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## The Customary Grazing Grounds of the Ngiturkana: A Key Factor in the Settlement of the Kenya – South Sudan Boundary Dispute

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### Abstract:

*Although there is abundant literature about Kenya – South Sudan boundary dispute, unfortunately, most of it is loaded with fallacies of earlier writers, misinformation, biased opinions, and references to unscholarly and sometimes poorly researched academic works. Attempts by scholars to address the issue have instead yielded confusion and unnecessary border claims where available evidence firmly suggests none exist. This article is not meant to settle the boundary issue between South Sudan and Kenya but to examine, (1) historical undercurrents that have contributed to evolution of the six boundary lines on the grassland and, (2) the Ngiturkana customary grazing grounds factor in the settlement of Kenya – South Sudan boundary dispute. The findings indicate that the Northern extent of the customary grazing grounds of the Ngiturkana contemplated in the 1914 Order in Council are along the 1950 Sudan Defense Force patrol line. The northward boundary adjustments of 1931, 1932, 1938, 1944, and 1950 constitute attempts by Kenya and Sudan to delimit the northern extent of the customary grazing grounds of the Ngiturkana conceived in the alternative boundary given by the 1914 boundary treaty. The article is based on Author's historical and anthropological knowledge of the disputed area and literature review.*

**Keywords:** *Elemi Triangle, Ngitur kana, British Protectorate, Kenya, Ngikwatela, Boundary treaty*

### 1. Introduction

The territory under dispute (popularly known as Elemi triangle), is a triangular piece of land measuring about 9,155 Square Kilometres<sup>1</sup> bounded by the 1914 straight line (also known as Maud line), the 1950 Sudan Defense Force patrol line, and the 1902 (1907) Kenya – Sudan – Ethiopia boundary, variously defined as *de facto* Kenya and *de jure* Sudan. The triangle is divided by three administrative boundaries which evolved in the course of delimiting the northern extent of the customary grazing grounds of the Ngiturkana under the 1914 order in Council.

The boundary dispute between Kenya and South Sudan goes back to the happenings that followed the scramble for and partition of Africa by European countries. Following the Berlin conference of 1884, seven European powers invaded and partitioned Africa and annexed African territories as parts of their countries without the involvement of African people and without them in mind. Throughout the conquest of Africa from 1884 to 1914, Europeans drew arbitrary straight lines by a ruler or along astronomical meridians across tribal territories placing members of homogeneous or congruent communities under different colonial powers. This was followed by a period of rectification of territorial frontiers to reflect tribal boundaries for administrative convenience and alignment of conquered territories misplaced by arbitrary lines drawn on maps to secure their economic and political interests in Africa.

The Kenya – South Sudan border dispute has foundations in the 1899 Anglo-Egyptian agreement that created and defined the territory of Sudan and the 1902 order in Council that created Uganda British Protectorate. While the 1902 order in Council estimated the northern boundary of the Uganda British Protectorate to be along the 5<sup>th</sup> degree of latitude, the Anglo-Egyptian agreement of 1899 that created Sudan did not define the southern frontier of Sudan with the Uganda British protectorate and Abyssinia. As such, a series of boundaries surveys were conducted by Britain to fix the undefined borders. The first which is relevant to this discussion is the Maud boundary survey of 1902 which created the famous Maud lines, followed by the Kelly-Tufnel commission which created the 1914 line. Then came, the 1924 Kitgum agreement, which resolved that the unadministered Elemi triangle which contains the unknown northern limits of the customary grounds of the Ngiturkana should be recognized as within Uganda, then came the 1926 treaty which transferred Rudolf province and the unknown northern limits of the Ngiturkana customary grounds of Elemi triangle to Kenya.

As the Kitgum agreement had not been enforced, in 1931, colonial officials in Turkana (Turkan) and Mongalla districts drew a line depicted on maps as redline north of the 1914 line as the northern extent of the Ngiturkana customary grazing grounds. In 1932, the redline was adjusted northwards as Ngiturkana cattle camps were still north of the new line. In 1938 Sudan and Kenya established a commission to delimit the customary grazing grounds of

<sup>1</sup> This figure is based on my own calculations.

the Ngiturkana provided for in the 1914 order in council to fix the boundary between Kenya and Sudan. This commission came up with another line marked on maps in red, properly described on paper, and marked on the ground as the administrative boundary. As the cattle camps of the Ngiturkana were still north of the redline, the Ngimarile (Dassanach) in August 1944 conducted a raid on the Ngiturkana inflicting heavy casualties and loss of much livestock on Ngiturkana; consequently, the Foreign Office drew the 1944 administrative line and marked it on maps in blue. In 1947, Sudan and Kenya confirmed the blue line as a fair boundary between Ngitoposa and Ngiturkana and therefore the extent of their authority. Finally, in 1950, the Sudan Defense Force (SDF) created the patrol line to mark the northern-most limit of Ngiturkana, the southeastern-most limit of the Ngitoposa, and their effective administrative and patrol boundary. At the critical date of independence, this is the line which Sudan and Kenya inherited from Britain in 1955 and 1963 respectively, and has from then to date served as the frontier between Sudan and Kenya, and later between South Sudan and Kenya.

## 2. Literature Overview

### 2.1. Fallacies and Misconceptions on Elemi Triangle

As regards the Elemi triangle, Ethiopia has no active boundary dispute with Kenya; neither does it have any boundary dispute with South Sudan as per the boundary treaties of 1902, 1907, and the 1972 boundary agreement where it renounced any border claims on the Sudan territory. However, as a neighboring state sharing physical borders with Kenya and South Sudan, Ethiopia has only one task, setting up of the tri-junctional point, under the 1970 Kenya – Ethiopia boundary pact, and the 1972 exchange of notes between Ethiopia and Sudan, which provided for the joint delimitation of the tri-junctional point by the three countries. Despite this fact, some writers such as, (Mburu, 2003; Charles Haskins, 2009; Okumu, 2010) just to mention but a few have defined Elemi triangle as a triangular piece of land disputed by Kenya, Sudan, and Ethiopia. Even though the ownership of the triangle is disputed by Kenya and South Sudan, Tungo (2008) defines it as Sudanese territory. Okumu (2010), and Eliza M. Johannes, Leo C. Zulu & Ezekiel Kalipeni (2014), have even included Uganda as a protagonist in the triangle dispute. Okumu states that “The Elemi triangle seems among the most volatile and unstable, and could yet see a dispute between four protagonists Kenya, Uganda, Ethiopia, and Southern Sudan especially if rumors of oil discoveries in this long-disputed area prove to be well-founded”.

Mburu and many others who have written about Elemi triangle call it home to five or six tribes, namely, Merile (Ngimarile) and Nyangatom (Nginyangatom) also known as Dongiro (Ngidongiro) of Ethiopia, Toposa (Ngitoposa), and Didinga (Ngididinga) of South Sudan and Dodoth (Ngidooso) of northern Uganda. Note that, Ngididinga, for instance, are located to the west of Ngiturkana and Ngitoposa, and for them to access Elemi grounds far afield, which are a considerable distance from the eastern Ngididinga corridor have to fight their way into and penetrate the Ngiturkana and Ngitoposa settlements along the western edge of Elemi, to cross to Elemi grounds, which begin at the inter-junction of Lomeyan River and the northern-most point of Mt. Mogila. As found by Winter, (2019) the claim that Ngididinga are among the tribes using Elemi grazing fields cannot be verified. He states ‘It is also sometimes said that the Didinga people of South Sudan use the grazing in the Triangle, but I have not heard this corroborated’.

The Ngidooso of Uganda are hundreds of Kilometers from Kenya; for them to get to Elemi triangle, they have to cross the Kenya – Uganda border, fight the Ngijie and Ngikwatela sections of Ngiturkana and penetrate them, or enter it through South Sudan by fighting the Ngididinga and Ngitoposa which is an impossibility. Mburu, in yet another article, ‘Meaninglessness of ‘national’ border in transnational pastoralist societies of the Elemi Triangle’ (n.d.), asserts that:

*“In the fringes of the disputed triangle, their [Ngiturkana] immediate neighbors to the southwest are the Ngididinga. The latter’s traditional pastures are the better-drained hilly areas of northwestern Elemi, but being hunters, the scarcity of wild game lures them further to the east of the triangle’. In the same article, he talks of ‘Turkana territorial sections, for example, the Kwatella (Ngikwatela) of Sudan, Matheniko (Ngimatheniko) of Uganda, and the Ngibochero (Ngibocoros) of Kenya”.*

Elsewhere, Mburu (2003) makes reference to the Ngiturkana of Southern Sudan and northwestern Kenya. Ngiturkana do not have Ngikwatela and Ngimatheniko sections in Sudan and Uganda respectively, neither do they live in South Sudan nor any other country other than Kenya. In the same article Mburu asserts that, ‘the Uganda Order in Council (1902) transferred Uganda’s Eastern Province (Rudolf Province) to British East African Protectorate (Kenya) and that the territory transferred from Uganda to Kenya included the area inhabited by the Ngiturkana and vaguely encompassed the pastures of their Ngwatela (Ngikwatela) section, whose inhabitants also lived in southern Sudan’.

This is a distortion of facts. While quoting Mburu on the same, Edward Waithaka and Patrick Maluki (2005) escalated the distortions about the tribes of Elemi triangle. Ngikwatela have never been part of the eastern province of Uganda as alluded by Mburu, and eastern province is not the same as Rudolf province of northern Uganda, as by putting Rudolf Province in bracket immediately after eastern province, Mburu means that they refer to the same thing. The two are distinct, they covered different geographical locations and were transferred to Kenya at different times, under different orders in council.

Eastern province of Uganda was transferred to British East Africa Protectorate (now Kenya) on April 1<sup>st</sup>, 1902, while Rudolf province which contains the Ngiturkana grazing fields of Elemi triangle was transferred to the colony and protectorate of Kenya (now Kenya) in 1926. Eastern province was delimited on the west by the present Kenya-Uganda boundary, on the north by the Suam or Turkwel River, on the east by the eastern escarpment of the Rift Valley for much of the distance between Lake Rudolf and Lake Natron, and on the south by the German sphere westward to Lake Victoria. Rudolf province was delimited on the west by the present Kenya-Uganda boundary, on the north by the then eastern sector of the Sudan – Uganda boundary, and on the east and south by a meridian in the Lake Rudolf and the Turkwel River,

respectively. Tirkwel River divided the Ngiturkana into two. The southern sections located east and south of river Tirkwel were administered from Baringo district of British East Africa protectorate, while the northern sections north and west of the Tirkwel River were administered from Rudolf province (later ceded to Kenya) of Uganda. At no time have the Ngikwatela been administered from the Eastern province of Uganda.

According to Collins (2004), Elemi triangle measures between 4000 – 5000 square miles equivalent of 6,437 – 8,046 Km<sup>2</sup>; Tungo (2008) approximates it to be 8,743Km<sup>2</sup>; Mburu and Wikipedia, probably one quoting from the other, have held that the triangle measures 10,320 – 14,000 square Kilometres, an equivalent of 6,412 – 8,699 square miles. A quick verification of these measurements showed that Mburu, Wikipedia, or their source probably converted Collin's figures (6,437 – 8,046Km<sup>2</sup>) already in kilometers into kilometers again. Given that the area in question is the area bounded by the 1914 straight line, the 1950 patrol line, and the 1902 (1907) Maud line, the same being the area occupied by Kenya and claimed by Sudan, it goes without saying that the measurement of the contested territory should be the same; and if the area given in ranges regards the boundary lines, then the area enclosed by each line should be specified. Tungo (2008) lengthens the confusion by mixing the Standard International (SI) units for the area of the triangle. He claims that Elemi triangle measures 8,743 Km<sup>2</sup>; however, in the following paragraphs, he says that western Elemi comprises an area of 5,013 square miles, and eastern Elemi comprises an area of 3,730 square miles. With this confusion, one is left guessing on which of the two measurements is right, is it 8,743 square kilometers or 8,743 square miles?

There are incredible inconsistencies and inaccuracies about the description and size of the Elemi triangle in the existing literature. (Waithaka, 2018; Farah, T. 1976; Mburu, 2003) assert that eastern Elemi alone which Britain wanted to exchange for Abyssinia's Baro salient measures 6,000 square miles (15,540 Km<sup>2</sup>). Take note that Elemi triangle measures about 9,155 Kilometres square, as such, there is no way the eastern part of it can be bigger than the entire triangle. Although the tri-junctional point where the Maud or Uganda line meets the Kenya-Ethiopia border is clear, Mburu opines that the disappearance of Namoruputh border point and the drying up of the Sanderson gulf described in the 1914 straight line as the easternmost point is likely to make it difficult to locate the intersection point. He states, 'one essential border point is Namoruputh, which exists only in colonial records and maps yet no official or local inhabitant can today pinpoint its extent or breadth on the ground'. This is not true. Namoruputh (meaning grey rock in Ngaturkana) is a territory lying astride Kenya and Ethiopia border point. In accordance with the Ethiopia – Kenya agreement of November 15, 1963, the wells of Gaddaduma were transferred to Ethiopia in Exchange for the wells of Godoma and the Namuruputh area west of Lake Rudolf where a former Kenyan Police post had been located, as described hereunder:

*"...thence in a straight line to a point on the Todenyang – Namuruputh road Known as consul's rock (Lomotodo), thence along the road to the junction of the Sudan – Kenya boundary, leaving in Ethiopia Namoruputh (together with an adequate area surrounding the Police post)".*

Namoruputh area west of the Lake, on the Kenyan side, where a former police post had been located was swallowed by the lake, it is adjacent to Tultale village of the Ngimarile, northeast of Todonyang sub-location. The Ngiturkana know it as *Namoruputh Nangorot* (the old Namoruputh) popularly referred to as *Ngadong'koi* (Debris), normally visible when the lake waters recede, and currently a fishing site for the Ngiturkana fishermen.

