acquiescence* is a form of qualified inaction in a situation that would demand otherwise (Müller & Cottier, 1992). As such, determining a state's inaction pose some theoretical and empirical challenges. A state's silence or lack of protest in the face of a situation that constitutes an infringement of its territorial rights undermines its sovereign claim to the territory in favour of another state (MacGibbon, 1954). In this case, in favour of the infringing state. The failure of a state to exercise *effectivitiès* in any part of its territory where it is duty-bound undermines its claim to such a territory.

#### VI. KENYA'S APPEAL TO EFFECTIVE OCCUPATION AND ACQUIESCENCE ON ILEMI TRIANGLE

This part examines the potency of Kenya's appeal to *effective occupation* and *acquiescence* on its territorial claim on the *Ilemi Triangle*, drawing from acts that constitute claim and those that render the same null and void. As stated elsewhere in this article, *effective occupation* and *acquiescence* work to confer or transfer sovereignty from different trajectories. *Effective occupation* or possession operates to confer sovereignty to the state for whom *effectivitiès* are attributed. *Acquiescence*, on the other hand, works to transfer sovereignty from the state that consents to the infringement of its territorial rights. Acts of *acquiescence* operates to confer title to infringing party and against the consenting party. The application of *effective occupation* in territorial claims is dependent on a number of issues. The degree of occupation required to constitute *effective occupation* is important (Gibson, 1975-76). This inevitably brings forth the debate on what constitutes *effective occupation* or the threshold of the same and the prerequisites for *effective occupation*. The number and intensity of acts that constitute *effective occupation* however, depend on the nature of the territory (Dixon, McCorquodale, & Williams, 2016).

The acts and duration as criteria for *effective occupation* is relative and subject to the parties' interpretation (Sharma 1997; Kohen & Hébié 2017 & Brownlie & Burns, 1979). For Sharma (1997), the acts and duration would depend on the circumstances of each case. What is important however, is the fact that even isolated acts of display of sovereignty are very persuasive in the determination of territorial claims. Continuous and uncontested occupation are important prerequisites and

criteria for evaluating *effective occupation*. In contextualizing the aforementioned to Kenya's claim on the *Ilemi Triangle*, this article examines the extent to which its presence in the disputed territory manifests *effective occupation* as reflected in *effectivitiès* by the state claiming *effective occupation*. *Effectivitiès* or acts undertaken by the state in exercise of sovereign authority are central to *effective occupation*. The entity performing the acts and the nature of acts performed are important if *effectivitiès* were to count in contextualization of *effective occupation*. Acts performed by the organs of the central government and other state agents in their official capacity are considered as constituting *effectivitiès* (Kohen & Hébié, 2017). The conduct or acts of the central government are however, assumed to have greater evidentiary significance as reflecting the true intentions of the state. In other words, the activities that constitute *effectivitiès* need to be acts attributable to the state or acts *a titre de souverain* (Dixon, McCorquodale, & Williams, 2016:260 & Kohen & Hébié, 2017). In terms of the nature of the activities that are deemed to constitute *effectivitiès*, only those acts that have evidence of display of authority are relevant. These acts or activities are best reflected in three traditional functions or powers of the state; the executive, legislative and judicial (Kohen & Hébié, 2017).

A contextualization of *effective occupation* thesis on Kenya's territorial claim in the *Ilemi Triangle* raises important theoretical and empirical issues in the country's claim to the disputed territory. The continuous and peaceful display of the functions of the state is crucial to the success of claims based on *effective occupation* (Evatt, 1970). This is reflected in Kenya's presence in the *Ilemi Triangle*. The country has had a continuous and peaceful display of sovereignty in the *Ilemi Triangle*. The nature of display of sovereignty notwithstanding, there is no dispute or contestation as to Kenya's long running presence in the *Ilemi Triangle* (Mburu, 2003; Collins 2005; Amutabi, 2010 & Tungo, 2008). Even the most ardent of the proponents of Sudan's and by implication, South Sudan's claim on the *Ilemi Triangle* acknowledge.

Kenya's has had long standing presence in the disputed territory. Collins (2005), for instance while maintaining that the *Ilemi Triangle* is Sudanese territory acknowledges that whatever state presence has existed in the disputed territory has been that of Kenya. Explicit in Collins (2005) is the recognition of the exercise by Kenya of acts *a titre de souverain* in the *Ilemi Triangle*. In what is consistent with the thesis of such scholars as Collins (2005) and Mburu (2003) on Kenya's longstanding presence in the *Ilemi Triangle*, Oduntan (2015) maintains that the country has had sole control over the territory since 1950. It is thus; evident from the above that what is in contention is not whether Kenya has solely occupied the *Ilemi Triangle*, but whether it can claim the territory on the basis of its long-drawn occupation. In the *Island of Palmas Case*, the ICJ held that continuous and peaceful display of sovereignty was as good as title. Kenya has exercised peaceful display of sovereignty in the *Ilemi Triangle* for a long period of time.

