Issues & Studies© 49, no. 1 (March 2013): 179-212.

Research Note

A Theoretical Analysis of the Diaoyu Islands Disputes from the Perspective of Pure Theory of Law*

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The current study attempts to analyze the issue of the Diaoyu Islands based on relevant historical facts according to the methods of scholars of the Vienna School of Jurisprudence, as represented by Hans Kelsen, originator of the Pure Theory of Law. Although leading scholars of the Vienna School of Jurisprudence, represented by Kelsen did not experienced disputing the issue, Kelsen dealt with the case both directly in the material sense and indirectly in the formal sense, as well as in an abstract way. After a preliminary application of the Pure Theory of Law to a legal analysis of the case, it can be concluded that the Diaoyu Islands ought not belong to Japan. This shows that there is, to some extent, a backward-glancing aspect to Kelsenian theory. Kelsen's Pure Theory of Law may help us reach a further abstract understanding of human inter-

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*The author would like to thank Professor Dr. Sonja Puntscher-Riekmann, University of Salzburg, Austria, Professor Robert Walter (deceased 2010) and Professor Clemens Jabloner, Hans Kelsen-Institut, Vienna, Austria, Dr. Klaus Zeleny, Hans Kelsen-Institut, Vienna, Austria, and Professor Chang, Hohai University, Nanjing, China, as well as all friends, colleagues, and scholars for their help in providing support and opportunity for studying this topic. The author is also grateful to Dr. Chen Derun (deceased 2010), famous physician of TCM in Jiangsu, for his special support as well as the anonymous reviewers for their vital and valuable comments, suggestions and help in revision of the manuscript. The author of this article himself is fully responsible for any remaining errors.

action in this "world village" as it evolves into Kelsen's ideal of a "world state" showing a forward-looking aspect of Pure Theory of Law.

Keywords: Pure Theory of Law; Hans Kelsen; Vienna School of Jurisprudence; international law; Diaoyu Islands.

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Background of the Current Study

In a paper published in the *China Review* in 2011,[1] I followed the methods of Jean-Marc Blanchard and presented the historical facts concerning the Diaoyu Islands (釣魚臺列嶼) as recorded in the relevant documents and ancient texts. The paper contained a brief analysis of that information based on two logical inferences according to the concept of free evaluation of the declassified official documents and the written literature (in other words, the ancient texts). These inferences were that these documents either can or cannot constitute proof. If the latter is the case, there is almost nothing to be written, because the documents cannot be used as evidence and can prove nothing. If the former is the case, however, as long as the documents do not contain falsifications, one can hope that something can be proved.

It is the same for a theoretical study of historical facts concerning the provenance of the Diaoyu Islands issue. All theories should be taken into consideration. Scholars also need tolerance, patience, and a friendly and democratic environment in which to listen attentively to these different theories. This should aid the search for truth and for academic exchanges among scholars throughout the world, because the thinking of mankind is pluralistic and multidimensional, and the theory of any individual scholar or one school of thought alone constitutes only one dimension of the thinking of mankind as a whole, or it may simply be built on the foundation of the thinking or ideas of those who have gone before. On this basis,

[1]Zhijian Liang, "Study of the Diaoyu Islands: A Continuation of Document-Based Research in the Style of Jean-Marc F. Blanchard," *China Review* 11, no. 1 (Spring 2011): 113-38.

this paper presents for further discussion the idea that the theories of the Vienna School as represented by Hans Kelsen are both relevant and appropriate to analysis of the issue of the Diaoyu Islands. This paper should be regarded as only one of a number of theoretical studies that may facilitate a comparison of various theories and critiques. Although the application of Kelsen's Pure Theory of Law to the issue of the Diaoyu Islands may be relevant and appropriate, it is too early to say which theory is or is not the more suitable or more objective now.

Before commencing the theoretical analysis, it would be helpful to present a brief review of one version of the provenance of the Diaoyu Islands, namely that of Japan, contained in a document issued by Japan's Ministry of Foreign Affairs:[2]

> The Senkaku Islands are not included in the territory which Japan renounced under Article II of the San Francisco Peace Treaty. . . . They were placed under the administration of the United States of America as part of the Nansei Shoto Islands, in accordance with Article III of the said treaty, and were included in the areas whose administrative rights were reverted to Japan in accordance with the Agreement Between Japan and the United States of America Concerning the Ryukyu (琉球) Islands and the Daito Islands, which came into force in May 1972. The facts outlined herein clearly indicate the status of the Senkaku Islands as being part of the territory of Japan.
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> The Government of Japan made a Cabinet Decision on January 14, 1895 to erect a marker on the Islands to formally incorporate the Senkaku Islands into the territory of Japan.
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> Since then, the Senkaku Islands have continuously remained as an integral part of the Nansei Shoto Islands which are the territory of Japan. These islands were neither part of Taiwan nor part of the Pescadores Islands which were ceded to Japan from the Qing Dynasty of China in accordance with Article II of the Treaty of Shimonoseki which came into effect in May of 1895.[3]

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[2]The following opinion of Japan, entitled The Basic View on the Sovereignty over the Senkaku Islands, is one of the briefest versions of the provenance of the Diaoyu Islands from a Japanese perspective. I have quoted the main part of the text here to avoid any misunderstanding that might arise if it was paraphrased.

[3]The Ministry of Foreign Affairs of Japan, "The Basic View on the Sovereignty over the Senkaku Islands," http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html. Japan issued this document on March 8, 1972. See: Ju Deyuan, *Diaoyudao zhengming: Diaoyudao lieyu de lishi zhuquan ji guojifa yuanyuan* (The Diaoyu Islands: the historical sovereignty of the Diaoyu Islands and the source of international law) (Beijing: Kunlun chubanshe, 2005), 34.

Japan governed Taiwan and the adjacent islands for fifty years after the Treaty of Shimonoseki (馬關條約) with China came into effect in 1896,[4] and, in the opinion of some scholars, according to the Cairo and Potsdam declarations, Japan ought to have returned Taiwan and the adjacent islands, including the Diaoyu Islands, to China.[5] China was excluded from the peace conference in San Francisco after the capitulation of Japan at the end of World War II. The peace treaty with Japan, concluded on September 8, 1951, in San Francisco, placed the Diaoyu Islands under the administration of the United States as part of the Nansei Shoto without China's participation or consent. After the conclusion of the San Francisco Peace Treaty, the two sides of the Taiwan Strait stated officially (on September 8 and September 18) that the treaty was not binding;[6] they held that it was illegal, void, and absolutely could not be recognized.[7]

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[4]Tan Zaixing, "Diaoyutai shijian yu Jiujinshan heyue" (The issue of the Diaoyu Islands and the San Francisco Peace Treaty), in *Chunlei shengsheng: baodiao yundong sanshi zhounian wenxian xuanji* (Spring thunder: selected papers on safeguarding the Diaoyu Islands), ed. Lin Guojiong et al. (Taipei: Renjian, 2001), 45, 48.