Kibon (2019), alleges that (Tungo, 2008; Mburu, 2007; & Collins, 2004), think that Elemi triangle was created for the convenience of Sudan; and that, it was a Ugandan territory exchanged for *Lado enclave* which was a Sudanese territory. I don't seem to find where they said this, but as far as it can be established, no part of Elemi triangle was ever exchanged for *Lado enclave* or any other international territory. The only proposal concerning the transfer of Elemi triangle was that of exchanging the eastern part of it for the Baro salient, which Italy rejected. The view held by Tungo (2008) that, the main objective of the 1914 order in council was to stipulate a *quid pro quo* transfer of territory between Sudan and Uganda, was, as far as it can be established, in reference to the transfer to Sudan of the territory lying between the 5<sup>th</sup> parallel of latitude and approximately 4° 37', from Nimule, on the River Nile to *Kilima Cha Habash* (the northernmost point of the northernmost crest of the long spur running north of Mt. Mogila), in exchange for a strip of territory from Nimule to Lake Albert, previously part of the *Lado enclave*. The area ceded to Sudan is outside the confines of Elemi triangle. Elemi triangle begins from *Kilima Cha Habash* (north of Mt. Mogila) and runs eastwards to Sanderson gulf, while the territory referred by Tungo begins from *Kilima Cha Habash* and runs westwards to Nimule.

Some writers have painted Elemi triangle as a forgotten area, untouched by civilization and therefore undeveloped. Edward Waithaka and Patrick Maluki (2005) paint it as a place 'that is lacking in infrastructure or modern facilities and is so insulated that its only reminder of the outside world is a Kenyan frontier post'. I find this unfortunate, especially it coming from Kenyans, who would have saved themselves the embarrassment of relying on outdated literature by simply touring the field to verify information. Compared to the rest of northern Kenya's borderlands which are less developed, Kibish town which hosts Kibish Sub-county headquarters at the border of Turkana County, and the South Omo Region of Ethiopia is comparatively developed. The sub-county has three functioning airstrips, namely, Kibish, Kokuro, and Kaikor; twelve (12) health facilities, namely, Sasame, Kokuro, Napeikar, Liwan, Kibish, Lokamarinyang, Koyasa, Napak, Lobulono, Loitanit, Nakinomet Dispensaries, and Kaikor Health Centre. It has gazetted Early Childhood Development (ECDs) & Primary schools, namely, Sasame, Kokuro, Napeikar, Liwan, Kibish, Natodomeri, Lokamarinyang, Koyasa, Napak, Lobulono, Loitanit, Nakinomet, Kaikor, Loruth (ECDs & primary schools), and Kaikor and Kokuro high schools. The sub-county has a mechanized water system, hand pumps and boreholes fully installed with solar energy and generators, serviceable rural road-network, modern military infrastructure for National Police service (NPS) units, namely, Administration Police (AP), Kenya Police (KP), General Service Unit (GSU) and Kenya Police Reservists. Kibish has a modern Provincial Administration Headquarters housing the County and Assistant County Commissioners and other junior administrators.

In examining how scholars have handled the question of Elemi triangle, it is sad that it has not received a serious scholarship as most writers seem to depend on desktop research, maybe due to the stories that, the place is isolated, inaccessible, uninhabited, and insecure, therefore a good research topic to earn easy awards rather than a topic to provide serious suggestions to settle a complex territorial dispute. Some have waded into the discussion to defend the argument that Elemi belongs to the country they come from. Taha and Tungo have selectively exploited arguments and interpretations of the law and International Court of Justice (ICJ) pronouncements which in their view seem to favor the South Sudan case. Collins, Kibon, Mburu among other objective scholars have for their part given a balanced assessment of historical, anthropological, political, and sociological dynamics responsible for the boundary dispute thus offering fodder for the jury out there to assess the issue and give their own informed opinion. Ngatia, for his part, has provided *amicus briefs* on the legal difficulties of delimiting Elemi triangle. As far as it can be established, he is the only one who has explained what it means when a boundary is defined in terms of alternatives, thus broadening our scope of understanding of the alternative boundary given by the 1914 treaty and the place of the Ngiturkana customary grazing grounds in Kenya – South Sudan boundary-making.

Misplaced comments e.g., by Mr. Lopuke in the article doing rounds on social media – ‘*The Elemi triangle: Shadows of the four lines on the grassland*’ is another example of contributions that perpetuate confusion and falsehoods. The observation given here, in as much as it may give undue prominence to Lopuke’s grievances, is largely meant to give a general idea about the quality of contributions shaping the discussion on Kenya – South Sudan boundary dispute. Firstly, the article by Mr. Lopuke is not scholarly; it is misleading and loaded with misinterpreted references. From its wording, it can fairly be regarded as a grievance or a lamentation note on the ownership of the Elemi triangle. Statements such as ‘The predatory attitude of Kenya and Uganda which **we** the people of South Sudan see today was nurtured right from the Kitgum Conference of April 1924’ reduces it to a mere complaint note in the fashion of ‘*To Whom It May Concern*’. He also goes ahead to make references to inapt secret dispatches between colonial administrators of the two colonies with little regard to admissible legal justifications for territorial claims. Availability of such concocted literature on the web proliferates the likelihood that misrepresentations, fallacies, misinformation, and biases continue to find space in the literature about Elemi triangle.

Lopuke, probably relying on contentions of Tungo asserts that, when Rudolf province of Northern Uganda British protectorate was transferred to Kenya colony, the 1914 straight line lost its provisional status and automatically converted into Kenya – Sudan international boundary. This assertion goes against the international practice on the succession of states in respect to treaties. Under international law, the rights of the indigenous groups attach to the treaties that create them, as such, the Ngiturkana as an indigenous people have rights to their territory, and these rights are protected by Article 10 of the United Nations declaration on the rights of the indigenous people which states that:

*‘Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return’.*

In the case of German settlers, the Permanent Court of International Justice expressly rejected the idea of automatic nullity of rights acquired under the law of a predecessor state in consequence of cession of territory: ‘private rights acquired under existing law do not cease on a change of sovereignty’ (Ngatia, Op. Cit.). More on this area will be discussed in the next sections.

In summary, the fact that no writer has given serious attention to the precise measurements and correct description of this territory is proof that the literature on Elemi is underprovided and therefore calls for a serious reexamination to separate facts from falsehoods and shape the boundary discussion. Making references to sources of literature of this nature uncritically, whether verified or unverified, from peer-reviewed journals, or otherwise has the potential of escalating misrepresentations, misinformation, and errors of commission and omission consequently misleading the discourse on the subject matter.

According to my own calculations, with the aid of google maps area calculator, Elemi triangle measures approximately 9,155 Km<sup>2</sup> distributed according to the lines as follows: 3,367 Km<sup>2</sup> is the area between the 1914 Order in Council line and the 1938 red line; 2,815 Km<sup>2</sup> is the area between the 1938 Red line and the 1944 Blue line, and the remainder 2,973 Km<sup>2</sup> comprises the area between the blue line and the 1950 patrol line. Refer to figure 1 below.

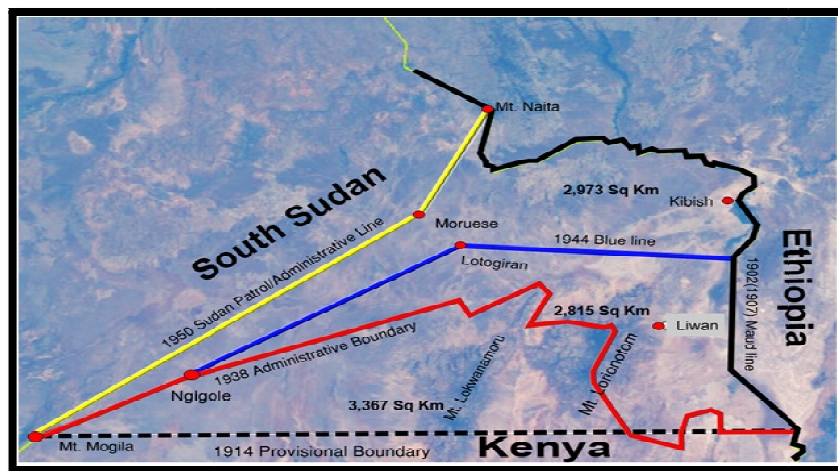


Figure 1: Map of Elemi Triangle Based on E. A. Survey  
Group 1942 Map  
Source: Author

Elemi triangle is said to derive its name from a famous Anuak chief Elemi Akwon, who lived between the border of Sudan and Ethiopia. Anuak village is not within the confines of the triangle, this leaves everyone guessing on when, who, why, and how was the triangle named after a non-resident. According to the available evidence, the disputed piece of land became a triangle in 1950 after the Sudan Defense Force drew the patrol line from north of Mt. Mogila to Mt. Naita, actually making it a triangle. Any reference to this piece of land, as 'triangle' before 1950 is incorrect and therefore misleading. Tribal boundaries were and still are determined by topographical features, namely, hills, rivers, plateaus, valleys, plains known to the people themselves by distinct ethnic/vernacular names, etc. The naming of the triangle after a nonresident is questionable, it must have been done by a European or someone with a western concept of state or territory. Among the surrounding communities of Elemi triangle, like the rest of Arica, people take names from natural features e.g., rivers, mountains, valleys, plains, etc., and vice versa. Naming a vast territory after a village chief of a small ethnic group, who is first a non-resident, is proof that the person who did the naming, and/or those present at the time of naming had no knowledge of the hinterland or natural features east of Anuak village and so decided to use the name of the chief to position the area on map or create a controversy it has already created. The name also has a Ngiturkana derivation, it derives from the verb '*akilem*', to harvest. '*Elemi*' in Ngaturkana/Nganyangatom means, he/she is harvesting, '*ilemi*' means you are harvesting. This makes the name more *Ateker* than Anuak; could it have been taken from the grain farmers of Nakuwa River?

### 3. Ngiturkana History: *The Customary Grazing Grounds*

The history of Ngiturkana in northern Kenya dates back to the 1825 territorial expansion of *Ngiturkana* led by the *Ngiputiro* generation. This history is well documented by P. H. Gulliver, a British colonial government sociologist, Prof. John Lamphear, an anthropologist, and a host of other European ethnographers and African historians. Besides the historical accounts found in books, the Ngiturkana themselves, have maintained vivid memories of their history, handed over from one generation to the next by spoken word, singing, chanting, and recitations. Wilson (1970) in a preliminary study of the Oworopom notes that the Ngiturkana expansion from Uganda to the current territory began with the displacement of a Proto-Kalenjin tribe (Maliri) which pre-existed the proto-Jie or Kote-Mogos group from Kote and Mogos hills. This disruption and displacement caused the Maliri to split into two, with one section being pushed southwards and the other eastwards. At the beginning of the nineteenth century the Ngiturkana community, which had just evolved from the fusion between Ngimonea, a splinter group from the Najie, and the Ngicuro, a pre-existing group at the headwaters of Tarac River. Sooner than later, the Ngiturkana became aware of the existence of other groups just to the east.

At the beginning of the initiation of the Ngisuguru generation about 1760, ecological pressures started to build up and the Ngiturkana cattle camps began to push down the Tarac valley in search of new pastures upon which to graze their animals. In their search for good pasturelands, they first encountered red people (Samburu) and likening them to an *ekorot*. Pl. *ngikor* - redpiece of meat removed from the side of a slaughtered animal, they called them *Ngikor*. Following '*Aoyate*' [long spell] drought of the late 18<sup>th</sup> or early 19<sup>th</sup> century, which, according to (Lamphear, 1988) corresponds with a centennial drought that swept across rift-valley and neighboring regions, remembered by western Ateker groups as *Laparnat*, the whole of Turkan was in a sorry state of affairs. At the inauguration of the *Ngiputiro* generation in 1825, there was no livestock to marry and establish legal families. Driven by the need to acquire livestock and rectify the situation *Ngiputiro* embarked on an ambitious restocking program by raiding and expelling the neighboring groups.

The first line of *Ngiputiro* territorial expansion began from west of the original centre of the Ngiturkana people i.e. Lower Tarac river, Kawalase river, and middle and lower Tirkwel basins with Pelekec, Northern and Eastern Loima, and South of Lokwanamor mountains, (Gulliver, 1951). Displacement, capture, and assimilation of inhabitants and acquisition of livestock and pasture fields and water holes accompanied successful raids. As they advanced northwards, the Ngikwatela section raided and displaced the Ngitoposa from Mt. Songot and Mt. Mogila, pushing them across Lomeyan River, Nadapal, Loolim, all the way up to Narus, Kopoeta, Nanyangacor, and the area west of Aita a Ngikoroma - (Mt. Naita),

their current homeland in South Sudan. Ngikoroma is the Ngiturkana name for Mursi. The Ngiyapakuno and Ngisiger sections raided and expelled the Ngimarile first through Moru a eris, and then Lapur ranges pushing them to their present homeland, and probably their original cradleland around the Omo valley, namely, Omorate, Kaalam, Locuc, Tultale, and east of Namoruputh in southern Ethiopia.

The Nginyangatom – those of the yellow gun, also known as Ngidongiro were pushed by the Ngikwatela section from east of Mt. Songot and west of Mt. Lokwanamor and confined north of Nakuwa River. The Dodoth and Ngikarimojong encroaching settlements were pushed by Ngilukumong and Ngiwoyakwara, Anyangataok, and the Ngijie lu a akomwae-arengan from Oropoi, Natiira, and Mt. Songot up Timu escarpment back to their present locations in Uganda. At the same time, Ngikarimojong settlements at the upper Tarac River, western of Mt Loima, Kospir River, and east of Tirkwel River, were expelled from the area and pushed to the area west of Mt. Moroto. According to both Gulliver and Lamphear, after a period of rapid and dramatic territorial expansion led by the Ngiputiro generation in the first half of the nineteenth century, Ngiturkana found themselves in possession of a vast territory that corresponds to their present district (Cf. Gulliver, 1951, 1952; Lamphear, 1976, 1988). This period is remembered by the Turkana as *ekaru a akijuka* (the era of jostling) and corresponds with the 1823-37 initiations of the *Kipayang* age-set, recalled by the Samburu as the time they made initial contacts with Ngiturkana (Lamphear, 1992), which is the same time Ngiturkana expelled the Ngimarile, Nginyangatom, and Ngitoposa, etc., to their present territories.