If Kenya has maintained sole control over the *Ilemi Triangle* as Oduntan (2015) asserts, then it could be argued that it has strong claim on the basis of *effective occupation*. Kenya has exercised sole governmental roles in terms of



executive, legislative, and judicial functions in the *Ilemi Triangle* since colonial times. It has been policing the whole of *Ilemi Triangle* up to the 1950 *Sudan Patrol Line* as evident in the presence of several Kenya Police Posts in the area (Collins, 2005; Mburu, 2003 & Tungo, 2008). The Kenya Police Post at Kibish which was established in 1942 marks the most northerly deployment of the Kenya police in the *Ilemi Triangle*. As far back as 1947, Kenya had seven police posts in the *Ilemi Triangle* (Oduntan, 2015 & Collins, 2004). Since then, it has established more police posts in the disputed territory. Kenya has also deployed Police Reservists to augment the regular police in the provision of security in the *Ilemi Triangle* as part of wider security architecture in the Turkana County (Agade, 2015 & 2014).

In recent times, Kenya has also reinforced its executive acts in the *Ilemi Triangle* with the establishment of military presence. What is of interest is the fact that Kenya has always viewed any incursions from Ethiopia, Sudan, and South Sudan into the *Ilemi Triangle* as violation of its territorial sovereignty and integrity. It has lodged official protests with the countries whenever such incursions occur. This is an important demonstration of acts of exercise of sovereignty on the part of Kenya. On several occasions, Sudan and Ethiopia have apologized to Kenya for acts of infringement or violation. A state cannot violate its sovereignty as it would imply in the case of Sudan and South Sudan. In theory, the official apologies to Kenya's protests by Sudan and South Sudan could be taken to imply recognition of the former's sovereignty over the *Ilemi Triangle*.

Legislative and judicial acts constitute acts *à titre de souverain*. In the Eastern Greenland Case, the Permanent Court of International Justice (PCIJ) held that legislation was the most striking form of the exercise of sovereign power (Kohen & Hébié, 2017). Tungo (2008) rightly argues that Kenya authorities in the *Ilemi Triangle* used to assume the *de facto* role of Sudanese officials and applied Sudanese Penal Code. This however, is no longer the case. Kenya has exercised legislative jurisdiction role in the *Ilemi Triangle* for the whole period since independence. Kenya's legislation and laws reign supreme in the *Ilemi Triangle* and govern the inhabitants of the area just as other parts of the country. The application of the Sudanese penal code in the *Ilemi Triangle* on the basis of magisterial arrangement between Kenya and Sudan long ceased to exist. This was the situation prior to 1950, when Sudan established the patrol line (Tungo, 2008 & Collins, 2005). Kenya has dutifully applied and enforced its laws in the *Ilemi Triangle* and the inhabitants of the area have not resented the same. Sudan and South Sudan have not also protested the application of Kenyan laws or legislations in the *Ilemi Triangle*. Acts of state organs regulating the presence of individuals are considered as *effectivités*, hence are regarded as acts *à titre de souverain* (Sharma 1997 & Kohen & Hébié, 2017). In the case of the *Ilemi Triangle*, Kenya has exercised the same since 1950. Today, Kenya exercises sole jurisdiction in the *Ilemi Triangle*, applying and enforcing its laws.

Just as certain unilateral acts performed by a state in relation to a given territory confer title, they also have the effect of invalidating title. In the latter scenario, certain acts of the state that constitute *acquiescence* operate to undermine claim or to transfer title. The doctrine of *acquiescence*

operates to transfer title to the state for whose acts are being acquiesced. From the beginning, Sudan has consistently acquiesced to Kenya's acts and conduct in relation to the *Ilemi Triangle*. Some of the acts by Kenya have not only infringed on what Sudan and South Sudan viewed as their rights in the *Ilemi Triangle* but their claim to the territory. When a state fails to protest the infringement of its sovereignty, it is deemed to have consented to the same (MacGibbon, 1954 & 1957 & Sumner, 2004). Sudan's failure to protest against the activities by Kenya in the *Ilemi Triangle* that constituted a challenge to its sovereignty amounted to consenting to the latter's territorial designs. A careful examination of Kenya's northward territorial expansion beyond the *1914 Line* was consciously facilitated by a systematic *acquiescence* on the part of Sudan. This raises two fundamental questions as regards the behaviour of Sudan in relation to the *Ilemi Triangle*. The first is whether the actions of Sudan were mere acts of *acquiescence*, or secondly Sudan did not regard the *Ilemi Triangle* as part of its territory and hence, the issue of *acquiescence* should not arise? Two issues however discount the latter proposition or assumption. The first is the fact that Sudan officially contributed to the cost of Kenya's administration of the *Ilemi Triangle*. Secondly for the most part of the period before 1950, Kenya used to seek magisterial approval from Sudan before deploying security forces in the territory (Tungo, 2008; Collins, 2005 & 2004 & Nur, 1971). This suggests that Sudan viewed the *Ilemi Triangle* as part of its territory and Kenya believed so based on its seeking of magisterial approval. In this case therefore, it could be argued that Sudan *acquiescence* to the activities of Kenya in the *Ilemi Triangle*.