[5]Liu Zhongmin and Liu Wenke, "Jin shinian lai guonei Diaoyudao wenti yanjiu zongshu" (A summary of the last ten years of research on the Diaoyu Islands in China), *Zhongguo haiyang daxue xuebao (shehui kexue ban)* (Journal of Ocean University of China [Social Sciences Edition]) 21, no. 1 (January 2008): 22-23. A scholarly view quoted in a U.S. State Department document supports the abovementioned opinion: "Under international law ambiguous terms in an international agreement have been interpreted favorably to the state which accepted them. The state which proposed them should express its intention clearly." See Harvard Research, Draft Convention on Treaties, *American Journal of International Law* 29, Supp. (1935): 941, citing several arbitral awards. See *Foreign Relations of the United States: Diplomatic Papers: The Conference of Berlin (the Potsdam Conference) 1945*, vol. 2 (Washington, D.C.: U.S. Government Printing Office, 1945), 1284. (Hereafter, Foreign Relations of the United States is abbreviated as FRUS.) China was the state which accepted the seemingly ambiguous term "all islands appertaining to" in the Treaty of Shimonoseki. "The island of Taiwan, together with all islands appertaining to the island of Taiwan" ought to have been interpreted in favor of China under international law, and the Diaoyu Islands, as islands appertaining to Taiwan, should belong to Chinese Taiwan.

[6]Liu Hebo, "Lun 'Jiujinshan dui Ri heyue' yu zhanhou taihai guanxi" (On the relationship between the San Francisco Treaty of Peace with Japan and post-World War II cross-Taiwan Strait relations), *Qilu xuekan* (Qilu Journal) (Qüfu), 2007, no. 1:56-60.

[7]Zhou Enlai, "Zhonghua renmin gongheguo zhongyang renmin zhengfu waijiaobu buzhang Zhou Enlai guanyu Meiguo jiqi pucong guojia qianding Jiujinshan dui Ri heyue de shengming" (Statement about the Signing of the San Francisco Peace Treaty by the United States and Other Countries), *People's Daily*, September 18, 1951, http://web.peopledaily.com.cn/item/zrgx/newfiles/c1010.html (accessed May 10, 2009).

It is no wonder that there was a dispute concerning the islands after the end of World War II, as the origins of the Diaoyu Islands dispute are really complicated, and a simple description of its provenance would not be sufficient for an in-depth theoretical study. What would be helpful is an objective analysis of the two sides of the argument using a suitable existing theory. All academic theories, including those of the Vienna School, should be used to study the difficult topic of the Diaoyu Islands. Hans Kelsen, the leading scholar of the Vienna School, is someone whose theory and method, or way of thinking, might be suitable for this purpose. Kelsen seemingly discussed this issue in an abstract way during his long academic career which started in Vienna and concluded at Berkeley.[8] Obviously, Hans Kelsen was expressing his academic opinions regarding the law as it stood at that time and his own personal ideals; he was not making policy recommendations. However, this paper consists of an attempt to discover whether Kelsen's theory of international law still reflects interaction between nations today. It is also hoped that this paper will contribute a tentative evaluation of Kelsen's theory.

Hans Kelsen and the Diaoyu Islands

The distinguished international jurist Hans Kelsen[9] is widely regarded as the most important legal theorist of the twentieth century[10] or a giant of the law whose Pure Theory of Law has been a focal point of debate for legal philosophers throughout the world, and whether one agreed or disagreed with Kelsen's theories, all would agree with Dean Roscoe Pound's

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[8]A. Javier Treviño, "Transaction Introduction," in *General Theory of Law and State*, written by Hans Kelsen (New Brunswick, N.J.: Transaction Publishers, 2006), xxi-xxiii.

[9]Pitman B. Potter, "Editorial Note," in *Legal Technique in International Law—A Textual Critique of the League Covenant*, written by Hans Kelsen (Geneva: Research Center, 1939).

[10]Treviño, "Transaction Introduction," xxi; Tamara Ehs, "Vorwort vom *Hans Kelsen*" (Foreword to *Hans Kelsen*), in *Hans Kelsen*, ed. Tamara Ehs (Vienna: Nomos Facultas, 2009), 5.

assessment of Kelsen as "unquestionably the leading jurist of the time."[11] He was the founder of the school of the Pure Theory of Law or the Vienna School, a theory of positive law as part of the heritage of human thought. Positive law is always the law of a definite community—one example being international law. The Pure Theory of Law is directed at a structural analysis of positive law rather than at a psychological or economic explanation of its conditions, or a moral or political evaluation of its ends.[12] It attempts to eliminate from the object of this description everything that is not strictly law. This is the methodological basis of the theory.[13] The only purpose of this theory of law is to understand the law itself, not its formation. That is to say, to describe the law as it actually is, not to prescribe how it should or should not be.[14] The starting point of the present discussion is one of Kelsen's arguments in his book *Pure Theory of Law* concerning the norm "ought" (*sollen*) and the function of norms as a scheme of interpretation.

The Norm "Ought" and the Function of Norms as a Scheme of Interpretation

By "norm" Kelsen means something that "ought" (*sollen*) to be or "ought" to happen; in particular, that a human being ought to conduct themselves in a specific way.[15] "Ought" is the subjective meaning of every act of will directed at the conduct of another person. Yet not every such act has also this objective meaning; and only if the act of will has also the objective meaning of an "ought" is it called a "norm." That the

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[11]Edward C. Halbach, Jr., "In Memoriam Hans Kelsen (1881-1973)," *California Law Review* 61, no. 4 (June 1973): 957.

[12]Hans Kelsen, *General Theory of Law and State* (New Brunswick, N.J.: Transaction Publishers, 2006), xxxv-xxxvi.

[13]Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Beijing: China Social Sciences Press, 1999), 1.

[14]Kelsen, *General Theory of La*w, xxxvi; cf. Kelson, *Pure Theory of Law*, 106.

[15]Kelsen, *Pure Theory of Law*, 4.

"ought" is also the objective meaning of the act is expressed in the way that the behavior at which the act is directed is regarded as something that ought to be, not only from the point of view of the individual who has performed the act, but also from the point of view of a third individual not involved.[16]

Legal norms making certain acts legal or illegal are the objects of the science of law.[17] Therefore, the norm functions as a scheme of interpretation, and the judgment that an act of human conduct is legal or illegal is the result of a normative interpretation.[18]

Value in the Eyes of Hans Kelsen

Kelsen held that the object of a scientific theory of value can only be norms made by human will and values constituted by these norms.[19] In Kelsen's opinion,

> The value that consists in the relation of an object—particularly of behavior—to the wish or will of an individual can be designated as *subjective* value, in contradistinction to the value that consists in the relation of a behavior to an objectively valid norm that can be designated as *objective* value.[20]

Kelsen wrote that value means also the relation of human behavior as a means to a purpose and that "suitableness," which means to be suitable for a certain purpose, is the positive value and "unsuitableness" is the negative value.[21] He also pointed out:

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[16]Ibid., 7; Hans Kelsen, *Reine Rechtslehre* (Pure Theory of Law), 2nd ed. (Vienna: Verlag Österreich, 2000), 7. (Max Knight, the English translator of *Reine Rechtslehre*, added the following to page 7 of the text, ". . . but also from the point of view of the individual at whose behavior the act is directed.")

[17]Kelsen, *Pure Theory of Law*, 4.

[18]Ibid.

[19]Ibid., 18.

[20]Ibid., 20.

[21]Ibid., 23.

> The purpose may be objective or subjective. An objective purpose is one that *ought* to be realized, namely a purpose that has been stipulated by a norm regarded as objectively valid. . . . A *subjective* purpose is one established by man himself, a purpose that he wishes to achieve.[22]

Scholars may have different value judgments, and sometimes this leads to misunderstanding and bias. Kelsen's theory of value is an approach that might enable us to avoid such situations, to prefer the objective value (judgment) to the subjective value (judgment). Academic exchange as a human behavior (*menschliches Verhalten*) is a means to a certain purpose. Yet this purpose may be objective or subjective. Take discussion of the Diaoyu Islands for example. Not all the scholars involved have an objective purpose, and this can be a source of misunderstanding and bias because (1) scholars have not had or still do not have a common measure of judgment or objective purpose, and (2) they have not evaluated as evidence the relevant ancient Chinese texts or third country sources, such as documents contained in the *Foreign Relations of the United States* (FRUS).