After the scramble and partition of Africa, half of the Ngiturkana territory, that is, the area north and west of river Tirkwel was administered by British Uganda Protectorate, while the area east and south of river Tirkwel was under British East Africa. South Turkan came under civil administration in 1905 while the area under Uganda's British protectorate governed from Northern Uganda area of Karamojong was left un-administered because the British considered it dangerous and unproductive. In this regard, the British Uganda Protectorate adopted a policy of slow administration and non-interference with the lifestyle of Ngiturkana living North and West of Tirkwel area stretching up to Lake Turkana, all the way to Mt. Naita. Non-administration of the north by the British gave advantage to Ethiopia which was also fighting to extend its administration to cover the whole of Turkan, to the extent where the Abyssinian administration appointed chiefs to enforce their administration in northern Turkan. For over 15 years till 1911, Ethiopian governor of Maji region had held and collected taxes from Northern Turkan and Karamoja areas (Lamphear, 1976).

Ngiturkana resisted British domination throughout the colonial period. Reciprocal raids conducted by the Ngiturkana on their adversaries were dealt with militarily to protect weaker ethnic groups that had come under the British administration and considered to be loyal and cooperative. The British set up military posts in strategic locations to deal with the Ngiturkana. According to Barber (2006), the primary task of the military administrators was to maintain order and security. They were to pacify the country; protect the friendly tribes (Samburu, Pokot, and Karimojong); punish raiders - Ngiturkana, suppress the Abyssinian arms traffic, and disarm border tribes - Ngiturkana. To this end, between 1914 and 1918 five major patrols went out, one of which was a joint affair by the governments of Kenya and Uganda, and one organized by the governments of those two colonies together with that of Sudan with the cooperation of the K.A.R. and the Sudan equatorial force (Gulliver, 1951). Gulliver was a British government sociologist hired to study the Ngiturkana. In 'the preliminary survey of the Turkana report', he compiled for the British, the 1915 police patrol alone killed more than 400 Ngiturkana and captured over 19,000 head of cattle as well as a large number of small stock. In 1918 a combined force of over 5,000 well-armed men, consisting of Sudanese troops, troops of the Kings African Rifles, and levies composed of warriors from groups antagonistic to the Ngiturkana, launched what came to be known as the 'Labur (Lapur) or Turkana Patrol of 1918'.

Ngiturkana acquired the first firearms from Ethiopian elephant trackers and ivory dealers. Ethiopia's overwhelming combat hardware in the 1850s to mid-1900s saw an inundation of surplus obsolete – [muzzle-loaders] firearms in the hands of merchants who offered them to elephants' trackers and ivory dealers. As European weapon smiths made progressively modern self-loading rifles, single-shot breech-loaders disposed to Ethiopia's firearm market wound up in the hands of private traders. Following the arrival of obsolete weapons to subordinates following the battle of Adowa in 1896, and the ensuing debilitation of Emperor Menelik in 1910, it got hard for him and his chamber of ministers to control the influx of firearms into the private traders. By 1902, early ivory hunters had begun selling Muzzle-loaders to the Ngiturkana. A weapon with rounds of ammunition was purchased with 10 bovines, or 100 goats, or one major tusk of elephant or 2 little ones. As Abyssinia was endeavoring to have control of Ngiturkana, it is said that, other than offering firearms to the Ngiturkana, the *Gebar* administration which by then had begun appointing chiefs in northern Turkan appropriated weapons to the chiefs they designated to help the Ngiturkana ward the British off. Loito a northern Turkan Chief who served under Gebar –*Nakoro a eosin*(those of the hot bowels) helped them to distribute weapons to the Ngiturkana to oppose the British armed force which had begun overpowering the Ngiturkana in the south of Turkan.

Being better equipped than the neighboring groups mainly Ngitoposa and Nginyangtom who were numerically weak, the northern Turkan sections viz *Ngikwatela*, *Ngiyapakuno*, and *Ngisiger* roamed with their animals across the frontiers, oscillating between the 1914 order in council line and the 1950 Sudan patrol line. Evidence of Ngiturkana presence in Elemi area is found in the writings of various scholars, namely, (Collins, 2004; Eulenberger, 2013; Kibon, 2019) who agree that Elemi has from time immemorial been home to the Ngitur kanapeople and under Kenya's *de facto* control. Collins has remarked that 'their wandering subjects, however, regarded its wells and dry season pastures essential to their survival and worth dying for. In the *'heart of Elemi'* live the nomadic Turkana who move back and forth between the Sudan and Kenya'. Both Eulenberger (2013) and Kibon (2019) agree that the Ngiturkana is the largest ethnic group in the disputed territory, making up 90 % of the population of the Elemi Triangle. In times of peace, it is the Ngiturkana, as

the main occupants of elemi, with full rights to pasture and waterholes, who actually grant grazing permissions to the Ngitoposa, Ngimarile, and the Nginyangatom to have limited access to pastures and waterholes along the borderlines.

The period between 1915-1924 coincided with the King's African Rifles (KAR) military expeditions against the Southern Ngiturkana who by then had been singled out as the worst subjects in the whole of the British empire to be subdued by punitive military expeditions. The worst of them all is the '1918 Turkana patrol' which altered for worse or better the Ngiturkana military prowess and survival strategies. Of importance is that, the anticipated pacifying effect of the military expeditions on the Ngiturkana always yielded a contra-reaction. When the Ngiturkana conducted a raid, they lived expecting a retaliatory raid from the raided group; however, with the involvement of the British in confiscation of raided animals and punishment of the Ngiturkana, Ngiturkana lived anticipating two or more counter-raids. In the event that counter-raids took place, it meant that the Ngiturkana had to conduct more reciprocal raids to recoup their losses. These counter-raids kept the neighboring groups on their sides of the boundary. As the Ngiturkana fighters were running away from the British, the enemy tribes were equally running away from the Ngiturkana. On the Ngiturkana defense, Gulliver (1951) has remarked as follows:

*'Turkana herds, therefore, especially cattle, were potentially always in danger. There had, therefore, to be constant watchfulness, constant preparedness to defend the herds and to mount counter-attacks in cases of successful enemy raids. This permanent war-footing was an important feature of social life. Indeed it may have been a further cause of the successes of the Turkana's own raiding since the social system was built on a basis of more or less permanent war-making. The men were always, on alert, in defense always forced to fight to defend families and herds, would always be well prepared, and experienced to take the offensive.'*

### 3.1. Ngiturkana Seasonal Calendar & Grazing Cycle

The Ngiturkana divide their country into dry season – *akamu* and wet season – *akiporo* areas. Livestock camps move between the Mountains and riverine (dry season areas), and the plains (wet season areas). The Northern sections reserve Mt. Mogila, Lokwanamor, Soya, and Lorionotom as dry season grazing areas, and the plains west of Mt. Lokwanamor and Lorionotom, stretching as far as Mt. Naita are wet season grazing areas. Every year, at the beginning of the wet season in March – *Lomaruk*, the Ngikwatela, and Ngisiger sections strategically descend from the mountains and rush to graze their animals along the borderlands, namely, the areas east and south of Mt. Naita, that is Lorumoru, Natapar waterhole (springs), Kalopotikol river, Nalupwongor, Kadoke, Morueth hill, Lokwanya ranges, Ngigole twin-hills, Lomeyan River, Ngapawoi a Loito (Loito's water-pools), Karamuny waterhole (spring). Kamorunyang, Apas a Koriwo pasture field/waterhole, etc. At the onset of the dry season, in the months of *Lolongu to Lodunge* (August – November) cattle camps slowly retreat from the frontiers towards the mountains to access the dry season pastures and waterholes delaying for some time around Lokwanya plains, Soya hills, etc.

The Ngiturkana have a survival strategy of splitting the family and herds into two. The elderly, sick, women, and young children (the vulnerable lot) are usually left with a few milk herds and some small stock at the homesteads – *ere*, *pl. ngirireea*, around the moorlands or designated areas along the river banks as young men drive the rest of the healthy and young stock to look for pasture and water in outlying areas along the frontiers, *abor*, *pl. ngaborin*. Ngiturkana territory is defined by pasturelands and waterholes, and not by physical human settlements, estates, ranches, or farmlands, because of their transhumant nature. Family segments integrate when conditions allow, but this seldom happens as unpredictable weather conditions usually keep cattle camps away from *ngirireea* for prolonged periods, such that when rains fall, they [camps] immediately rush to the borderlands ahead of their adversaries to access the pastures before they are depleted. For twelve (12) months the Ngikwatela, Ngiyapakuno, and Ngisiger sections oscillate between the dry and wet season pastures of Elemi triangle.

Nigel Pavitt (1997) a British Army Soldier, who worked in Turkana district acknowledges that Ngiturkana are the only people after the Nandi that resisted the British rule right from the beginning to the end. They did not just resist in rhetoric, they fought and killed British officials with contempt making them labeled as the fighting race. A host of British officials who had experience with the Ngiturkana, for example, Mr. Crampton, the Political Officer, who accompanied punitive expeditions against the Ngiturkana, estimated the fighting force of the Ngiturkana as 25,000 spearmen and 1,000 riflemen. He wrote that 'The Turkana is the finest fighting man in East Africa, the nature of his country and the nomadic life he led tending to make him a fine, hardy savage whilst not possessing the fanatical contempt of death of some tribes he did not hesitate to expose himself when worthwhile'. H. H. Austin who led the first official British expedition into Turkana in 1898 too had great disdain for the Ngiturkana. He categorized them as 'treacherous tigers with whom it was useless to try and maintain friendly intercourse with'. From their earliest contacts with the Ngiturkana, the British began building up a negative image of the Ngiturkana as a truculent, expanding society with whom conflict would be likely (Korobe, 2021).

The Ngiturkana considered the British, and the surrounding tribes viz Ngimarile, Nginyangatom, and Ngitoposa as enemies, all of who raided Ngiturkana cattle dispossessing them of their mainstay. In fact, the Ngiturkana have one word for 'enemy and non-Ngiturkana' – *emoit*, *pl. Ngimoe*; they are xenophobic of foreigners who they believe have a common mission on earth, that of raiding and killing' Ngiturkana. As such, Ngiturkana treated the British as Ngitoposa and other enemy tribes. For that reason, any information sought by the British whether intended for good purposes or not was given with cautiousness, most of the time, they gave misleading information for security reasons. Gulliver (1955), writes:

*'Frankly, I never felt, with exception of one or two cases, that I was ever entirely trusted by the Turkana amongst whom I lived. Men and women amongst whom my wife and I worked for many weeks doing our eighteen months' stay there remained, under the surface, suspicious of our presence and never really understood our intentions. Evasions*

*and downright lies were common practice to the last. Women who became friendly with my wife were more than once warned off by their menfolk'.*

It must be emphasized that Ngiturkana guarded information about their settlements for fear of government raids. For, whenever the Ngiturkana raided enemy tribes, the British confiscated their livestock to restock the raided groups and to reward collaborators who showed them where the raided animals are hidden, and because the British did not have their own livestock to be raided back to recoup the losses suffered, the Ngiturkana would in return conduct a retaliatory raid against the groups considered loyal to the British (Cf. Lamphear, 1976; Gulliver, 1951; Korobe, 2021).

The fact that the Ngiturkana lived in three jurisdictions, namely, Uganda British Protectorate, British East Africa, and an administered Eleme fields, made it difficult for them to be properly governed. The suggestion by Kenya and Uganda authorities during the Kitgum conference to have Sudan transfer the Ngiturkana fields of Eleme to Rudolf province of northern Uganda (later transferred to Kenya) was to have them, like other tribes of the protectorates managed by one administration.

As the British government's policy was, tribes under their protectorates and colonies should pay hut taxes for their protection, the first opposition the British government faced from Southern Turkana already under its administration was the refusal to pay hut taxes. The British enforced an unfamiliar governance structure antagonistic to Ngiturkana political organization by introducing the office of the chief to try to administer the Ngiturkana indirectly. This was faced with resistance to the extent that, Ngiturkana soon started to assassinate government chiefs beginning with the spearing of Loburimoe, a former Ngikamatak war leader, followed by Ngisekona, unpopular Ngikamatak chief, then the murder of Chaki a Ngibilae Chief, and then the assassination of Alukumor who was killed by Kokoi's men in 1914 for cooperating with the British (Lamphear, 1976; Korobe, 2021). Kokoi was a powerful and influential Diviner who doubled up as political leader of Ngiturkana endowed with mystical powers, who commissioned raids against enemy tribes and provided mystical protection to the people and land.