The proof of actual consent or failure to protest is an essential condition for *acquiescence* (O'Connell 1956). The last time that Sudan contributed towards the cost of Kenya's occupation or administration in the *Ilemi Triangle* was in 1940s (Tungo 2008; Collins 2004 & 2004 & Nur, 1971). Likewise, there is no evidence to suggest that Kenya has been seeking permission from Sudan and South Sudan for its continued activities in the *Ilemi Triangle*. Of critical relevance in relation to *acquiescence* as the failure by Sudan and South Sudan to protest the violation of its territorial rights by Kenya in the *Ilemi Triangle*. Sharma (1997:110) observes that if the possession of territory by a foreign state, meets the precondition of peaceful and un-interrupted possession, then it has the effective reversal of title of the definitive sovereign. Kenya's possession of the *Ilemi Triangle* has been nothing but peaceful. If Kenya has maintained sole control over the *Ilemi Triangle* as is widely held by many including Oduntan (2015), then it can be inferred that its possession of the territory has been peaceful.

The *Ilemi Triangle* has been referred to in some discourses as the un-administered territory of Sudan (Tungo, 2008; Nur, 1971; Collins 2004 & 2005). This indicates an aspect of administrative *abandonment* on the part of Sudan. While *abandonment* may not be synonymous with *acquiescence* but when it is done as response to the same, it has the effect of reinforcing it. This poses the question as to what happens when a state takes over an un-administered territory of another state as it would appear to be the case between Kenya and Sudan and by implication, South Sudan.

Peaceful and uninterrupted or continuous possession is central to the presumption of *acquiescence*. While this is the case, possession must be public. In highlighting the importance of public demonstration of acts of intention to possess territory, Sharma (1997) observes that publicity is essential as without knowledge, there cannot be *acquiescence* at all. The activities of Kenya in the *Ilemi Triangle* that indicate intention to assume sovereignty have not been covert but public and thus could not be presumed to be unknown to Sudan and South Sudan. It could thus, be concluded that Sudan and South Sudan consented to Kenya's acts on the *Ilemi Triangle*.

States cannot exercise political authority in a territory over which they have no legitimate control (Sumner, 2004). If the *Ilemi Triangle* was Sudanese and by implication South Sudanese territory, then Kenya's exercise of sovereignty over the territory contradicts the above thesis that states cannot exercise authority over territory they have no legitimate control. This brings to the fore the debate on the impact of the exercise sovereign authority or to use Kohen & Hébié (2017) 'the plenitude of state competences' over territory other than its own on the ownership of the same. An *acquiescence* of the same over long period constitutes effective grounds for reversal of title of the definitive sovereign (Sharma, 1997:110). This is the case with Kenya's occupation of the *Ilemi Triangle*. Sudan rarely protested the acts that promoted Kenya's claim on the *Ilemi Triangle* to the detriment of its own interests. One such act of *acquiescence* on the part of Sudan is in relation to fundamental changes in the official maps and some public documents of Kenya, which appear to infringe on Khartoum's territorial claims in the *Ilemi Triangle*. Prior to 1978, Kenya's official maps showed the *Ilemi Triangle* as disputed territory with a 'provisional administrative boundary' (Mburu, 2003). Since 1978, the boundary between Kenya and Sudan has shifted northwards in the official maps of Kenya. The *1914 Line* or *Maud Line* the line is also known as has virtually disappeared in Kenya's official maps (Mburu, 2003). Kenya's official maps currently depict the *Sudan Patrol Line* as the boundary between Kenya and South Sudan. In what manifest disinterest, Sudan did not lodge any consistent diplomatic protest to the unilateral change of boundary by Kenya. The mere diplomatic protest by a state is not sufficient enough to defeat the presumption of *acquiescence* (Sharma 1997). In the case of Sudan, the protests against Kenya were not only isolated but were not followed by sanctions.

## VII. CONCLUSION

A contextualization of Kenya's claim on the *Ilemi Triangle* on the basis of *effective occupation* and *acquiescence* raises complex issues. In theory Kenya's claim on the *Ilemi Triangle* appears sustainable as it meets some basic criteria in terms of *effective occupation* and *acquiescence*. Not only has Kenya exercised sole governmental functions in the *Ilemi Triangle* that are indicative of acts *a litre de souverain* and amounts to *effectivités*, its exercise of the same has been peaceful and continuous over a long period of time. On the basis of this, if Kenya was to appeal to the principle of *effective occupation* on its territorial claim in the *Ilemi*

*Triangle*, it would have strong argument. The *acquiescence* of Sudan and South Sudan to Kenya's exercise of acts *á litre de souverain* or sovereignty reinforces the latter's claim on the *Ilemi Triangle*. Sudan appeared to have turned a blind eye to Kenya's exercise of sovereignty or state's acts that went beyond the mere the administration. Kenya's acts in *Ilemi Triangle* are beyond the mere territorial administration on behalf of Sudan and by implication, South Sudan but reflect exercise of sovereignty. Kenya's law is applicable in *Ilemi Triangle* and Kenya's officials in the area are acting on behalf of Kenya.

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