Customary Law and the "Temporal Sphere of Validity" of Legal Norms as the Essence of Intertemporal Law

Concerning customary law, Kelsen wrote, "If customary law, like statutory law, is positive law, then there must be an individual or collective act of will whose subjective meaning is the 'ought'—that is interpreted as [an] objectively valid norm, as customary law."[23] This prompts the question, what is the objectively valid norm, or customary law, concerning the acquisition of territory? This is the fundamental question that should be answered in any research paper on the Diaoyu Islands.

According to J. C. Bluntschli, Europeans were practicing "discovery and acquisition" by the end of the fifteenth century. Bluntschli wrote, "Zur Zeit der großen europäischen Entdeckungen überseeischer Länder

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[22]Ibid.; Kelsen, *Allgemeine Theorie der Normen*, 103, 147.
[23]Kelsen, *Pure Theory of Law*, 226.

meinte man, schon die blosse Entdeckung unbekannter Länder sei ein genügender Rechtstitel für die behauptete Gebietshoheit" (at the time of the large-scale European discovery of overseas territory, it was asserted that the mere discovery of unknown lands was sufficient in order to claim sovereignty over them [author's own translation]).[24] Bluntschli pointed to two examples of this behavior: one in 1493 and one in 1496.[25] In fact, evidence of the acquisition of the Diaoyu Islands by China can be found in a Chinese book printed in 1403, even earlier than the two examples raised by Bluntschli.[26] That is to say, the Chinese were the original discoverers of the Diaoyu Islands, and had named and legally acquired them as Chinese territory.

Once scholars such as Bluntschli had answered the question concerning what customary law or valid norm was involved in the acquisition of territory, then another question could be raised: was there a valid norm of international law or treaty concerning the acquisition of territory in 1895, and if so what was it? Can the cabinet of a sovereign state, as a legislative organ with the right to make administrative law, make a decision about the norms of international law that affects the territory of another sovereign state? Kelsen would reply that the general norms of international law are created by custom or treaty, which means they are created by the members of the legal community themselves, not by a special legislative organ.[27]

In order to see how scholars of the Vienna School have analyzed international laws, we should consider what they have said about the General Act of the Conference of Berlin Concerning the Congo of 1885, or the Berlin Act.[28]

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[24]J. C. Bluntschli, *Das Moderne Völkerrecht der Civilisierten Staten* (Modern international law of civilized nations), 3rd ed. (Nördlingen: Verlag der C.H. Beck'schen Buchhandlung, 1878), 168.

[25]Ibid., 169.

[26]Liu and Liu, "Jin shinian lai guonei Diaoyudao wenti yanjiu zongshu," 22.

[27]Kelsen, *Pure Theory of Law*, 323.

[28]Hereafter, the "General Act of the Conference of Berlin Concerning the Congo" is abbreviated as the "Berlin Act of 1885."

In a book on international law published in 1937, Alfred von Verdross, one of the most important scholars of the Vienna School, mentioned the Berlin Act of 1885[29] in connection with the norm concerning that territory, although Verdross did not mention the Pure Theory of Law or Kelsen directly:

> Articles 34 and 35 of the General Act of the Conference of Berlin Concerning the Congo of February 26, 1885, which was invalidated by the treaty of St. Germain of September 10, 1919, prescribe *moreover* that the occupying state is liable to notify other states of the occupation with the aim of enabling the other states to put forward an objection if the occasion arises.[30]

Unlike Verdross, Paul Guggenheim mentioned Pure Theory of Law and Kelsen directly as he dealt with the Berlin Act of 1885 eleven years later than Verdross did. In the opinion of Paul Guggenheim, his own work was aimed at a theory of positive international law, not a theory of sociological-political international law; he himself was indebted to Kelsen's Pure Theory of Law, and said that the Pure Theory of Law had succeeded to a great extent in freeing the science of law from extraneous elements.[31] Guggenheim wrote in the same way as Verdross did:

> No rule of international customary law provides for third states to be notified about the occupation of territory as a prerequisite of territory acquisition, but such notification was included in Articles 34 and 35 of the General Act of the Conference of Berlin Concerning the Congo of February 26, 1885. These two articles made it possible for third states to raise their objections to occupation and the acquisition of territory resulting from the occupation. However, the Convention of St. Germain of September 10, 1919, abrogated this obligation for the parties to the Convention.[32]

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[29]Almost all the important states of Europe at that time, with the exception of Switzerland and Greece, were represented at the Congo Conference in Berlin on November 15, 1884. The United States also sent a delegation. The conference closed on February 26, 1885, and its General Act was ratified by all the powers who had participated in the deliberations, with the exception of the United States. See Daniel De Leon, "The Conference at Berlin on the West-African Questions," *Political Science Quarterly* 1, no. 1 (March 1886): 103, 127-28, 139.

[30]Alfred von Verdross, *Völkerrecht* (International Law) (Berlin: Verlag von Julius Springer, 1937), 127 (author's own translation).

[31]Paul Guggenheim, *Lehrbuch des Völkerrechts, Band 1* (Textbook of international law, vol. 1) (Basel: Verlag für Recht und Gesellschaft, 1948), v.

[32]Ibid., 402 (author's own translation).

It is therefore interesting to analyze the decision of the Japanese cabinet of January 14, 1895, concerning the Diaoyu Islands according to the methods of the Vienna School. One element of the Pure Theory of Law is the temporal spheres of validity of international law. According to Kelsen, "Legal norms regulate human behavior, and human behavior takes place in time and space. Consequently, legal norms have relation to time and space. They are valid for a certain time and for a certain space (territory). Hence we speak of a temporal and a territorial sphere of validity of legal norms or a legal order."[33] In the context of the temporal spheres of validity of international law, Kelsen holds that a legal relation implying duties and corresponding rights is to be judged by the international law under which the legal relation has been established, provided that there is no reason to assume that the new international law has retroactive force.[34] The above-mentioned opinions of Verdross and Guggenheim in connection with the Berlin Act of 1885, which are inspired by the Pure Theory of Law and Kelsen's temporal spheres of validity of international law, are vital to any legal analysis of the Japanese cabinet decision adopting the method of Vienna School of Jurisprudence. The cabinet decision was made ten years after the conclusion of the Berlin Act of 1885 and twenty-four years before the conclusion of the Convention of St. Germain, so one can say that it was made in the "temporal sphere of validity" of the Berlin Act of 1885. Japan was therefore liable in 1895 to notify third countries of its occupation of the Diaoyu Islands, including the Qing Dynasty government of China, in order to legitimize that decision. As it happened, the

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[33]Hans Kelsen, *Principles of International Law* (New York: Rinehart, 1956), 93.