#### 4. Historical Background of the Boundary Lines

##### 4.1. The 1902 line

The drawing of the 1902 line, was specifically driven by the British ambitions to secure its east African properties from the competing colonial powers and imperial ambitions of Emperor Menelik II of Abyssinia, rather than the desire to rectify the boundaries earlier on drawn arbitrarily on paper to reflect the tribal frontiers of African peoples. The journey of boundary-making began on February 1<sup>st</sup>, 1900, when the Governor of Uganda unilaterally proposed to issue a notice defining the boundaries of Uganda. As far as the northern boundary of Uganda was concerned, the draft notice after fixing as the starting point the position in the north-east where latitude 5° north cuts across the river Omo, provided that from the Nile-Congo water-parting, the boundary was to be carried eastwards along the aforesaid 5<sup>th</sup> degree north of latitude until the west of bank of the River Omo. As this proposition did not involve Sudan, even though the agreement of January 19, 1899, between Britain and Egypt on the future administration of Sudan, defined the northern but not the southern boundary of Sudan, the understanding was that the proposed line was strictly to demarcate the northern boundary of Uganda and not the southern boundary of Sudan. In 1902, Captain Philip Maud of Royal Engineers of King's African Rifles and Mr. Archibald Butter surveyed the Kenya – Ethiopia boundary, which was later recognized in 1907 as de facto Kenya – Ethiopia border described as hereunder:

*'... to the point of the peninsula east of Sanderson's Gulf, thence along the west shore of that peninsula to the mouth, or marches at the mouth, of River Kibish (River Sachi), thence along the thalweg of this river to latitude 5°25' north: from there due west to a point 35°15' longitude east of Greenwich, thence the line follows this degree of longitude to its intersection of the 6° north latitude with 35° of longitude east of Greenwich'.*

##### 4.2. 1914 Order in Council

The straight line created in 1902 as the boundary of Sudan and Uganda British protectorate divided the Bari, Ngiturkana, Kuku, Ngididinga, etc., into two placing halves in Uganda and Sudan. To rectify this anomaly, in what seemed to be a general concern regarding administration of its respective tribes, the Sudan government in November 1911 proposed to Uganda government an interchange of territories along tribal boundaries of their respective tribes left by the 5<sup>th</sup> degree line of latitude on either side of the colonies. The Sudan government thought it was desirable that the boundary between the two countries should be a tribal one and should extend across the Nile River so that both banks be under the same administration (Taha, op. cit.). The reason being that, for otherwise natives resenting any form of administration or wanted by the authorities of either country might escape justice by simply crossing the river. Secondly, the proposed boundary was to curve into Sudan the Dodinga (Ngididinga) and Dabosa (Ngitoposa), and the remainder of the Bari, the majority of whom were already in Sudan and would leave to Uganda the whole of the Ngiturkana tribe (Taha, Op. cit.).

Uganda Protectorate agreed to the proposal; so in 1913, a joint commission, popularly known as the 'Kelly-Tufnel Commission' (named after) Captain H. H. Kelly and Captain H. J. Huddleston who represented Sudan, and Captain H. F. Tufnel and Captain H. A. Lilley who represented Uganda, was set up to delimit on the spot and in accordance with the proposal the boundary between the two countries.

The Kelly-Tufnel boundary commission faced a number of problems preventing it from examining the boundary on the spot to fix hard and firm tribal boundaries. Owing to the scarcity of water in the region at the time and difficult terrain Captain Tufnel who represented Uganda abandoned the survey at Madial, and from that position, Sudan's side of

the commission proceeded alone, but again ended its investigations at Mt. Mogila, and from that point to the east, they assumed the boundary to be 'a straight line running north of Mount Labur (Lapur) to Lake Rudolf as follows:

*'A line beginning at the point on the shore of Sanderson gulf, Lake Rudolf due east of the northern-most point of the northern-most crest of the long spur running north from Mt Labur (Lapur), thence following a straight line: or such a line as would leave to Uganda the customary grazing grounds of the Turkana tribe to the northern-most crest of the spur running west from Jebel Mogila, thence following a straight line in a south-westerly direction to the southernmost point of Jebel Horogo, thence following a straight line to the summit of Jebel Lotome'.*

According to Rowe (1999), from Kelly's diary, published by Oxford University Press for the British academy, one reason the boundary was drawn so hastily was that 'Tufnell, the government representative from colonial Uganda, was desperate to go home on leave after two years on the frontier; consequently, all his negotiations, or lack thereof, were governed by his desire for a quick fix'. According to the diary, it has also emerged that the survey expedition had it rough to secure local guides and interpreters, they had to be press-ganged into service and punished if they tried to escape. Rowe reports as follows:

*'On one occasion two such involuntary guides were handcuffed together. Kelly subsequently complained in his diary that he feared he'd be stuck with them indefinitely because his second-in-command had lost the keys! Eventually, the two were separated by cutting the chain between the cuffs and each guide went home wearing a permanent reminder of 'government' service. The hapless perambulator wheel operator was photographed under armed guard with a noose around his neck'.*

This arbitrary delimitation, by way of putting just two reference points, one at the inter-junction of Lomeyan river and the northernmost point of Mt. Mogila, and the other one at the Sanderson gulf in Todonyang, left in Sudan the traditional grazing grounds of the Ngiturkana to be administered by Uganda British protectorate. However, not having traversed the territory east of Mt. Mogila:

*'the commission recommended that when close administration was established in the region; the boundary should be reconsidered to reflect the actual grazing grounds of the nomadic Turkana.... the Sudan Government subscribes to the principle that the whole of the grazing grounds of the Turkana, properly so-called, shall be included in Uganda, provided that in any case the right of the Sudan of free access to a navigable port on Lake Rudolf is secured. It was assumed that the 1914 Line would be amended to accommodate the reality of local circumstances when the true limit of Turkana grazing was known'<sup>2</sup>.*

To legalize the proposed interchange of territory, rectification of the boundary, and provisions of the Kelly-Tufnell commission, an order was issued on April 21, 1914, by the secretary of state for the colonies under the Uganda order in council of 1902. As the boundary was not conclusively settled, the order left four points unsettled (a) the delimitation of the Ngiturkana grazing grounds, (b) the question of the reservation of a strip of territory to Sudan to give it access to the lake Rudolf, (c) the reservation to the Sudan of an enclave at Nimule, south of the mouth of the River Unyama, in order to secure to Sudan a point on the east bank of Bahr el Jebel which would be accessible to steamers, (d) the delimitation of the southern boundary of the Sudanese tribe of Kuku. 'The fact that these four points were left for future determination militated against any recognition of the finality of the boundary delimitation effected by the 1914 order in council, so Uganda and Sudan governments agreed to the boundary delimited by the order as 'provisional and subject to such amendments as circumstances may require' (Taha, op. cit.).

One of the obligations and duties of Anglo-Egyptian Sudan and Kenya British Protectorate under the 1914 boundary treaty was to establish the customary grazing grounds of the Ngiturkana and ensure they are within Uganda British Protectorate. As per Kelly – Tufnell commission recommendations, this exercise was to be undertaken at a later date when close administration was established in the area. However, by the time of transfer of Rudolf province of Northern Uganda British Protectorate to Kenya colony, the customary grazing grounds of the Ngiturkana had not been ascertained as there was no close administration established in the area.

#### 4.3. Kitgum Conference of 1924

From the beginning, it was the intention of the British officials in Uganda and Kenya, and their Sudan counterparts to rectify territorial boundaries drawn arbitrarily on map that divided tribal holdings and placed members of homogeneous communities in different colonies, to reflect ethnic borders for administrative convenience. In line with the provision of the 1914 boundary treaty, the quest for the northernmost limit of the Ngiturkana customary grazing grounds began immediately as the Ngiturkana, at the time of the treaty, were, grazing their livestock at the wet season grasslands and waterholes – *ecor, pl. ngicorin* of Lorumor, Kaading'etom, Kalukakeris, Natelo – (all of them west of Mt. Lokwanamor), and Nangolemoru, Koyasa, Lokamarinyang, and Lomonakipi springs – (all in the northwestern part of Lorionotom) north of the 1914 straight line. Confronted by this reality and failure by Sudan to establish effective administration and control over Elemi, and the need to prevent the Nginyangatom and Dassanach from raiding the Ngiturkana who had already been disarmed and weakened by the 1918 Labur patrol, in 1924 at a conference in Kitgum, the British authorities in Kenya and Uganda proposed to their Sudan counterpart to transfer Elemi triangle to Rudolf province of Uganda (later transferred to Kenya) under the 1914 treaty. This was agreed unopposed, but as claimed, needed concurrence of Egypt due to the Anglo-Egyptian condominium rule in Sudan.

Although the concurrence with Egypt did not see the light of day, the Kitgum agreement of 1924 was never reviewed or revoked. And thus, recognition of Elemi as customary grazing grounds of the Ngiturkana manifested in the

<sup>2</sup> See, Collins, (2004) footnotes: Central Records Office, Khartoum, Departmental Reports, Survey Department, 16/4, Sudan Agent, Cairo, to Cheetham, Acting Consul-General, Egypt, December 20, 1914.

1926 treaty which transferred the Ngiturkana and their unresolved customary grazing grounds of Elemi triangle to Kenya colony. As the Ngiturkana continued to live north of the 1914 line, they continued to face violent encounters with the neighboring groups, namely, Ngimarile, Nginyangatom, and the Ngitoposa over access to the customary grasslands and waterholes of the Ngiturkana. This further fueled the urgency to establish administration in the area and delineate the Ngiturkana grazing grounds and have them within Kenya.

#### 4.4. The 1926 treaty – Transfer of Rudolf Province to Kenya

In 1926, Rudolf province, along with the unresolved customary grazing grounds of the Ngiturkana, was transferred from Uganda British protectorate to British Kenya colony. This was primarily to consolidate members of the Ngiturkana tribe and confine them in a single colony where they could be handled effectively. In 1928, the British – Kenya colony established a military post in Lokitaung, south of the 1914 straight because of its strategic location. Ascertainment of the customary grazing grounds of the Ngiturkana was the next in the tasks that needed to be undertaken in order to prevent fugitive offenders on the Kenya side of the straight line from fleeing to unadministered Elemi fields.

#### 4.5. The 1929 Sudan Expedition of Elemi triangle

As grazing permissions had not been contemplated in the 1914 treaty, between 1928-1930, Kenya put pressure on Sudan to administer the territory north of the straight line to protect the Ngiturkana who had become an easy target of the Nginyangatom and Ngimarile entering the grazing fields of the Ngiturkana from the Sudan side, or on the alternative compensate Kenya for administering the area pending boundary rectification. Note that in 1928 and 1929 alone, the Dassanach had mounted deadly raids on the Ngiturkana killing 215 and 135 people respectively (Mburu, 2001)<sup>3</sup>. Opting for the second alternative – that of administering the area, thinking it was the easiest option, in 1929, Sudan sent a preliminary expedition to survey the area north of the straight line to assess and report on its economic and strategic advantage. However, it surrendered the plans of regulating it, after preliminary expedition reported that:

*'the territory appears entirely useless. It would grow nothing and could never support a population. Water is practically non-existent and other grazing is poor. It is intensely hot and shadeless. Cotton soil, thorny bush, straw-like grass, and open mudflats comprise the whole country'* (Collins, Op. Cit.; Tungo, Op. Cit.).

As a follow-up to the foreign office's conference of 25<sup>th</sup> July 1925 where Kenya, Uganda, and Sudan officials met to discuss security problems of Elemi and northwestern part of Turkan, another conference was convened on October 1929 to discuss the position of Sudan on administering Elemi triangle. In attendance were, the Governor-General of Sudan, the Civil Secretary, the commander of Sudan Defense Force, and representatives of the colonial office and foreign office (Tungo, 2008). In that conference, Sudan expressed difficulties in administering the triangle citing absence of permanent Sudanese population in the area, hardship in transportation of supplies from Nile to the territory, setting up military posts within the vicinity of Abyssinia was feared it would cause provocation, and finally, the fear of attack of military posts by hostile tribes. Instead, Khartoum suggested to subsidize Kenya of which Kenya agreed and proposed a subsidy of £20,000 for roads and telegraph and another £10,000 annually for the maintenance of the garrison which Khartoum objected immediately.

#### 4.6. The 1931 – 1932 Lines

And so, although, Sudan had initially objected to subsidizing Kenya, having no other better alternative, in the meeting of July, 23<sup>rd</sup> 1931, she accepted to contribute £10,000 for two years plus an initial lump sum payment of £5,500 for roads and infrastructure to and within Elemi triangle (Collins, 2004; Tungo, 2008).

In 1931, when Khartoum started to pay Kenya the subsidy, the District Commissioners of Mongalla and Turkana Districts made the first attempt to define the customary grazing grounds of the Ngiturkana north of the 1914 straight line albeit informally. This line was marked in red on existing maps and represented the northern extent of the customary grazing grounds of the Ngiturkana and therefore the authority of Kenya. A few months later, in 1932, this line, also called Glenday line [after District Commissioner] from Kenya was adjusted northwards to include more Ngiturkana grazing grounds and waterholes of Adingatom (Kaadingetom) and Loruth a Esekon and was depicted on map in green (Cf. Tungo, op. cit.; Collins, op. cit.).

#### 4.7. The 1938 Wakefield

Pressed by the need to settle the boundary between Kenya and Sudan, in 1938, Sudan and Kenya established a boundary survey team to determine the northern extent of the Ngiturkana grazing grounds under the 1914 order in council. This survey was also important as Sudan was considering to cede some parts of eastern Elemi to Abyssinia in exchange for the Baro salient in order to have all the grazing grounds of the Nuer and Anuak tribes on Sudan side. Faced with the need to discard the triangle, Sudan prepared strong grounds to prevent objection by Egypt to ceding Sudan territory without an acceptable *quid pro quo* compensation from Kenya. Sudan's position was that the Ngiturkana, have had prescriptive rights in the triangle from time immemorial, that is, before colonization, and that the Glenday (red line) had been the *de facto* administrative boundary since before the time when the boundary was defined, despite the fact that it did not appear in any published maps<sup>4</sup>. Furthermore, Sudan argued that, a *quid pro quo* compensation from Kenya was unreasonable since it regarded the triangle as an economic liability and that the transfer would take place when the triangle ceased to be part of Sudan after it is exchanged for the Baro salient of Italy.

<sup>3</sup> See Mburu (2001) (KNA: DC/ISO/2/5/5)

<sup>4</sup> See (Tungo, 2008 footnotes) C.O.822/89/9/ dispatch no. 43,93.H.1, dated March 30<sup>th</sup>, to the British Ambassador to Cairo

On May 2<sup>nd</sup>, 1938, the Foreign Office in London granted authority to Sudan and Kenya governments to form a Joint Commission to survey and demarcate the red line and have all the customary grazing grounds of the Ngiturkana on the Kenyan side. The commission consisted of Captain G. R. King, District Commissioner, Kopoeta, Captain R. C. Whalley, Expert Advisor, and Mr. Wakefield, Inspector of survey, representing Sudan Government, from Kenya side there was Mr. C. B. Thompson, P. C. Turkana district, Lt. Commander D. Makay, District Commissioner, Lodwar, Captain Kean, Lokitaung and Lt. St. L. Morris, Military Representative (Cf. Tungo, op. cit.)<sup>5</sup>. In June when survey exercise began Ngiturkana cattle camps were confined around the mountains which offered them natural fortresses from the Nginyangatom and Ngimarileforays; as such, the commission left the northern pastures of the Ngiturkana north of Mt. Lokwanamoru and Lorienotom. On the 3<sup>rd</sup> June 1938, representatives of Kenya colony and the Anglo-Egyptian Sudan assembled at Lokitaung in Turkana district to determine Kenya –Sudan boundary between the two points fixed in 1914. On 5<sup>th</sup> June the commission began to mark the line described on paper on the ground and fixed the following points between the 1914 line reference points:

- Point 1: the Kenya – Anglo-Egyptian Boundary Point at the Kilima Cha Habash (Makonnen Cherosh) or interjunction of Lomeyan River and the northernmost point of Mt. Mogila, Latitude 4°35' N., longitude 34°25' E, thence following a straight line to:-
- Point 2: The northernmost peak of Ngole (Amora Gadel), Latitude 4° 46' N, Longitude 34° 40' E, thence in a straight line to:-
- Point 3: A cairn on the peak of Karach hill, latitude 4° 55' N, Longitude 35° 05' E, thence on a straight line to:-
- Point 4: A cairn on the most northern and rounded top of Lokwanya latitude 4° 59' N, Longitude 35° 15' E, thence following a straight line to:-
- Point 5: A cairn on the highest point of Nataaba (Kaps rocks)
- Point 10: from Kalukakeris thence by a series of small cairns and natural objects to:-
- Point 11: N. (04. 54.10), (E 35. 23.00), a line 1 ½ miles north of Lokulan waterhole to:-
- Point 12: A cairn on Kongoma hill (N 04.56.00), (E 35. 28.20)
- Point 16: A distinctive and blared brown olive tree in the midst of the forest. The top of the tree is green, the lower branches having died. The place is called Abwangai, and in the prominent spur about a mile north northeast of Nawakaiye (Lorionotom South, Latitude 4° 48' N, longitude 35° 31' E. thence following a straight line to:-
- Point 17: A lone tree marked with stones at its base on bluff on the eastern escarpment in the Lokoukwa (Kokuruka) grazing area latitude 4° 46' N, longitude 5° 31' E, thence following a straight line to:-
- Point 18: A cairn on the top of the Kamanang (Kangamanang) – *conical hill* which leaves the high south east bluff of the Lorionotom range within Kenya, latitude 4° 57' N, longitude 35° 36' E, thence following a straight line to:-
- Point 19: A cairn on the most northerly of two 20 feet mounds which are 50 m. apart. And about 150 metres to the west of the left bank of the Lomogol river, and about one mile south of its junction with the Kakelae River, latitude 4° 35' N, longitude 35° 42' E, thence following the thalweg of Lomogol River to:-
- Point 20: A point on the river due north of the fixed point defined in the order of April 21, 1914, as the northernmost crest to meet the 1914 line at that point which shall be known as point 21.

#### 4.8. The 1944/1947 Line

As the Ngiturkana were militarily weak because of continuous disarmaments and punitive expeditions conducted by the British against them, in July 1939, Nginyangatom and Ngimarile conducted a deadly raid north of the 1938 red line that left 250 Ngiturkana dead (Mburu, 2003). In 1944 again the Ngimarile raided the Ngiturkana killing many of them and took a large number of their animals (Collins, 2004), as such, Kenya Defense Force (Kenya Colony) unilaterally established the 1944 blue line as the customary grazing grounds of the Ngiturkana without any protest from Sudan government. This new boundary functioned very well, and in 1947, Kenya made a proposal to the Foreign Office in London to have the 1944 line recognized, and Sudan accepted this as a fair representation of the northern extent of the grazing grounds of Ngiturkana, and boundary between the Ngiturkana, Ngitoposa and Nginyangatom tribes<sup>6</sup>.

#### 4.9. The 1950 Sudan Defense Force Patrol Line

In 1950, Sudan Defense Force on their own volition, most likely in recognition of the northern extent of the customary grazing grounds of the Ngiturkana, established, as the northernmost limit of the Ngiturkana, and the Southeastern-most limit of the Ngitoposa, and their effective administrative boundary, the '1950 patrol line – also called the yellow line'. As the Turkana grazing fields had not been accurately ascertained, this line, although not described directly in any boundary treaty appellations between the two countries was, by the conduct of states, accepted as a fair approximation of the northern extent of the Turkana grazing fields and the southern-most extent of the Ngitoposa, and by dint of that, represented the alternative boundary provided for under the 1914 order in council. By the words of Fredrik Barth, (1999) a boundary is 'officially sanctioned natural or artificial lines that divide territories on the ground and set limits that mark social groups off from each other.

<sup>5</sup>See Tungo (2008 footnotes) C.O.822/89/9, telegram no. 4 dated May 24<sup>th</sup>, 1938, Governor General to the British Ambassador to Cairo.

Egypt, Sudan Government's Civil Secretary described the commission's duties as to 'delimit an administrative Boundary which will define for Kenya the traditional Turkana grazing grounds'. N.R.O/Dahlia file no. 132/2543

<sup>6</sup>See Southern Sudan Boundaries: Background Paper: (FO 371/63137, no. 6300, reproduced as document 143 in Johnson 1998, part I: 291).

## 5. Discussion

Territorial and boundary disputes are mostly decided on the basis of facts. In this regard, it is quintessential to state the facts of the dispute before examining the justifications founded in law that support claimants' cases. Before we get there, it is prudent to appreciate the difference between boundary dispute and territorial claim. Boundary disputes are primarily concerned with either written or verbal or geographic uncertainties, while territorial disputes involve relatively large areas of land and claims to title. Kenya's case is about a territory containing the customary grazing grounds of the Ngiturkana, while South Sudan's case is the legality of a boundary line created by the 1914 order in council, which also provided for the customary grazing territory of the Ngiturkana people. South Sudan claims that the 1914 treaty straight line is the recognized international border between Kenya and South Sudan based on the fact that Sudan government,

- Paid Kenya to administer the triangle
- Granted grazing concessions to British officials in Turkana district to allow the Ngiturkana to graze their livestock in the Eleme triangle,
- Granted magisterial powers to Kenya to prosecute criminals arrested within Eleme triangle,
- And that, at the time of Sudan independence, Sudan inherited the 1914 straight line and not the other lines.

On the other hand, Kenya's claim is that the alternative boundary given by the 1914 boundary treaty, which accommodates the customary grazing grounds of the Ngiturkana coincides with the 1950 Sudan Defense Force patrol and administrative boundary. This claim is based on the following:

- The doctrine of *Uti possidetis Juris* (Colonial administrative boundaries inherited at independence)
- Acquisition by acquiescence or tacit agreement
- Historical claim (first possession)
- Doctrine of effectivités (effective control/administration)

From the wording of the 1914 boundary treaty, it is common sense that the straight line claimed by Sudan was only but provisional since finality and stability of the boundary depended on ascertainment of the northern extent of the Ngiturkana customary grazing grounds. However, as pronounced by Estonian courts in *Ditmar and Linde v. Ministry of Agriculture case*, 'Provisional boundary' between adjacent states, has the legal status of an 'International Boundary', as long as the contemplated rectifications/adjustments envisioned in the boundary agreements that created it have not been carried out in accordance with the provisions therein. As such, for all legal purposes, the provisional straight line created by the 1914 order in council served as the Kenya - Sudan international boundary. This meant that, pending boundary adjustments contemplated in the 1914 boundary agreement, whenever Ngiturkana moved to access their customary grazing grounds situated north of the 1914 straight line, the British administrators in Turkana and Mongalla districts had to sign an administrative agreement without their knowledge to regularize their grazing and presence north of the straight line. Be that as it may, permissions to graze north of the straight line did not in any way extinguish the rights of the Ngiturkana to their ancestral grasslands, or invalidate the 1914 treaty provision that stipulated that once ascertained the customary grazing grounds of the Turkana are within Uganda.

Although described on paper, the 1914 straight line was never administered. Take note that when Kenya began administration of the area in 1928, it went for the northern limits of the customary grazing grounds of the Ngiturkana - who at the time, were north of the straight line. Acting together, the Kenya colony and Anglo-Egyptian Sudan, established the Glenday line in 1929 as the administrative/provisional boundary thus rendering the 1914 straight line superfluous. Kenya and Sudan respected this line. Take note that, by the time the line was adjusted northwards in 1931 to capture more grazing grounds of the Turkana, no Sudanese tribe had crossed south of it, except the Ngiturkana who moved to and fro to access their traditional seasonal pastures and waterholes in the north. The 1931 line was rendered superfluous by yet another line drawn in 1932 line to take in more grazing fields and waterholes of the Ngiturkana, which still lay in the north. This line served as the frontier between Kenya and Sudan until 1938 when Sudan and Kenya delimited the redline as the provisional administrative boundary between them. Again, as the line in use, the 1938 line rendered the previous lines superfluous. As the customary grazing grounds of the Turkana had not been accurately captured by the 1938 redline, the Foreign Office established the blue line in 1944 as a fair estimation of the northern limit of the Turkana. In 1947, Sudan and Kenya accepted this as a fair boundary between the tribes under them. This action rendered the 1938 line superfluous, as no movement of people and livestock was ever regulated across it. When the Sudan Defense Force drew the 1950 administrative and patrol line, both Kenya and Sudan respected it as the frontier between them again rendering the 1944 line (confirmed in 1947) irrelevant.

### 5.1. Kenya's Justifications to Eleme Triangle Territorial Claim

There is no single basis for a territorial claim in boundary disputes. In the current discussion, while South Sudan claim is based on the 1914 treaty, and the grazing and local administrative concessions that allowed Kenya to administer the area, Kenya's case is based on a number of justifications to territorial claim, namely, treaties, history, cultural homogeneity, geography, economy, effective control, and *Uti Possidetis Juris*. As stated earlier on, South Sudan does not have competing claims on the economic, geographic, cultural homogeneity, and historical significance of the triangle to her citizens since she does not have a resident population in the triangle, unlike Kenya which has a resident population - the Ngiturkana in the triangle, who have inhabited it from time immemorial. As such, this section will deal with justifications advanced by each side on competing claims only.

### 5.1.1. Kenya – Sudan Succession to the 1914 Boundary

According to Tungo (2008), Kenya succeeded to the 1914 straight line by virtue of the 1926 Kenya Colony and Protectorate (boundaries) order in council which transferred Rudolf province of Uganda to Kenya. According to him, the 1926 treaty mentioned nothing about the Ngiturkana grazing grounds and thus the relevant boundary line in the territory transferred was the 1914 treaty straight line. However, as per the wording of the 1926 boundary treaty, there was no mention of the straight line as well, the order only described the western part of the province upto where it joins the Anglo-Egyptian Sudan boundary, which boundary is defined by the 1914 order in council in terms of alternatives – the straight line and the line that would leave to Uganda the grazing grounds of the Ngiturkana, so by reference to Anglo-Egyptian boundary, the 1926 treaty mentioned the Ngiturkana grazing grounds albeit implicitly.

At this point, what needs to be determined is whether the 1914 boundary treaty was dispositive or not and whether Kenya succeeded to the straight line or the alternative boundary that would leave to Uganda the customary grazing grounds of the Ngiturkana. Under international law, a boundary treaty is distinguished as 'Personal' or 'real' (dispositive). 'Personal' treaties are described as contracts that can only remain in force through the continued existence of the contracting parties (treaties of extradition, treaties of commerce, treaties on the reciprocal enforcement of foreign judgments, alliance treaties, etc.). On the other hand, 'dispositive' treaties consist of treaties whose legal effect is to impress on a territory a status which is intended to be permanent and independent of the identity of the State exercising sovereignty (Jahromi, 1996). Thus, the rights created for third States by 'dispositive' treaties are not affected by a succession of States and so dispositive treaties are treated as being valid *erga omnes*, in the sense that, firstly, the rights or obligations created by this kind of treaties were of permanent nature and opposable against all States and, secondly, a succession of States would not alter the rights and obligations which exist for parties or third States in relation to the territory affected by a 'dispositive' treaty (Emanuelli, 2003). Treaties that provide for the neutralization or demilitarization of a region, or treaties which accord a right of way over territory or right of navigation on national waterways to a neighboring State or States or to all States are examples of dispositive treaties. Dispositive treaties attach to a territory so that if the territory is transferred from one State to another, they are transmitted to the Successor State.

Principally, existence of a prior boundary treaty or other documentation reflecting interstate agreement as to boundaries (or provisions for their delimitation) is generally dispositive for the court, and this rule often holds even when an agreement is unclear or incomplete. In cases when state consent is evident, the court has started and ended its legal analysis with the agreement (Sumner, 2004). In short, the 1914 boundary treaty delimiting the boundary of Uganda and Sudan is dispositive; as such, upon cession of Rudolf province to Kenya the prior rights vested in Uganda devolved *ipso jure* to Kenya, and in further support of this submission, according to the principle of *res transit cum suo onere*, rights and duties deriving from treaties relating to boundary lines not only remain valid, but also devolve *ipso jure* upon the Successor state (Ngatia, op. cit.). As such, Kenya succeeded to the alternative boundary provided in the 1914 treaty.

Therefore, under the 1914 treaty, Kenya and Anglo-Egyptian Sudan had the obligation to establish the northern extent of the customary grazing grounds of the Ngiturkana as their international boundary when close administration was established in the region. Furthermore, as pronounced by Permanent Court of International Justice (PCIJ), in interpretation of Article 3, paragraph 2, of treaty of Lausanne, it is natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provision in their entirety should be the establishment of a precise, complete and definitive frontier. So upon cession and transfer of the Rudolf province of Northern Uganda to Kenya, the obligation of establishing the customary grazing grounds automatically fell on the successor state (Kenya colony) and Anglo-Egyptian Sudan, and later between South Sudan and Kenya.

### 5.1.2. Acquisition by Acquiescence or Tacit Boundary Agreement or is it Prescriptive Acquisition or Estoppel by Acquiescence?