[34]Ibid., 95. In the footnote to this statement Kelsen wrote: "The principles regulating the temporal sphere of validity of legal norms by which previous legal norms have been modified or abolished are sometimes called 'intertemporal law'." See: Kelsen, *Principles of International Law*, footnote on 95-96. Kelsen also quoted the definition put forward by Max Huber in the award in the *Island of Palmas Case* made in 1928: ". . . a judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled . . ." (ibid., 96). Yet it should be noted that Kelsen advanced the concept of the temporal sphere of validity of norms three years earlier than Max Huber's idea of intertemporal law, although the two concepts are essentially almost the same. Cf. Hans Kelsen, *Allgemeine Staatslehre* (General constitutional law) (Berlin: Springer, 1925), 137-38.

decision was only made public by Japan in the twentieth century.[35] Yet by 1895, the Japanese had already abandoned their own traditions and were endeavoring to adopt the European interpretation of international law.[36]

Kelsen's Definition of Treaty and pacta sunt servanda in the Hierarchy of International Law in Connection with the Concepts of Reason of Validity and Sovereignty

First, Kelsen's definition of an international treaty is as follows:

> A treaty is an agreement normally entered into by two or more states under general international law. . . . An agreement is an act of coming into accord, or the state of being in accord—accord of opinion or will. A treaty is an accord of will. The accord must be manifested by signs, spoken or written words. A treaty is a manifested accord of the will of two or more states.[37]

Kelsen continues, "Sometimes a treaty is called an international agreement, a convention, a protocol, an act, a declaration, and the like. However, the name is of no importance."[38] According to Kelsen, a written international consensus or agreement in opinion is a treaty, no matter what its title. Therefore, *pacta sunt servanda* applies in the case of treaties. Besides, a treaty is also lawmaking.[39] These views seem to have been confirmed by other authoritative opinions, for example, *pacta sunt servanda* has been defined as "the rule that agreements and stipulations, esp. those contained in treaties, must be observed."[40] The Vienna Convention on the Law of

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[35]Kiyoshi Inoue, *Diaoyudao de lishi he zhuquan wenti* (The history and sovereignty of the Diaoyu Islands), trans. Ying Hui (Hong Kong: Qishi niandai zazhishe,1973), 116-17.

[36]Ignaz Seidl-Hohenveldern, *Völkerrecht*, 8th ed. (International Law) (Cologne: Heymann, 1994), S.19. In the context of Japan's adoption of European international law, Seidl-Hohenveldern notes that international law based on the European tradition developed into the international law of the world sometime during the nineteenth century. As the European powers colonized territory outside of Europe they brought with them the European interpretation of international law.

[37]Kelsen, *Principles of International Law*, 317.

[38]Ibid., 318.

[39]Ibid., 308.

[40]Bryan A. Garner, *Black's Law Dictionary* (St. Paul, Minn.: Thomson/West, 2004), 1140.

Treaties also recognizes "the consensual nature of treaties and their ever-increasing importance as a source of international law." It could be held that Kelsen's statements concerning treaty have been recognized and interpreted without any big changes in their meaning.

In Kelsen's opinion, *pacta sunt servanda* can also be viewed within the framework of the Vienna School's theory of hierarchy (*Stufenbau Theorie*). In fact, hierarchy of norms is interlinked with the concept of the reason of validity of norms. By "validity" Kelsen means the specific existence of norms.[41] A norm that is not derivable from another valid norm is a non-valid or invalid norm.[42] "A non-valid norm is a non-existing norm, is legally a non-entity."[43] The reason of validity of the legal norms of international law created by treaty is the custom-created norm which is usually expressed as *pacta sunt servanda*.[44] "The reason for the validity of a norm can only be the validity of another norm. A norm which represents the reason for the validity of another norm is figuratively spoken of as a higher norm in relation to a lower norm."[45] In the opinion of Kelsen, the lowest level of norms within the hierarchy of international law consists of decisions of the international court, the second level is treaties;[46] the highest level is the principle *pacta sunt servanda* as the basic norm of the whole system of international law.[47] Based on Kelsen's opinion concerning reason of validity and the theory of hierarchy of the Vienna School, one can infer that the lower norm has the reason for its validity in the higher norm. Consequently, if a lower norm is regarded as not being in accordance with a higher norm, the lower norm must be regarded as non-valid.[48]

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[41]Cf. Kelsen, *General Theory of Law and State*, 30.
[42]Ibid., 111.
[43]Ibid., 155.
[44]Kelsen, *Pure Theory of Law*, 216.
[45]Ibid., 193.
[46]Kelsen, *General Theory of Law and State*, 369.
[47]Kelsen, *Principles of International Law*, 316.
[48]Kelsen, *Reine Rechtslehre*, 212; cf. Kelsen, *Pure Theory of Law*, 208.

During World War II, a number of important international meetings or conferences were held by the Allies which concluded with written consensuses. These included the Declaration by United Nations of January 1, 1942; the Cairo Declaration of December 1, 1943; the Dumbarton Oaks Proposals which came out of the Dumbarton Oaks Conference in October 1944 and which served as the foundations for the UN Charter signed on June 26, 1945; the Potsdam Declaration of July 26, 1945; and the Japanese Imperial Rescript Regarding Japan's Acceptance of the Provisions of the Potsdam Declaration of August 14, 1945 (hereafter, "Japanese Imperial Rescript).[49] These are treaties according to Kelsen's definition, and they are relevant to any discussion of the Diaoyu Islands issue. In Kelsen's opinion, those treaties are international laws. Therefore, the logical inference is that as such, they should be applied to the case of the Diaoyu Islands.

At the end of World War II, a treaty, or an international law, entitled the San Francisco Peace Treaty was drawn up—that is to say, it was a law set by men, or positive law, or simply law. According to the aforementioned academic opinions, it may also be called lex lata. But the Pure Theory of Law as a theory of positive law is not satisfied with such a simple classification of laws. Kelsen pays particular attention to analysis of the validity of laws set by men.

If Kelsen had known more about the triangular relationship between China, the United States, and Japan during the war and shortly after its end, and if he had read all the important treaties concluded during the war, he would have analyzed the San Francisco Peace Treaty from the perspective of the validity of his theory in 1952—possibly in the book, *Principles of International Law*, published in 1956. If that had been the case, Kelsen would have been of the opinion that the abovementioned

[49]Note: the Potsdam Declaration should be always mentioned together with the Japanese Imperial Rescript as the Potsdam Declaration is a statement of terms addressed to Japan and to the Japanese government which if accepted would constitute an international agreement. See *FRUS: Diplomatic Papers: The Conference of Berlin (the Potsdam Conference) 1945*, vol. 2, 1284.

treaties, including the San Francisco Treaty with Japan, are all positive law, or laws set by men. But he would have questioned whether those laws were all valid law. If *pacta sunt servanda* is at the top of the hierarchy of international law in connection with the Vienna School's concept of reason of validity, then the stipulation in the Cairo Declaration that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China"; the stipulation in the Potsdam Declaration that "the terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine"; and the stipulation in the Declaration by United Nations of January 1, 1942, that the United States, the United Kingdom, China, the Soviet Union, and a number of other states—all signatories of the declaration—were obliged not to conclude a separate peace with the Axis powers, are reasons of validity of all postwar treaties, including those stipulating territorial arrangements, as long as those treaties are in accordance with the aforementioned treaties concluded during the war from January 1, 1942, to August 14, 1945. At the same time, the Cairo Declaration, the UN Charter, the Potsdam Declaration in connection with the Japanese Imperial Rescript, and the Declaration by United Nations of January 1, 1942, are higher norms than other norms concerning postwar territorial arrangements concluded later. Excluding China and certain other countries from the San Francisco Peace Conference means that the San Francisco Peace Treaty is not in accordance with the Declaration by United Nations of January 1, 1942, and that Article 3 of the San Francisco Peace Treaty—based on which the Diaoyu Islands, as islands belonging to Taiwan as stipulated by Treaty of Shimonoseki between China and Japan, were incorporated into the Liuqiu Islands—is not in accordance with the Cairo Declaration, the UN Charter, or the Potsdam Declaration in connection with the Japanese Imperial Rescript. Therefore, the San Francisco Peace Treaty, as a norm lower than the aforementioned treaties, is legally a nonentity and therefore not valid. Now that we have concluded that the San Francisco Peace Treaty is legally a nonentity, discussing *pacta sunt servanda* in relation to that treaty is naturally out of the question.