The principle of acquisition by acquiescence states that silence of a state over violation of its territorial integrity by another state is assumed consent for occupation and conferment of ownership of the territory to the state occupying it. Kenya's position is that, she has had an uncontested administration and sovereignty over all the boundary lines from 1926 to date, and that Sudan's inactivity in the exercise of sovereignty and failure to protest against her [Kenya's] display of sovereignty, east of the 1950 Sudan Defense Force patrol line, is not just conferment of ownership of territory to Kenya, but indeed a confirmation that Sudan had conceded the claim that the territory in dispute contained the customary grazing grounds of the Ngiturkana and therefore Kenya's. As the Ngitoposa had never settled southeast of the triangle, and based on their seasonal pastures, Sudan decided to establish the 1950 patrol line as an administrative boundary to secure their traditional grazing fields, protect them against the Ngiturkana, and mark the extent of their authority. In this regard, the argument which Sudan is likely to advance to support her case, were she to rely on the court ruling in the Island of Palmas case as argued by (Tungo, 2008), that 'she is not bound to establish a system of administration in the region considering that the area is sparsely populated and the migratory habits of the inhabitants do not require fixed administration units, and sovereignty needs not be exercised at every moment on every point of a territory', will not suffice in law.

Both the Ngitoposa and Ngiturkana pastoralists lead a transhumant mode of life, and have, by nature of their livelihood, established traditional seasonal corridors for their livestock. The fact that the Ngiturkana live in Elemi while the Ngitoposa do not is clear evidence that the Ngitoposa have their pasturelands elsewhere and whenever they attempt to cross the 1950 patrol line to access Elemi pastures are raided, or find no pastures as the Ngiturkana cattle camps which normally get there earlier than them [Ngitoposa] each wet season would have exhausted all the pastures by then and retreated back to their customary dry season pastures and waterholes around the mountains.

In view of the foregoing, the fixing of the 1950 patrol line by Sudan as the southeastern limit of the Ngitoposa pastoralists, it is submitted, was informed by the fact that, they [Ngitoposa] never went beyond the patrol line and whenever they did, Ngiturkana raided and expelled them, and so were only safe west of the patrol line. On the other hand, Kenya had no interest in expanding her territory; her involvement in the boundary demarcation was to effectively control the Ngiturkana who were, first, subjects of the British imperialism, and secondly, had been labeled as troublesome and needed close administration in a territory that is purely Kenyan. Kenya's territorial ambitions with regards to Elemi triangle is a non-issue since both countries were British colonies and protectorates, and the territory under reference was regarded as unproductive and worthless to the British. James Barber (2006) has remarked on this point as follows:

*The British side – which eventually involved three separate colonial administrations (Uganda, Sudan, and British East Africa, now Kenya) – became involved in an internal debate. One viewpoint was that, other than denying this harsh and arid region to imperial rivals, it should be left alone. The other side favored 'hands on' administration with the aim of developing the area. The debate persisted and was unresolved at the end of British rule in the early 1960s'.*

From the body language of the two countries, none of them wanted to spend on the administration of the triangle. Sudan considered it an economic liability and so was always eager to discard it by exchanging for Ethiopia's Baro salient. Kenya on her part wanted Sudan to take responsibility of administering the triangle and possibly help in pushing the Turkana kraals south of the straight line until such a time when their customary grazing grounds are accurately ascertained, and have them properly controlled.

From the wording of the 1914 order in council, it was clear that once ascertained the customary grazing grounds of the Ngiturkana are within Uganda's Rudolf province (later ceded to Kenya), as such, in 1926 when the Rudolf province of northern Uganda was transferred to Kenya, it traveled with the unknown northern extent of the Ngiturkana customary grazing fields. In 1928 when Kenya colony set up a military post in Lokitaung, she began administration of the Ngiturkana north of the straight line where the cattle camps were, with the understanding that, the straight line only served as 'provisional boundary' between Sudan and Kenya, and that the actual boundary between the two countries coincided with the northern limit of the customary grazing grounds of the Ngiturkana.

In 1931 Sudan started to subsidize Kenya for administration of the customary grazing grounds of the Ngiturkana people north of the 1914 straight line; interestingly, she abandoned the commitment without notice and in 1950 established her own administrative boundary and stopped patrols east of the patrol line. Kenya interpreted this as realization by Sudan that she was spending on protection of the Ngiturkana (Kenyans) in a territory which was an economic liability to Sudan and proved to contain the customary grazing grounds of the Ngiturkana conceived in the alternative boundary of 1914 order in council. Well knowing that the Ngitoposa never crossed the six boundary lines, namely, the 1914, 1931, 1932, 1938, 1944 and the 1950 Sudan patrol line, overwhelmed by the Sudan's disinterest in the triangle, in 1950, Kenya began to openly carry out sovereign acts east of the triangle peacefully and without any protest or action from Sudan government. Infrastructural developments were undertaken in all the permanent settlements – *ngirerea* along Kaikor – Kibish road, namely, Lobulono, Napak, Koyasa, Lokamarinyang, Natodomeri, and along Lokitaung – Kibish road, namely, Kibish, Liwan, Napeikar, and Kokuro. All the rangelands west of Mt. Lokwanamoru and Mt. Lorionotom to the Patrol line were reserved as wet season corridors. Police posts were the first to be built in Kokuro, Kibish, Liwan, Todonyang, Lokamarinyang, Koyasa and Kaemothia, followed by mechanized handpumps, protection of watersprings, and establishment and gazetting of schools, hospitals, political and administrative units for settled populations.

As a pastoral and transhumant society, guided by the availability of pasture and waterholes for their livestock and people, development is restricted in the grazing areas. Although water is essential for people and livestock, sinking of boreholes is not entertained along transhumant corridors, as this is considered dangerous, and has the potential of encouraging permanent settlements around the dry season water points therefore disrupting the grazing cycle. Administratively, the triangle covers the whole of Kibish Sub-county (Kibish ward, parts of Kaikor/Kaaleng) and parts of Lapur ward of Turkana North sub-county, and Nanam, Songot, and Lokichoggio wards of Turkana west sub-county. Politically, it stands astride Turkana North and Turkana West Constituencies. Under the national government, it is administered by the Sub-county/Assistant County commissioners for Kibish and Turkana West Districts.

In the *Minquiers and Ecrehos* case, the court attached probative value to acts which relate to exercise of jurisdiction, local administration and legislation (Ngatia, 1984). In that case, the court ruled that, what was of decisive importance was not indirect presumptions based on matters in the Middle Ages, but direct evidence of possession and the actual exercise of sovereignty. After considering this evidence, the Court arrived at the conclusion that the sovereignty over the *Minquiers and Ecrehos* belonged to the United Kingdom.

The notion of a tacit agreement in international law is not entirely clear. Nonetheless, it may be understood as, an agreement whose existence may be inferred from the conduct of the parties involved. In addition to explicit agreements (written agreements), courts recognize agreements formed by conduct or non-explicit verbalized communications (unwritten agreements). The jurisprudence relating to acquiescence and tacit agreement may be of assistance when examining whether there exists an agreement that is not in written form regarding a boundary between two States. To expound on this, in the case between Kenya and Somalia, ICJ recalled that acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent. If the circumstances are such that the conduct of the other State calls for a response, within a reasonable period, the absence of a reaction may amount to acquiescence. This is based on the principle *qui tacet consentire videtur si loqui debuisset ac potuisset*<sup>7</sup>. In determining

<sup>7</sup> See. International Court of Justice ruling delivered on 12<sup>th</sup> October, 2021 on the Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)

whether a State's conduct calls for a response from another State, it is important to consider whether the State has consistently maintained that conduct. In evaluating the absence of a reaction, duration may be a significant factor.

The primary objective of establishing the 1950 Sudan Defense Force Patrol line, it is submitted, was to create a boundary between the Ngiturkana of Kenya and Ngitoposa of Sudan, and therefore the extent of authority of their respective governments. This boundary, from 1950 to date, has worked so well that, the Ngiturkana and Ngitoposa crossing to cause trouble on the other side of the line have always been punished or reprimanded by their respective government for violating the status quo. As from the time the patrol line was established in 1950, Kenya's acts of sovereignty have been to the east of the line while those of Sudan have been to the west of it. Display of sovereign acts by the two governments on their sides of the patrol line accords it the status of an international boundary, and consistent silence by Sudan (and now South Sudan) in the face of what would amount to a violation of her territorial integrity from 1950 to date can be interpreted as acquiescence or tacit agreement, and this precludes her [Sudan/South Sudan] by estoppel from claiming title to the territory, as it is by her conduct (silence over violation of her territory) that Kenya was made to believe Sudan had acquiesced to her [Kenya] sovereign acts in the triangle. Therefore, the 1950 administrative and patrol line represents the northern limit of the customary grazing grounds of the Ngiturkana intended in the 1914 boundary treaty. Furthermore, this is the line which Sudan and Kenya inherited from the United Kingdom on independence in 1955 and 1963 respectively.

In the *Temple of Preah Vihear case*, a line had been drawn upon a map and this was intended to represent the frontier agreed by a delimitation commission under a treaty which had provided that the frontier should follow a watershed. As it happened the line drawn did not follow the watershed. Nevertheless, the International Court upheld the map line on the basis that 'both the Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line'. Thus, considerations of stability militate in favor of the accepted status quo. Furthermore, in the *Beagle Channel case*, the Tribunal noted that 'a limit, a boundary, across which the jurisdictions of the respective bordering States may not pass, implies definitiveness and permanence'. Similarly, the border tribes, viz the Ngiturkana and the Ngitoposa, have respected the 1950 patrol line as the boundary between them, and those wishing to cross it with their livestock have always obtained authority from elders and local administrators. Local/national governments have also respected this line to the extent that unilateral punitive expeditions taken by the respective governments of the Ngitoposa and Ngiturkana on their sides of the 1950 patrol line have always been respected as sovereign acts. For example, in 1988, when a joint force of the Ngitoposa and Nginyangatom raided Lokichoggio and Kibish divisions of Kenya, Kenya conducted a two-pronged military operation involving ground troops and Air-force along the 1950 patrol line up to Mt. Naita, rounded livestock, and expelled the Ngitoposa and Nginyangatom in full sight of the Sudan military without any action or protest from the Sudan government. This incident is remembered by the Turkana as *Ekaru a Ngagiligilia* – the year of Helicopters, the Ngitoposa and Nginyangatom remember it as *Ekaru a Diyo* – the year of D.O. (referring to District Officer)

The *Malaysia v. Singapore case* in relation to the Island of *Pedra Branca*, provides a good example of transformation of non-boundary agreement into title to territory by acquiescence. Although Malaysia had proven that *Pedra Branca* had belonged to the Sultanate of Johor until 1844 and therefore that it had title as its successor, but after assessing whether the British acts in constructing and maintaining a lighthouse on the island over a long period of time supported by other *effectivités* had led to a transfer of title to the UK for its benefit and that of its successor, Singapore, or whether such acts were only the result of the authorization given for the construction by the titleholder, the Sultan of Johor, the Court concluded that:

*'Title had passed from Johor to Singapore, and rooted its conclusion in a diverse set of facts. First, and obviously, there were actions carried out by the UK and Singapore as sovereign, such as investigating maritime risks and shipwrecks in the territorial waters of Pedra Branca, the installation of military equipment on the island in 1977, and a proposed reclamation of 5,000 sq. m. of land in 1978. Second was the British declaration that the island was its own, a declaration made in 1958 legislation specifically claiming that the island belonged to Singapore, then a British colony, which the Court regarded as worth mentioning. Thirdly, there was Malaysia's acquiescence' (Alvarez-Jimenez, 2012).*

Were it to be found that, by virtue of the 1914 vague boundary treaty, Elemi triangle belonged to Sudan, similarly, as in the case of *Malaysia v. Singapore*, title to Elemi triangle will be assumed to have passed from Sudan to Kenya on the grounds of Sudan's acquiescence, and Kenya's display of sovereign acts e.g., (1) maintenance of administrative infrastructure, (2) military installation in Elemi triangle since 1926, (3) enactment of national legislations e.g., the Provinces and Districts Act of Parliament of 1992, and the Constitution of Kenya 2010 which define it [Elemi triangle] as Kenyan territory as shown on official maps of Kenya, and (4) National Policy formulations e.g., District focus for rural development, Arid Lands Resource Management Programs targeting Turkana and other Arid and Semi-Arid districts of Kenya.

### 5.1.3. Effective Control/Administration

This is where a state claims ownership of territory because it has uncontested administration of the land and its resident population. Effective and continuous display of state activity implies concrete acts of appropriation or display of state activity consonant with sovereignty (Ngatia, 1984). In the case of *Island of Palmas*, where Netherlands claimed ownership of the island based on its effective control and occupation against America's *de jure* claim, the arbitrator found that, the Netherlands had exercised sovereign authority over the island for many years and by the time the dispute arose in 1906, the Dutch authority established in the island had reached such a degree of development that the importance of maintaining the state of things as they were ought to be considered as prevailing over claim, possibly based on either

discovery in very distant times and unsupported by occupation or mere geographical position. On these grounds, the arbitrator held that the *island of Palmas (Miangas)* formed in its entirety a part of Netherlands territory.

Similarly, the state of Kenya has uninterrupted sovereign authority in Elemi triangle from 1926 to the present. As citizens of the protectorate and independent Kenya living in the heartland of elemi triangle, Ngiturkana paid hut taxes to the British authorities in Kenya, and have continued to pay taxes to the government of Kenya. They possess moveable and immovable assets among other investments in the area. They have been enumerated and targeted for emergency and development interventions by the Kenyan government, they appear in government's records for census, immunization, livestock treatment and vaccination, emergency relief programs from 1926 to date. As such, this undisputed display of state sovereignty justifies Kenya's claim to the 1950 administrative and patrol line.