From another point of view, given the fact that China was not a contracting party to that Peace Treaty, China is not bound by it. As Kelsen wrote, "it is usually assumed that a treaty imposes duties and confers rights only and exclusively upon the contracting states—*pacta tertiis nec nocent nec prosunt* (Treaties are neither of benefit nor of detriment to third parties)."[50]

In addition, Kelsen referred to the origin of the Diaoyu Islands issue (in relation to Article 3 of the San Francisco Peace Treaty with Japan)[51] as

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[50]Kelsen, *Principles of International Law*, 345.

[51]According to a prior agreement among the Allies, all of them, including China, should have participated in the San Francisco Peace Conference, but by 1948 the United States had concluded that the Soviet Union and China should be excluded. See "Memorandum of Detailed Comments on the Kennan Report," *FRUS 1948, The Far East and Australasia*, vol. 6 (Washington, D.C.: U.S. Government Printing Office, 1974), 727. The U.S. State Department was treating the Diaoyu Islands as if they were incorporated into Nansei and not a part of Taiwan as early as 1947. See the annex to George F. Kennan's memorandum of October 1947 in *FRUS 1947, The Far East*, vol. 6 (Washington, D.C.: U.S. Government Printing Office, 1972), 539. The Japanese had long intended to acquire the islands, and they suggested to the United States that "Nansei" be substituted for "Ryukyu" (Liuqiu) in the original draft of the Peace Treaty. See Gao Jianjun, "The Territorial Status of the Diaoyu Islands in 1895: A Crucial Issue for the Dispute over these Islands," *Social Sciences in China* 31, no. 4 (2010): 109. Indeed, the official map of Japan, published in May 1930 during the period of validity of the Treaty of Shimonoseki, showed the Diaoyu Islands, under the name Senkaku, incorporated into Nansei, while one State Department adviser, Samuel W. Boggs, proposed to the State Department decision maker that "Ryukyu" should be replaced by "Nansei" in Article 3 of the Peace Treaty at the suggestion of Japan. See: Ju, *Diaoyudao zhengming*, 67. In view of Boggs' proposal, it was only to be expected that U.S. plans concerning the islands in 1947 should coincide with Japan's long-held intention of acquiring them. See Liang Zhijian, "Study of the Diaoyu Islands: A Continuation of Document-Based Research in the Style of Jean-Marc F. Blanchard," *China Review* 11, no. 1 (Spring 2011): 113-38. And this common target of both Japan and the United States was achieved simply by substituting "Nansei" for "Ryukyu" (Liuqiu) according to Boggs' suggestion, without mentioning the islands by name in the official version of the Peace Treaty (neither were they named by the Japanese or the Americans during the secret bilateral negotiations leading up to the drafting of the Peace Treaty or by the Americans during their internal discussions and consultations). See: *FRUS 1951, Asia and the Pacific*, vol. 6, pt. 1, footnote on 1200. In addition, China was deprived of the right to reveal the truth of the matter to the other Allies. In other words, if the name "Liuqiu" in Article 3 of the San Francisco Peace Treaty had not been altered, there would be no Diaoyu Islands problem today, for the simple reason that "Liuqiu" does not include the Diaoyu Islands. Therefore, the islands in question were the Diaoyutai or Diaoyu Islands of China from August 14, 1945, onwards according to the Potsdam Declaration in connection with the Japanese Imperial Rescript. It is true that the United States Civil Administration of the Ryukyu (Liuqiu) Islands included the Diaoyu Islands in that archipelago in Civil Administration Proclamation No. 27, despite the fact that the term "Nansei," used in Article 3 of

early as 1952, just one year after that treaty was concluded. On pages 165 and 166 of *Principles of International Law*, Kelsen maintained:

> The former Japanese-mandated islands were placed under trusteeship by an agreement in which the United States of America was designated as the administering authority. This procedure is in conformity with general international law only if it is supposed that the mandatory powers, after the dissolution of the League, which implied the termination of the mandate system, and the United States after the surrender of Japan, extended their sovereignty over the respective territories.[52]

The important thing is that, in footnote 50, inserted after the end of the above quotation, Article 3 is also quoted:

> Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 deg. north latitude (including the Ryukyu [Liuqiu] Islands and the Daito Islands). . . . Pending the making of such a proposal and affirmative action thereon, the United States will have the

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the San Francisco Peace Treaty, is not used in the text of the Proclamation No. 27. But the Proclamation No. 27 was in the spirit of Article 3 of the San Francisco Peace Treaty. The wording of the Proclamation No. 27, which states that it is "in conformity with the terms of the Japanese Treaty of Peace," and that it "redesignates" the boundaries of Liuqiu, supports the logical inference that Article 3 of the San Francisco Peace Treaty separated the Diaoyu Islands from Chinese Taiwan on the map. The function of the Proclamation No. 27 was simply to make plain what lay behind the wording of Article 3 of the San Francisco Peace Treaty. In the language of the Pure Theory of Law, this can be expressed as follows: since Article 3 of the San Francisco Peace Treaty is legally invalid, it cannot be the reason of validity of the Proclamation No. 27. If it is treated as such, the Proclamation No. 27 must also be legally invalid. Put another way, Article 3 of the San Francisco Peace Treaty is the direct cause in a material sense of the issue, or an indirect cause in a formal sense, because it does not specifically mention the Diaoyu Islands. Therefore, examining the legitimacy of Article 3 of the San Francisco Peace Treaty, especially the way it places Nansei under U.S.-administered trusteeship, also allows us to test the legitimacy of the status quo of the Diaoyu Islands. Consequently, the comment by Kelsen on Article 3 of the San Francisco Peace Treaty can be directly applied to scientific research into the position of the Diaoyu Islands even though he did not mention them by name. Kelsen's way of commenting on the Diaoyu Islands, which is certainly objective in the sense that he was subjectively unaware of the enigma behind the term "Nansei," depends on the way that Article 3 of the San Francisco Peace Treaty subjectively separated the Chinese Diaoyu Islands from Chinese Taiwan without actually mentioning the islands by name. One thing should be born in mind: Japan's renaming of the islands as Senkaku and the redrawing of the geographical boundaries of the Liuqiu contained in Proclamation No. 27, which made public the separation of the islands from Chinese Taiwan on the map, cannot change the fact that the Diaoyu Islands—as islands belonging to Taiwan and ceded to Japan by China under the Treaty of Shimonoseki—ought to have reverted to China after the World War II.

[52]Kelsen, *Principles of International Law*, 165-66.

> right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Article 3 of the San Francisco Peace Treaty, as quoted in Kelsen's footnote, associates the prerequisite for the legitimacy of placing the former Japanese-mandated islands under trusteeship after World War II with the prerequisite for the legitimacy of placing Nansei under trusteeship with the United States as the sole administering authority. These two prerequisites are the same—that is, that Japan and the United States had extended their sovereignty over the respective territories. As regards Nansei, into which the Chinese Diaoyu Islands were incorporated by Article 3 of the San Francisco Peace Treaty, in a material sense according to logical inference based on the abovementioned facts neither Japan nor the United States had extended their sovereignty over them. This was because of Article 8 of the Potsdam Declaration in connection with the Japanese Rescript of 1945, and the Atlantic Charter in which both the United States and the United Kingdom stated that they "seek no aggrandizement, territorial or other."[53] Therefore, the procedure of placing Nansei under trusteeship with the United States as the sole administering authority is not in accordance with general international law. This questioning by Kelsen of the legality of Article 3 of the Peace Treaty, was published in 1956.[54]

One of the above quotations from Kelsen contains the term "sovereignty." The Kelsenian view of sovereignty is a component of the Pure Theory of Law.[55] Kelsen regarded sovereignty as a supreme and inde-

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[53]The Atlantic Charter, http://usinfo.state.gov/usa/infousa/facts/democrac/53.htm (accessed December 12, 2006).

[54]Kelsen, *Principles of International Law*, 166; Chiu Hungdah, "Diaoyutai lieyu zhuquan zhengzhi wenti ji qi jiejue fangfa de yanjiu" (A study on the territorial dispute over the Diaoyu Islands and possible solutions), in *Fengyun de niandai: baodiao yundong ji liuxue shengya zhi huiyi* (Decade of storm: recollections of the safeguard Diaoyutai movement and the days of studying overseas), ed. Yu-ming Shaw (Taipei: Linking Books, 1991), 279.

[55]Cf. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (The problem of sovereignty and the theory of international law), 2nd new printing of 2nd edition (Amsterdam: Scientia Verlag Aalen, 1981), title page.

pendent sphere of authority such as legislative power;[56] in 1928 he quoted the opinion of Jellinek: There is no half, divided, decreased, dependent, relative sovereignty, there is only sovereignty or non-sovereignty.[57] In 1949, and later in 1956, Kelsen refined his earlier view of sovereignty: sovereignty is said to be the defining characteristic of the power of the state, consisting of the legislative, executive, and judicial power of the state which is no more than the validity and efficacy of the legal order.[58] He writes, "From a legal point of view, one might designate the whole domain of the executive power as administration."[59] Here, "power" means legal power, namely the jurisdiction of the state; sovereignty "as a quality is not divisible,"[60] that is to say, sovereignty as a quality of any sovereign country is not capable of being divided up and shared with other sovereign countries. If it is so divided, that sovereignty no longer exists.

Connecting Kelsen's opinion, which accepted and developed Jellinek's idea, with the historical facts relating to the Diaoyu Islands, namely the transfer of administration of the islands to Japan by the United States, one can draw the conclusion that Chinese sovereignty was violated, because sovereignty consisting of legislative, administrative, and judicial power as the quality of supreme authority of a sovereign country is not capable of being divided into parts and shared with another sovereign country, in this case Japan.

Consequently, the transfer of the Diaoyu Islands, under the name of Senkaku, to Japan by the United States was illegal. If this is the case, the name "Senkaku," with its implications of violation of Chinese sovereignty, should not to be used officially anymore, although it can and should still be used in the context of the study of history, international law, and jurisprudence.

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[56]Ibid., 47-48.
[57]Ibid., 62, author's own translation.
[58]Kelsen, *General Theory of Law and State*, 255.
[59]Ibid., 256.
[60]Ibid., 113.

Based on the conclusions of Zhijian Liang in his 2011 paper, the relevant customary law, and the opinions of scholars of the Vienna School, it is clear that the status quo of the Diaoyu Islands is illogical and illegal. Scholars of the Vienna School would be of the opinion that the issue is related to the territorial integrity of China. The principle of "sovereign equality" is upheld by Article 2 of the UN Charter, and the element of territorial integrity is defined by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[61] These documents, along with the agreement on the definition of "sovereign equality" reached at Dumbarton Oaks by the United States, the United Kingdom, and China during World War II (which includes the elements of "territorial integrity and political independence"),[62] all constitute, according to Kelsen's theory, consensus, agreement, treaties, or international laws. All relevant contracting parties are obliged to observe these agreements, including the stipulation concerning "territorial integrity." In other words, it relates to *pacta sunt servanda* again.

As for the application of *pacta sunt servanda* to agreements, conflicts between obligations imposed by different agreements are inevitable. For example, in this case, the United States (State A) reached a relevant written consensus in the San Francisco Peace Treaty after the war with Japan (State C) which is inconsistent with an earlier treaty concluded on January 1, 1942, between the United States (State A) and a member of State Group B, of which China is also a member. For cases like this, Kelsen wrote:

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[61]The UN General Assembly approved this declaration on October 24, 1970, (Resolution No. 2625). According to this declaration, ". . . sovereign equality includes . . . (*d*) The territorial integrity and political independence of the State are inviolable." See: "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations," Resolution no. 2625, October 24, 1970, http://daccess-ods.un.org/TMP/5006076.0974884.html.

[62]The discussion on the definition of "sovereign equality" was moved by the Chinese delegation to the Conference on International Organization for Peace and Security, headed by H.E. Dr. H. H. Kung, at Dumbarton Oaks in the United States. The issue of "territorial integrity and political independence" as elements of "sovereign equality" was also raised by China at Dumbarton Oaks. For further details, see *The Second Historical Archives of China*, total file, no. 18, subfile, no. 2987, 11-13.

> State A concludes a treaty with State C which is inconsistent with an earlier treaty concluded between State A and State B. . . . If State A fulfills one of the two treaties, it violates the other with all the legal consequences of a treaty violation. Some writers on international law maintain that the conclusion of a treaty inconsistent with an earlier treaty is an illegal act and as such cannot have a legal, i.e., a law-creating effect. Consequently the later treaty is null and void. . . . Besides, the conclusion of a treaty inconsistent with a previously concluded treaty is an illegal act only if this treaty contains a provision imposing upon the contracting parties the obligation not to conclude a subsequent treaty inconsistent with it.[63]

So, the above-mentioned views imply that the written consensus between the United States and Japan indirectly concerning the Diaoyu Islands contained in the San Francisco Peace Treaty is illegal because the Declaration by United Nations of January 1, 1942, precluded the parties to that declaration from making a separate peace with Japan.

From the point of view of Pure Theory of Law and positive law, Kelsen elaborated on the topic of conflicting treaties in 1956:

> Article 103 of the [UN] Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present [UN] Charter shall prevail." This provision refers to treaties concluded prior to the coming into force of the [UN] Charter as well as to treaties concluded afterward. . . . As to treaties to which only members are contracting parties, Article 103 is superfluous. Such treaties, if preceding the Charter, are null and void or annullable because they attempt to amend the Charter, and an amendment to the Charter is valid only if enacted in conformity with Articles 108 and 109.[64]

In fact, Kelsen discussed "territorial integrity" as stipulated by Article 10 of the League Covenant (and stipulated in paragraph 4 of Article 2 of the UN Charter) seventy-one years ago, when he wrote on legal technique in international law. One paragraph should be quoted almost in its entirety here:

> There can be no doubt that the territorial integrity and the political independence of a State can be violated not only by an aggression but also by many

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[63]Kelsen, *Principles of International Law*, 363.
[64]Ibid., 364-65.

> other very different means. . . . In two letters addressed to the Secretary-General of the League of Nations, dated June 19th, and September 4th, 1926, the Ethiopian Government stated that a treaty—concluded between Great Britain and Italy with regard to the English dam at Lake Tsana and the Italian Eritrea-Somaliland Railway[65]—infringed upon the political independence of Ethiopia and was therefore contrary to Article 10 of the statute of the League. For our point it is not necessary to discuss whether this assertion was justified. But it is certainly possible that the mere conclusion of a treaty between two States can at the very least endanger the political independence or the territorial integrity of a third State.[66]

Kelsen continued commenting on Article 10 of the League Covenant:

> According to the intentions of the legislator this guarantee consists in the fact that the Members, bound to preserve the territorial integrity and the political independence of their associates, are also obligated . . . mutually to assist each other in preventing any change by violence in their territorial statute, . . . not to recognize any situation created by such an action and to do their best to re-establish the *status quo ante*.[67]

Kelsen's views on reestablishing the status quo ante are different from those of Suganuma on irredentism.[68] The most important difference is that Kelsen's measure of judgment was the norm that was valid at the time he was writing—Article 10 of the League Covenant. Kelsen's views should be considered as objective, while the views of Suganuma are subjective. The measure of Kelsen's theory about value now should still be the norm that is valid today—the stipulation concerning territorial integrity in the UN Charter. The opinion represented by Suganuma was not based on evidence that was cited or quoted by the author of this paper including *FRUS* documents concerning the case of the Diaoyu Islands and the valid norm (e.g., the stipulation concerning territorial integrity in the UN Charter). Therefore, the word "irredentism" would not be appropriate

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[65]Hereafter abbreviated to "Lake Tsana."