#### 5.1.4. Historical Consolidation of Title to Territory

This argument is not isolated from the other modes of acquisition of title under international law, which take into account many other important variables of fact and law. The argument of historical justification to boundary dispute has its roots in the 1815 congress of Vienna which applied the principle of '*restoration of the status quo ante*' in the reinstatement of pre-French Revolution boundaries (Murphy, 1990), meaning that legitimacy rested on historical inheritance. By this, the Congress of Vienna enshrined the notion that the historical possessor of territory had a right to that territory in perpetuity. Historical claims to territory are usually based on historical priority (first possession) or duration (length of possession), they can only get extinguished where rights to territory have been relinquished through a treaty. Claims based on historical priority are most closely related to claims based on historic title because such titles are generally derived from first-in-time claims to land (Brian Taylor Sumner, 2004). The history of the Turkana in the triangle dates back to *ekaru akijuka*, that is 1850, long before the scramble and partition of Africa when the British drew a geometrical line along the 5° of latitude in 1902 (and again in 1914) that bisected the Ngiturkana into two, leaving one half north of the straight line and another half south of it. Were it to be found that the Ngitoposa of South Sudan have a competing historical claim to the triangle, considering the time which the Ngiturkana have lived in the triangle, and owing to the fact that, a claim of historic right is bolstered by the passage of time; it goes without saying that Sudan and later South Sudan did not act to counter the claimant's right, it is deemed to have acquiesced in that right and is estopped from rejecting the title for lack of consent.

#### 5.1.5. The Doctrine of Uti Possidetis Juris

This principle provides that states emerging from colonization shall presumptively inherit the pre-independence administrative boundaries set by the former colonial powers, or colonial administrative borders they held at the time of independence (Ratner, 1996). The principle of *uti possidetis juris* developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new States at the moment of independence and converting existing lines into internationally recognized borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimating functions. It is also closely related to the principle of the stability of boundaries and both draws upon and informs a variety of other principles of international law, ranging from consent and acquiescence to territorial integrity and the prohibition of the use of force against States (Malcolm N. Shaw, 2008). The phrase 'colonial heritage or territorial heritage' is in reference to what the Chamber of the International Court in the *Burkina Faso v. Mali* case has called 'the photograph of the territory' at the critical date of independence<sup>8</sup>. At the time of Sudan independence in 1955, the 1950 patrol line was serving as the frontier between Anglo-Egyptian Sudan and the Colony and protectorate of Kenya, and on the critical date of Kenya's independence in 1963, this was the working frontier which Kenya inherited from the British.

Kenya's claim to the 1938 boundary, for instance can be equated to the boundary dispute between *India and Pakistan, 'the Rann of Kutch case'*. In that case, the court found that a portion of the boundary in the second decade of the 20<sup>th</sup> century had been determined to be the boundary between the state of *Kutch* and *Sind* and had been demarcated as such. The circumstances, the tribunal held, were necessarily such as to preclude Pakistan from claiming that this demarcated boundary be put in issue' for it was 'not open to the tribunal to disturb a boundary settled in this manner by the British administration and accepted and acted upon by it, as well as the state Kutch, for nearly a quarter of a century. Going by this court ruling, it can be inferred that prior to the establishment of the 1944 and 1950 administrative lines, the 1938 line had already attained the status of the international boundary between Kenya and Sudan.

## **6. Conclusions**

Although the customary grazing grounds of the Ngiturkana were to be established within a reasonable time, as per the recommendations of the Kelly-Tufnel survey commission and the 1914 order in council, it took a long time to do so for a number of reasons, namely, (1) reluctance by the colonial masters of Kenya and Sudan, as the area was viewed as useless, (2) Boundary surveyors never had time or gave serious attention required to map out the territory of a nomadic people, who move between wet and dry season pasturelands throughout the year, (3) Anglo-Egyptian condominium rule in Sudan, (4) vague wording of the 1914 agreement, (5) inaccurate interpretation of the law of treaties, etc.

The time taken by the Sudanese exploration commission to map out the customary grazing grounds of the Ngiturkana was short, and the worst part is that it was conducted with secrecy to forestall Ethiopia's speculation on the purpose of demarcation of Elemi which at the time was a subject of discussion in the Anglo-Egyptian - Abyssinia boundary rectification. To determine the grazing areas of a nomadic people requires one or two years to accurately establish the

<sup>8</sup> See ICJ Reports, 1986, pp. 554, 568.

location of cattle camps during dry and wet seasons in normal years, bad years, and at the time of drought. In normal years, the wet season begins in March (*Lomaruk* – derived from *Akimaruk*, that is, formation of rain clouds) to August (*Lotiak* – derived from *Akitiak* – to divide/separate). *Lotiak*, is the month that separates the seasons, it marks the end of the wet season and the beginning of the dry season. Furthermore, the fact that Ngiturkana were not involved in boundary surveys and were always on the run is evidence that, the surveyors based the lines on their own imaginations and inaccurate estimations of the Ngiturkana grazing grounds, and not on the actual northern extent of the Ngiturkana customary grazing grounds.

At the time of Leeke's memorandum, that is August 2014, some of the Ngiturkana cattle camps were around Lorionotom and Lokwanamor mountains for dry season pastures and waterholes as per their seasonal grazing calendar. To an outsider like Leeke, the presence of the Ngiturkana cattle camps in the vicinity of the two mountains may have created the impression that the northern limit of the Ngiturkana grazing fields was within the Mountains, which is a misperception. Tungo (2008) dived into some specific lines of Leeke's memorandum and used them to insinuate that his observations had confirmed and vindicated the general suitability of the provisional boundary between Uganda and Sudan shown as a straight line. Regrettably, he avoided mentioning Leeke's submission in the same memorandum that:

*'his knowledge was 'still very vague, and in this case depends on native reports and information from such porters who have traveled in those areas, conceding that the hearsay evidence he had transmitted could not be regarded as accurate as native information is very vague and untrustworthy and all existing maps are hopelessly inaccurate' (Ngatia, 1984).*

In the same memorandum, Leeke, as most outsiders have done in the past, viewed the northward movement of the Ngiturkana cattle camps as intrusion and belligerence against the *Nginyangatom* rather than a routine migration of a nomadic people to their traditional wet season grasslands and waterholes found between the mountains, and west and south of Nakuwa River. Access of borderland pastures at the beginning of wet season, coupled with intermittent raids against Ngitoposa, Ngikoroma, Nginyangatom and Ngimarile is a traditional security and resource management strategy which the Ngikwatela employ to create a buffer zone along the stretch connecting Mt. Mogila and Mt. Naita, and the area south of Nakuwa River to Mt. Kuras, and Todonyang, making the whole of Elemi triangle out of bounds for other groups, to be accessed only at the time of peace, or when the Ngiturkana have migrated to access Lotikipi or other rangelands.

The establishment of a boundary proceeds upon the basis of the consent of the relevant States, for, as the International Court noted, 'the fixing of a frontier depends on the will of the sovereign States directly concerned'. It also follows that such States are free to determine for themselves how this operation may be conducted. The most logical and the easiest method is usually for the States themselves to reach agreement enshrined in a treaty describing the relevant boundary line. This may be done either by re-confirming an existing boundary line or by deciding to recognize a particular line whatever its previous status as a boundary line. As the Arbitration Tribunal in the *Guinea-Bissau v. Senegal* case noted, 'in all cases, the purpose of the relevant [delimitation] treaties is the same: to determine in a stable and permanent manner the area of validity in space of the legal norms of States'.

In the matter of Kenya – South Sudan boundary dispute, it is of essence to mention that adjustment of the section of the boundary of Kenya and South Sudan, between Mt. Mogila and Sanderson gulf, was contemplated in the 1914 treaty which provided that once ascertained the customary grazing grounds of the Ngiturkana were to be recognized as within Uganda. This contemplation manifested in the conduct of states seen in their effort to rectify the boundary and have the customary grounds of the Ngiturkana in Kenya.

Furthermore, it is common sense that when an alternative provision is given in a treaty or agreement, it means the first provision is contemplated to be inadequate for the intended purpose, and that, should it be the case, then the second alternative conceived to cover the inadequacy of the first provision is given its intended effect, thus rendering the first provision superfluous. In addition to that, when a boundary is described in terms of alternatives, where the first alternative is restrictive and the second is liberal, as per practice of international law, the more liberal option is normally preferred. Sudan's insistence on the straight line as international boundary without regard to the customary grazing grounds of the Ngiturkana is ill-advised. In *Nielson and Jonson case*, the supreme court of the United States held that, when a treaty of provision fairly admits of two constructions, one restricting and the other enlarging rights that may be claimed under it, the more liberal interpretation is to be preferred. Applying this legal precedent to the boundary provisions given by the 1914 treaty, which gave two boundary lines, the first one restricting the rights of the Ngiturkana to a straight line, and the second one extending them to the unknown limits of the customary grazing grounds of the Ngiturkana, the second alternative which accommodates the customary grazing grounds of the Ngiturkana is to be preferred over the restrictive option (Cf. Ngatia, 1984).

Furthermore, as it stands now, unless otherwise proved to the contrary, Elemi triangle was not part of the Anglo-Egyptian agreement of 1899 that defined the Sudan territory, and the method of enlarging it; consequently, concurrence of Egypt on the Kitgum agreement of 1924, which transferred Elemi triangle to Uganda's Rudolf Province (later transferred to Kenya) was unnecessary; thus, Elemi triangle is part of Kenyan territory as per the Kitgum agreement, and the 1914 and 1926 'dispositive' boundary treaties.

Furthermore, from the history of Ateker groups, Ngiturkana were already resident in Elemi triangle prior to the establishment of Anglo-Egyptian rule in Sudan and Uganda British protectorate. Therefore, Ngiturkana customary grazing grounds cannot be regarded as *terra nullius* capable of acquisition by either administration. Even if, the triangle were to be imagined or considered a territory which had been acquired and occupied by the Sudan by virtue of the 1914 straight line, the rights of the indigenous people (Ngiturkana) to the land and resources therein stand protected and remain theirs in perpetuity.

Furthermore, the Anglo-Egyptian treaty of 1899 that defined the territory comprising Anglo-Egyptian Sudan, defined the northern part only and not the southern part. Admitting that there was no urgency in establishing the southern boundary of Sudan, Lord Cromer, the British Agent and Consul-General in Cairo, as quoted by (Taha op. cit.), stated that, 'the boundary between the Sudan provinces and Uganda remains undefined but relations with the Nile provinces of the Protectorate are still so comparatively undeveloped that the settlement of the question does not press'. This confirmation unequivocally supports the argument that Anglo-Egyptian agreement of 19<sup>th</sup> January 1899, did not define the boundary between Sudan and Uganda. For administrative convenience, Lord Cromer fixed Gondokoro as the advance post of Uganda and Mongalla as the most southerly station of the Sudan Government. This implies that, the whole area south of the Mongalla and the area north of the 5<sup>th</sup> degree of latitude, which includes 'Elemi triangle', was not part of the Anglo-Egyptian Sudan. According to Ngatia (1984) 'the eastern Elemi (and to a large extent the whole of Elemi triangle) was not within the 1899 Anglo-Egyptian agreement which defined the territory comprising Sudan, and that the area could not be fairly regarded as within the territory of Uganda (later ceded to Kenya) since the territory of Uganda, extended to the unknown limits of the Turkana grazing grounds' which lie north of the 5<sup>th</sup> degree of latitude, and certainly south of the 1899 Anglo-Egyptian boundary, which by the time of the 1914 order in council, was not yet defined.

Article I of the Anglo-Egyptian agreement of 19<sup>th</sup> January 1899, states that 'The word 'Sudan' in this Agreement means all the territories south of the 22<sup>nd</sup> parallel of latitude, which:

- Have never been evacuated by Egyptian troops since the year 1882; or
- Which, having before the late rebellion in the Sudan been administered by the Government of His Highness the Khedive, were temporarily lost to Egypt, and have been reconquered by Her Britannic Majesty's Government and the Egyptian government acting in concert; or
- Which may hereafter be reconquered by the two Governments acting in concert<sup>9</sup>.

The southern frontier of Sudan being outside the territories defined in Article I (a) and (b) was to be acquired by the means provided for in part (c), which is, be reconquered by the two governments acting in concert.

The only amendment to Anglo-Egyptian agreement of 19<sup>th</sup> January 1899, as far as it can be recollected, is the 'Suakin Amendment' between her Britannic Majesty's government and the government of the Khedive of Egypt, relative to the inclusion of Suakin in the agreement of January 19<sup>th</sup>, 1899 [signed at Cairo, July 10, 1899]. The fixing of the southern frontier outside the grounds provided under Article I (c) contravened international law of treaties, specifically, Anglo-Egyptian agreement of 1899 that defined the method of enlarging the territory of Sudan.

Furthermore, the Kitgum agreement of 1924 that considered the unknown extent of the Ngiturkana customary grounds north of the 1914 straight line as within Uganda is a case of a treaty that was never entered into enforce. The argument being that the customary grounds of the Ngiturkana were never within the territory of Sudan defined by the Anglo-Egyptian agreement of 19<sup>th</sup> January, 1899, thus did not warrant the Egyptian government's concurrence to enter into enforce. In the case of *Cameroon v. Nigeria*, regarding the 1975 *Maroua* declaration, on controversy over the existence of an international boundary agreement based on a claim that the agreement was signed but not ratified to enter into force, the court stated that there could be international agreements that came into existence upon signature, and after examining the text of the declaration, it declared that the declaration had entered into force upon its signature (Alvarez-Jimenez, 2012). Similarly, since the Kitgum agreement of 1924 had been signed by parties to it who attended the Kitgum conference, viz, Kenya, Uganda, and Sudan, (all of which are capable of entering into an agreement) ratification by Egypt, which was in the first place a non-party was unnecessary.