[66]Hans Kelsen, *Legal Technique in International Law—A Textual Critique of the League Covenant* (Geneva: Research Center, 1939), 68-69.

[67]Ibid., 80.

[68]Unryu Suganuma, "Historical Justification of Sovereign Right over Territorial Space of the Diaoyu/Senkaku Islands: Irredentism and Sino-Japanese Relations" (Ph.D. diss., Maxwell School of Citizenship and Public Affairs, Syracuse University, 1996).

if Suganuma wanted to make judgments objectively in the way Kelsen did.

Kelsen adopted an objective attitude to problems arising from illegal actions. If he was alive today, Kelsen would still be writing that the contracting parties of an international treaty ought to respect the territorial integrity of other sovereign countries, and be asking scholars to support the idea of not recognizing any situation created by a failure to accord such respect, and to do their best to reestablish the status quo ante.

Kelsen's abovementioned opinions on treaties and so on seem to transcend time and space. For this reason, Kelsen's ideas or ways of thinking may be used to study the case of the Diaoyu Islands and overcome the difficulties of the past. Up to now, this paper has dealt with theoretical analysis of the issue using Kelsenian theory as well as the interface between the past and the future from a backward-glancing perspective. This is aimed at reestablishing the status quo ante, namely, ending Japan's violation of Chinese sovereignty with regard to the Diaoyu Islands. Kelsen may have adopted such a position because he recognized that the people of the world could not enjoy a better future as long as unlawful acts such as these were repeated again and again, and therefore reestablishing the status quo ante was but one step toward a better future for all.

Here, we may deviate from discussion of Kelsen's doctrine of norm and value for a while and return to the Lake Tsana case mentioned briefly above. The Lake Tsana case certainly bears a resemblance to that of the Diaoyu Islands today. This similarity lies in the application of the legal techniques of international treaties. It seems that a shadow of the system that existed in China during the period of the Three Kingdoms (220-80) may also be found in Africa in modern times, though the protagonists of the play *Romance of the Three Kingdoms* of an African version were not feudal lords as were their counterparts in ancient China. One of the most important differences, at the micro level, between the Three Kingdoms of ancient China and similar cases in modern times is the application of the modern technique of international treaty law to the latter cases. At the macro level, the most important difference between the Chinese

Three Kingdoms and other similar modern situations is that the stage on which the modern sovereign states perform was or is larger one than that on which China's feudal dynasty performed. At the time of the Three Kingdoms there was no international law in the modern sense. Human society seems to have evolved toward increasing centralization and to some extent toward Kelsen's *Welt-Staat* (world state), although the *Welt-Staat* as the ultimate goal of legal centralization—which reflects the unique American attitude toward international law, i.e., belief in the inevitability of a community of nations living under the rule of law[69]—is at present out of the question. For the time being, the unity of all law may be asserted by showing that international law, together with national legal orders, is one system of norms, in the same way as people are used to considering their own national legal order as a unit.[70]

Human beings living and working in different parts of the world share almost the same ultimate ideals but they express them in different ways. For example, the concept of *datong shijie* (大同世界, great harmony) in Chinese is similar to both the German idea of the *Welt-Staat* and the belief in a community of nations living under the rule of law as expressed in English. But Kelsen pointed out one possible approach to the ultimate ideal—legal centralization, that is, treating international law together with the national legal order as one system of norms. He thought that it was necessary, for example, to understand and abide by general international law, including customary international law, which embraces such concepts as *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt*, on the basis of friendly and equal economic and cultural exchanges between nations. In these circumstances, human beings would be able to judge matters by the same standards. This idea reflects the forward-looking aspect of Kelsenian theory.

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[69]David J. Bederman, "Appraising a Century of Scholarship in the *American Journal of International Law*," *American Journal of International Law* 100, no. 1 (January 2006): 23.

[70]Kelsen, *Reine Rechtslehre*, 328; Kelsen, *Pure Theory of Law*, 328. The author's own translation of one sentence, "Derzeit kann jedoch von einem solchen [Welt-Staat] noch keine Rede sein," differs slightly from that of Max Knight, the translator of *Reine Rechtslehre*, although the general meaning should be the same.

Conclusion

First, scholars of the Vienna School, such as Verdross, Guggenheim, and Kelsen, reached the conclusion that because the Japanese were not the original discoverers of the Diaoyu Islands, they did not acquire the islands legally as Japanese territory according to customary international law. Therefore, the Diaoyu Islands were not and had not been Japanese territory before 1896. Yet Japan governed Taiwan, including the Diaoyu Islands, under the Treaty of Shimonoseki, a treaty that was valid from 1896 to 1945.[71] In the opinion of scholars of the Vienna School, the relevant clause of the Berlin Act of 1885 constituted positive international law. This clause was valid from February 26, 1885, to September 10, 1919. The Chinese government was not notified of the 1885 internal decision of the Japanese Cabinet concerning the Diaoyu Islands at the time. According to scholars of the Vienna School represented by Hans Kelsen, this internal administrative act on the part of Japan should be considered as illegal under the Berlin Act of 1885. Furthermore, in Kelsen's opinion, the primary function of international law is to determine the territorial, personal, temporal, and material spheres of validity of the national legal orders and thus to coordinate them. Therefore, the aforementioned Japanese cabinet decision of 1895 concerning the Diaoyu Islands, as a national norm of Japan, the validity of which is limited to a definite territory and the population living in that territory, is illegal.[72]

Accordingly, Japan's "Basic View on the Sovereignty of the Senkaku Islands" is dismissed by Vienna School adherents of positive law as represented by Hans Kelsen.

In the view of scholars such as Kelsen, certain relevant historical events, including the conclusion of the San Francisco Peace Treaty in 1951, that took place both before and after the the Diaoyu Islands became an issue are related to positive international law, especially a series of

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[71]Tan, "Diaoytai shijian yu Jiujinshan heyue," 48.
[72]Kelsen, *Principles of International Law*, 202, 208.

treaties or consensuses as well as stipulations in treaties.[73] Yet not all of these treaties are valid law, for example, the San Francisco Peace Treaty which has no binding force on the Chinese, and which is null and void as well as legally a nonentity because it is not in accordance with treaties concluded by the Allies during World War II. If the parties to the treaties concerned had fulfilled their obligations under valid treaties, agreements, consensuses, or stipulations, there would be no Diaoyu Islands issue at all. Consequently, we can draw two lessons from this situation. First, no country should violate the principle of *pacta sunt servanda*, an important principle of general international law which accords with the American principle of promoting stable and predictable relations between states.[74] If every sovereign state were to adhere to this principle as this world of sovereign states evolves toward a *datong shijie* or *Welt-Staat*, there would be less trouble now and in the future. We should always remember what Kelsen wrote, "The principle *pacta sunt servanda* . . . serves as the basic norm of the whole legal system which could be called international law."[75] Second, if Kelsen's concepts of objective value, objective judgment, and objective purpose were put into practice, there would be less misunderstanding and less bias, because all the relevant scholars would make their judgments on a common basis.

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[73]Some may deny that, according to the relevant treaties, the Diaoyu Islands should be returned to China. This may be because those treaties do not specifically mention the Diaoyu Islands. Nevertheless, at the Dumbarton Oaks Conference of 1944, Green H. Hackworth, legal adviser to the American delegation, put forward the following principle which was generally accepted: "If you include one you exclude the other." The British and Chinese delegations did not object to this principle, so a consensus was reached. See *The Second Historical Archives of China*, total file, no. 18, subfile, no. 2987, 13. Therefore, connecting the relevant agreement in the Cairo Declaration of 1943 and the relevant clause of the Potsdam Declaration of 1945 with the relevant opinions of scholars such as Suganuma concerning the history of the Diaoyu Islands, the relevant *FRUS* documents as well as the principle proposed by Hackworth, we may infer that the Diaoyu Islands should have been returned to China. Whether the relevant treaties mentioned the Diaoyu Islands or not is of no consequence.

[74]Bederman, "Appraising A Century of Scholarship," 23.

[75]In this context, "basic norm" could mean, for example, "an important norm"; it may have not the same meaning as "Grundnorm." See Kelsen, *Principles of International Law*, 316.

According to Kelsen's thinking, legal norms that make certain acts legal or illegal are objects of the science of law. In this sense, clarifying and confirming whether acts are legal or illegal should be the object of scholars, if those scholars agree with Kelsen's theory of norm, ought, and value as well as his ideal of a future world state. Kelsen's theories could provide an approach for scholars seeking to judge objectively the issue of the Diaoyu Islands as an episode in the evolution toward a world state.

The era of the Three Kingdoms as depicted in the novel *Romance of the Three Kingdoms* is long past. However, some authorities fear that the issue of the Diaoyu Islands, in some respects a new Three Kingdoms situation, may provoke another war between China and Japan.[76] It is therefore time to end this "Three Kingdoms of the Far East/Western Pacific" forever and to replace it with an entirely new collective security concept embracing mutual trust in the region on the basis of the UN Charter. This would allow people living in the region to progress toward a close regional community, an "Asian Union," and, finally, Kelsen's ideal of a "Union of the World." This ideal should result from following the logic of Hans Kelsen, rather than being a policy recommendation based on the Pure Theory of Law, because,

> The Pure Theory of Law refuses to serve any political interests by supplying them with an "ideology" by which the existing social order is justified or disqualified. . . . Precisely this anti-ideological tendency shows that the Pure Theory of Law is a true science of law. For science as cognition has the immanent tendency of revealing its subject. Ideology, however, veils reality either by glorifying it with the intent to conserve and defend, [sic] it or by misrepresenting it with the intent to attack, to destroy, and to replace it by another. Such ideology is rooted in Wishing, not in Knowing; it springs from certain interests or, more correctly, from the interest other than the interests in truth—which, of course, is not intended to say anything about the value or dignity of those other interests.[77]

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[76]Jean-Marc F. Blanchard, "The U.S. Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971," *China Quarterly* 161 (March 2000): 122; Kelsen, *Principles of International Law*, 208.

[77]Kelsen, *Pure Theory of Law*, 106.

In fact, Gao Chengyuan should be the first Chinese scholar who adopted Pure Theory of Law to study the foreign relations of China. The question of the territories in China leased by foreign powers, especially the German territory of Jiaozhou (Kiaochow, 膠州), the source of the Shandong question, was the first case to which Gao applied Kelsenian theory as early as 1936. The Shandong question was a result of the Paris Peace Treaty after World War I, a treaty that was not binding on China because China was not a party to it.[78] Now, more than seventy years later, Kelsenian theory is being applied to the Diaoyu Islands. It is possible to apply the conclusion drawn by Gao Chengyuan in the Kiaochow case to that of the Diaoyu Islands today: that upon the expiration of the lease, the validity of the legal norms or the system of norms of the country which leased the territory in the first place ought to be restored and executed without the aid of any other legal transaction of international law.[79] From the conclusion drawn by Gao in the light of the Pure Theory of Law, we can conclude that since the Treaty of Shimonoseki lost its validity as a result of the Postdam Declaration and the Japanese Imperial Rescript, the validity of the Chinese legal norms under which Taiwan together with the Diaoyu Islands was ceded to Japan should have been restored and executed without the aid of any other legal transaction of international law. Thus, the status quo of the Diaoyu Islands is illegal because it represents a violation by Japan of Chinese sovereignty. Consequently, following Kelsen's logic, the status quo ante ought to be reestablished.

Almost all the words and ideas of Hans Kelsen cited or quoted in this paper transcend space and time and should be applicable to the issue of the Diaoyu Islands today. The application of Kelsenian theory to the case of the Diaoyu Islands is conducive to finding a way out of the difficulties of the past and toward a brighter future. Only by reaching an

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[78]Gao Chengyuan, "Cong chuncuifalun lichang piping zujiedi geranglun yu weiren tongzhilun" (Critique of opinions regarding leased territories as ceded or mandated territories from the perspective of Pure Theory of Law), *Zhongguo faxue zazhi yuekan* (Journal of Chinese Legal Science) (Beijing) 1, no. 2 (1936): 131-40.

[79]Ibid., 140.

objective understanding of the past based on scientific analysis of events as recorded or reflected in reliable sources, and by objectively analyzing the relevant treaties using different approaches, is it possible to find a common starting-point for our quest for a better tomorrow. In Kelsen's view, one prerequisite for this is the reestablishment of the status quo ante. It seems that these two aspects of Pure Theory of Law accord with the standard of a good academic legal scholarship in the opinion of one American scholar: "I suppose all good academic legal scholarship and policy prescription has both a backward-glancing and a forward-looking aspect."[80] There could be of course other academic theories of positive law, or in other words law, that are better than those of the Vienna School of Jurisprudence. In this paper, Kelsenian theory has been subjectively and tentatively applied to the case of the Diaoyu Islands, and the author hopes that the subjectivity of this exercise will as far as possible correspond with commonly accepted standards of objectivity, for example, those valid treaties concluded during World War II, including the UN Charter, from the perspective of the Vienna School of Jurisprudence. We expect that other objective studies of this issue, either adopting different methods or approaches or offering more objective evaluations of the Vienna School of Jurisprudence as represented by Kelsen will be published soon. At the same time, the ideas of the Vienna School of Jurisprudence, as open theories, "will not be regarded as a description of the ultimate result, but as a cause that needs to be supplemented and improved."[81] This means that acquiring, accumulating, and developing human knowledge is a process, and one of the most important ways of carrying out this process is through academic discussion in the form of publishing papers. We should pay tribute to anybody who makes even a small contribution to the accumulation of knowledge. This is a good tradition shared by both East and West. There is no reason why we should not pay tribute to Hans Kelsen and the scholars of the Vienna School of Jurisprudence, particu-

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[80]Bederman, "Appraising A Century of Scholarship," 49.
[81]Kelsen, *Reine Rechtslehre*, vii.

larly considering the historical fact that since during the 1960s in China, Kelsen was once described as "one of the most reactionary jurists of the present time."[82] This comment reminds us not to forget history, as history cannot be separated from the present.

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[82]Wu Enyu, "'Chuncui faxue' de fandong shizhi," (The reactionary essence of the Pure Theory of Law) *Renmin Ribao* (People's Daily), February 27, 1962, 5.

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