Furthermore, the ideology of a people's right to territory is analogous to individual property rights within the Western legal tradition. Under property law concepts, a chattel that once belonged to an individual cannot be taken away against that individual's will, and if it is taken away, the individual is entitled to restitution, either through return of the chattel or through compensation. By extension of this line of logic, which is deeply embedded in the intellectual tradition out of which international law arose, if territory was controlled by a state at any time but that control was subsequently and involuntarily lost, an argument can be made that the state is entitled to restitution. Similarly, the Ngiturkana customary grazing grounds of Elemi triangle, were not *terra nullius* when the astronomical line proposed by the governor of Uganda in January 1900 left them north of the 5<sup>th</sup> degree of latitude, which was later on adopted by Sudan illegally as her southern boundary, in contravention of the 1899 Anglo-Egyptian treaty. On this basis, South Sudan has no grounds to claim Elemi, but to renounce its claim and recognize the territory as Turkan and therefore part of Kenya.

The history of the Turkana in Elemi triangle is a reality consistently acknowledged by the British officials, and it is for that very reason that delineation of the northern customary grazing grounds of the Ngiturkana was a constant factor in delimiting the Kenya-Sudan boundary. The recommendations by Kelly-Tufnell boundary survey commission that considered the customary grazing grounds of the Ngiturkana, and the need to provide in the 1914 boundary treaty that, once ascertained, the Ngiturkana customary grazing grounds were within Uganda, was an acknowledgement that, the Ngiturkana customary grazing grounds were not *terrae nullius* capable of occupation by either country (Ngatia, 1984).

In the case of *western Sahara*, where the General Assembly of the United Nations had requested an advisory opinion on whether or not Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain was a territory belonging to no one - *terra nullius*, and the status of legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity. The court, was unanimously of opinion that Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no one - *terra nullius*, and that although there were

<sup>9</sup>Great Britain. Foreign Office. Historical Section. (1920) *Anglo-Egyptian Sudan*. London, H.M. Stationery off. [Pdf] Retrieved from the Library of Congress, <https://www.loc.gov/item/a22000955/>.

legal ties between it and the Kingdom of Morocco, and with the Mauritanian entity, the materials and information presented to the Court showed the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. Secondly, they equally showed the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion was that the materials and information presented to it did not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court did not find legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free will of the people of the territory.

One would ask, is it 'Cession' of Sudan territory to Kenya or Rectification of the Kenya-Sudan boundary under the 1914 order in council? As per the 1914 order in council, the boundary between Kenya and Sudan had not been fixed due to the unknown limits of the customary grazing grounds of the Ngiturkana which the order contemplated to coincide with the Kenya – Sudan border. The 1914 order in council actually gave two suggestions, one was that, should the Ngiturkana grazing grounds prove to be south of the 5<sup>th</sup> degree of latitude, then the straight line was to be the boundary, and should they extend north of the straight line, then the boundary was to follow the northern extent of those grazing grounds. As the Ngiturkana grazing grounds proved to be north of the straight line, the boundary adjustments north of the 1914 straight line, in compliance with the 1914 treaty, did not in any way amount to cession of Sudan's territory to Kenya. Even though this was the case, there was some sort of confusion or innocent use of the word 'cession' by the British administrators in their correspondences in reference to the ascertainment of the Ngiturkana grazing grounds that extended north of the straight line. At some point, this generated the fear that Egypt, a partner in the Anglo-Egyptian Sudan rule might see these boundary adjustments to accommodate the Ngiturkana grazing grounds in Kenya as 'cession' of a Sudanese territory without a *quid pro quo* compensation. This fear generally compelled the British to make clarifications about the legal status of Elemi triangle *vis-a-vis* the customary grazing grounds of the Ngiturkana envisioned in the 1914 order in council. During the discussion to demarcate the red line as the northern limit of the Ngiturkana grazing grounds, both Kenya and Sudan clarified that recognition of the Ngiturkana grazing grounds (Elemi triangle) as part of Kenya in compliance with 1914 treaty is not 'cession' of Sudan territory to Kenya. The 1914 order did not contemplate cession of Sudanese territory to Kenya, but demarcation of a line which would leave to Uganda the customary grazing grounds of the Ngiturkana as the *de jure* boundary between Kenya and Sudan.

In international law, as put by Ngatia (1984), the manner in which international agreements come into operation is governed by intention and consent of the parties; provided they have the capacity to enter into the agreement and the proper organ exercised the power, and that, an agreement entered in this manner comes into effect notwithstanding that it is not referred by any appellations in use, such as the treaty and conventions. As to whether Kenya and Sudan had common intention to fix the border between them, for the avoidance of doubt, hereunder are some excerpts from the correspondences between the two states and Foreign Office in United Kingdom, that show their common interest to have (not cede) all the customary grazing grounds of the Ngiturkana in Kenya under the 1914 order in council.

#### 6.1. Intentions to Rectify the Boundary and Have Elemi Triangle in Kenya

- The Governor of Sudan in a dispatch (F.O. 371/22017) stated that:  
*'whereas in theory Sudan has only allowed Kenya tribes to graze upto the red line in years of drought, it is our joint interest now to recognize this, and I suggest that a pretty strong case could be put that tribes now under Kenya have had prescriptive rights in the area from time immemorial and the Glenday line has been the de facto administrative boundary since 1929'*<sup>10</sup>.  
In a display of open disinterest in the triangle, he added that: *"Sudan had never administered the area and it was immaterial whether the southern part of this area goes to Kenya or Italy in exchange for the Baro salient"*.
- In a memorandum prepared by Sudan and concurred by Egypt dated 6<sup>th</sup> May 1931, it was admitted that 'Sudan would 'cede' this area to Kenya as (successor in title to Uganda) when the precise grazing grounds of the Turkana had been ascertained<sup>11</sup> and this being the case, Mr. Paskin of colonial office stated that there was no occasion for Kenya to attempt to find some *quid pro quo* in the 'cession'.
- In clarifying the proposed rectification of the boundary between Kenya and Sudan, the colonial office in two separate communications to the Foreign Office in United Kingdom stated as follows, 'it was the definite intention of His Majesty's government and of the Government of Sudan in 1914, that this boundary should be adjusted on the lines now proposed when the limits of the Turkana grazing grounds on the Sudan side [of the straight line] were more accurately known. In other words the adjustment now proposed was no more than the delimitation on line which were agreed in principle between the governments concerned in 1914'<sup>12</sup>.
- In concurrence with the 1938 boundary survey report, the governor of Sudan, when dispatching the same to the Foreign Office stated as follows, 'the members of the survey party are satisfied and have satisfied me that, although prevented by the circumstances from consulting with the tribes in the north, they have not left on the Kenya side of the line any waterhole or grazing area in which the rights of the Turkana can be disputed. The governor-general recommended acceptance of the limits of the Turkana grazing grounds as those recommended

<sup>10</sup>See Ngatia (1984) footnotes F.O. 371/22017

<sup>11</sup>See Ngatia (1984) footnotes F.O. 370/22017; letter written by J. J. Paskin Colonial Office 14<sup>th</sup> April 1938

<sup>12</sup>See Ngatia (1984) footnotes F.O. 371/24638; F.O. /23373

by the survey commission being those in the boundary agreement of 1914 and now for the first time demarcated on the ground<sup>13</sup>.

- In concurrence with validation and adoption of the 1938 boundary survey report on the northern extent of the Turkana customary grazing grounds and the boundary of Kenya and Sudan, the government of Egypt requested Sudan to prepare a map ascertaining the customary grazing grounds of the Turkana but thought the term 'demarcated' was inappropriate and suggested that, it should be substituted with the following phrase, 'the extent of this area has never been ascertained hitherto but has now been determined by the local officials of Kenya and Sudan governments'<sup>14</sup>
- While explaining the historical background of the boundary, the Foreign office, in an Aide-memoire to the Egyptian government elaborated that, the 1914 order in council:  
*'Laid down that Uganda, which at the time extended over the territory now administered by Kenya up to Lake Rudolf, should cede to Sudan certain territory to the south of the previously existing boundary which followed in this region the 5<sup>th</sup> parallel of latitude. The order left undescribed the grazing grounds of the Turkana while laying down that this area should be cede to Uganda, the extent of this area has never been ascertained hitherto; but it was felt that, in connection with the proposed frontier, and this is now been done by the local officials of the Sudan and Kenya Government'*<sup>15</sup>
- The aide-memoire went further to say that:  
*'The area which is thus proposed to attribute to Kenya has in recent years been policed by Kenya. But the Sudan has been obliged to pay considerable sums of money to Kenya owing to its inability, arising from the lack of communication and from the great distances involved, to administer itself an area for which, owing to the uncertainty of the position of the boundary, it appeared to have some responsibility. These sums were spent on patrols in the area both as a deterrent to raiders and as protection for the nomad tribes in the area. This demarcation would relieve the Sudan of this responsibility'*<sup>16</sup>
- In another dispatch to the British Ambassador in Cairo, Sir. J. L. Maffey the Governor General of Sudan, acknowledged that the Kenya-Sudan boundary as defined by the order in council of 21<sup>st</sup> April 1914 was merely provisional and thought that the outstanding issue of the customary grazing grounds should be dispensed with; in this regard, the Ambassador responded favorably as hereunder (Tungo, op. cit.):  
*The ultimate disposal of this region would presumably depend on whether the government of Kenya regards the Turkana claim as substantiated. If so the Sudan government would, of course, have no objection to treating it as falling under the reservation made in 1914 order in council'*<sup>17</sup>
- In 1953, the Kenya government restated her position regarding the *de facto* administration of the area sandwiched between the 1938 straight line and the 1944 (1947) and formally requested the outgoing British officials in Khartum that the Instrument of Transfer of Power to the independent Sudan state should require the new government either to continue the arrangements which allowed Kenya to administer the area up to the Blue Line, or to undertake 'close administration' of the area itself. The statement reads as follows:  
*In brief, the administrative boundary (or 'red line') which, whilst including the customary grazing grounds of the Turkana, does not guarantee that tribe against attack by Merille or Nyangatom tribesmen. To ensure the tribe's security this Government has for many years past maintained, at considerable expense both in manpower and money, a series of Police Posts beyond the 'de facto' boundary [the 1944 line agreed in 1947] as far North as Kibish Wells. By assuming these police functions beyond our frontiers, the number of raids by Ethiopian tribesmen has been considerably reduced and the Turkana have been allowed the enjoyment of their traditional grazing grounds (Deputy Chief Secretary, Kenya, to Civil Secretary, Khartoum, 30 October 1953, FO 371/108220, no. 1, emphasis added).*

It should be understood that, Kenya's request to the outgoing British officials in Khartum in (9) above was a suggestion that more grazing grounds of the Ngiturkana people still lay north of the established administrative lines viz, red line and blue line. And as the process of ascertaining the grazing fields of Ngiturkana had proved to be challenging, as though oblivious of the fact that the rights of indigenous people to their territory, devolve both *ipso facto* and *ipso jure* upon cession of territory by the predecessor state to the successor state, Kenya demanded the arrangement that would allow her to police and administer the area, beguaranteed in the instruments of transfer of power to the new government of Sudan, pending ascertainment and inclusion in Kenya of the Ngiturkana traditional grazing fields under the 1914 order in council.

With Sudan's willingness to have the customary grazing grounds in Kenya, one would query why was the 1938 line (actually demarcated on the ground) not adopted as the international boundary between Kenya and Sudan. It should be noted that, at the time of the boundary survey, there was an ongoing discussion on rectification of the Sudan - Ethiopia border proposing cession of eastern Elemi Italy in exchange for the Baro salient. This meant that should the proposed cession of eastern Elemi triangle occur, the common border of Kenya, Sudan, and Ethiopia was going to be redrawn; as such, the 1938 line was taken as provisional to militate against the finality of the boundary because of the anticipated changes. Furthermore, bearing in mind that, the survey party for the second time did not fully survey the area specifically

<sup>13</sup>See Ngatia (1984) footnotes F.O. 371/22017

<sup>14</sup>See Ngatia (1984) footnotes F.O. 371/22018

<sup>15</sup>See Tungo (2008) footnotes C.O.822/89/9, enclosure in a letter no. J2917/37/1 dated September 1st 1938, Foreign Office, to Colonial Office

<sup>16</sup>See Tungo (2008) footnotes C.O.822/89/9, enclosure in a letter no. J2917/37/1 dated September 1st 1938, Foreign Office, to Colonial Office

<sup>17</sup>See (Tungo, 2008 footnotes) C.O.533/406/8, letter no. 98-94.B.3, dated April 11<sup>th</sup>, Mr. McMichael, Civil Secretary, on behalf of the Governor General, for the Governor General, to Sir Percy, High Commissioner, Cairo (Tungo's footnotes)

the section between *Ngigole* and Point no. 1 at the northernmost point of Mt. Mogila, the 1938 line was understood and accepted as provisional administrative as the Turkana grazing grounds had not been accurately ascertained and still lay north of the new line.

We have since established that: (1) the grazing grounds of the Ngiturkana travelled with the 1914 and 1926 treaties (dispositive) to the successor states, (2) Ngiturkana have lived in Elemi triangle from time Immemorial and have by the very fact acquired prescriptive title to elemi triangle, (3) Kenya's sovereign acts and development in the territory are advanced that it is late to disrupt the status quo, (4), by the words of Professor Maurice Amutabi, the government of Kenya should take/continue to take full control of the Elemi Triangle as per the agreement of 1924 that ceded the area to the control of colonial British government in Kenya, for if the countries of the Nile Valley are insisting that the Nile waters agreement signed between the colonial authorities on the use of the Nile waters stands, then similarly the Kitgum-Elemi Agreement of 1924 should be respected<sup>18</sup>.

## 7. Recommendations

Kenya and South Sudan should borrow a leaf out of the following interstate territorial conflicts where adversaries have peacefully converted *de facto* or contested borders into *de jure* borders outside courts of law.

- 1975, Italy and Yugoslavia signed a treaty of Osimo, which gave definitive legal status to an administrative boundary in Trieste that had been in existence for two decades.
- In 1997, Russia and Lithuania signed a treaty recognizing as their common border the line that had served as an internal Soviet boundary since 1963.
- In 1998, Ecuador and Peru reaffirmed the boundary set in 1942 Rio Protocol, a boundary that Ecuador had renounced and that had subsequently been the subject of militarized disputes, including a brief war in 1995.

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