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CONSENSUS AND DISSENT: AN INVETERATE DIALECTIC

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ABSTRACT: The research work carried out by Dr. Liñán Nogueras has opened a path of reflection on the nature of consensus in international relations that is very appropriate in the current conflict between Ukraine and the Russian Federation in the search for models of dispute settlement. However, in order to do so, it is necessary to reflect on the scope of consensus and analyse its conceptual connotations in order to interpret both its potential and its limitations.

KEYWORDS: Consensus, dissent, legitimisation, democracy, war in Ukraine.

CONSENSO Y DISENSO: UNA DIALÉCTICA INVETERADA

RESUMEN: Los trabajos de investigación realizados por el Dr. Liñán Nogueras han abierto una vía de reflexión sobre la naturaleza del consenso en las relaciones internacionales que resultan muy apropiadas en el actual conflicto entre Ucrania y la Federación de Rusia en la búsqueda de modelos de solución de las controversias. Si bien, para ello, se hace necesario reflexionar sobre el alcance del consenso y analizar sus connotaciones conceptuales, con el fin de interpretar tanto sus potencialidades como sus limitaciones.

PALABRAS CLAVE: Consenso, disenso, legitimación, democracia, guerra en Ucrania.

CONSENSUS ET DISSENSION: UNE DIALECTIQUE INVÉTÉRÉE

RÉSUMÉ: Le travail de recherche effectué par le Dr. Liñán Nogueras a ouvert une voie de réflexion sur la nature du consensus dans les relations internationales qui est très appropriée dans le conflit actuel entre l'Ukraine et la Fédération de Russie dans la recherche de modèles de règlement des différends. Toutefois, pour ce faire, il est nécessaire de réfléchir à la portée du consensus et d'analyser ses connotations conceptuelles afin d'interpréter à la fois son potentiel et ses limites.

MOT CLES: Consensus, dissension, légitimation, démocratie, guerre en Ukraine.

a) Professor Liñán Nogueras' work exhibits a constant drive for renewal, reflecting his intellectual and academic depth. Among the numerous topics he has pioneered, his reflections on the concepts of *consensus* and *legitimacy* stand out. In this vein, I propose to address the challenges posed to the in-

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ternational community by the dialectic between consensus and dissent, as a nuanced dilemma that merits reflection through an analogical lens in order to elucidate the inherent legitimations of international actors. This choice seems timely given that Liñán Nogueras' reflections on the meaning of consensus within the framework of the Helsinki Final Act and the East-West tensions that arose in the early 1970s seem to be resurfacing with the conflict in Ukraine in 2022; a situation that prompts us to question the nature and effectiveness of consensus at a time when dissent seems to be raised as a permanent re-edition of conflicts.

In this vein, it is worth analysing whether the use of consensus in legitimizing *détente* is feasible, given the nature of this latter category, in such a way that the construction of principles or guiding norms of this international political practice tends to reproduce the conflict within them, preventing the formation of a legal norm that, by definition, requires the formulation of a choice between those that are the basis of the social conflict². It is necessary understanding *détente* (as it was termed in the context of the Cold War) as a period of truce in a confrontation between States within a conflict that has not yet been resolved, but seeking an accommodation of tensions between divergent interests and through negotiations, where the figure of consensus seems to be gaining strength in the protean and contradictory international relations.

These steps were significant when after the “Cuban Missile Crisis” in October 1962, Kennedy and Khrushchev initiated the policy of *détente* in order to avoid greater evils, which culminated in the signing of important treaties such as the Nuclear Non-Proliferation Treaty of 1968 or the SALT I Agreement of 1972 to limit the number of intercontinental missiles in the hands of the United States or the Soviet Union, or the Conference on Security and Cooperation in Europe (CSCE), known as the Helsinki Conference, developed in several sessions between July 1973 and August 1975. The latter culminated in the Helsinki Final Act, giving rise to a model of distention (*détente*) in which consensus was the decisive instrument.

These historical and temporal coincidences have led me to wonder to what extent the war between Ukraine and the Russian Federation, with the involvement of the European Union, the United States of America, China,

² LIÑÁN NOGUERAS, D. J., “Consenso y legitimación en la Conferencia sobre Seguridad y Cooperación en Europa”, *Revista de Estudios Internacionales*, Vol. 2, No. 3, 1981, p. 656.

or Turkey against the backdrop of NATO, can reopen the channels of consensus as possible avenues for resolving a conflict that seems entrenched. For this purpose the work carried out by Liñán Nogueras can shed light and prove extremely useful in its capacity to unravel the complex conceptual underpinnings of the term's consensus, dissent, and legitimacy.

b) A strategy of international relations based on the criterion of consensus has entailed the pursuit of agreements in a permanent dialectic with dissent, which promotes the nullification of existing obligations and the breakdown of the circumstantial equilibrium in the international community, affecting the legitimacy of power models.

There is an intimate relationship between concepts such as consensus, rationality, and legitimacy as Ernesto Garzón Valdés of the University of Mainz points out: "In contemporary political philosophy, two concepts play an essential role in addressing the legitimacy of the State: consensus and rationality"³. Within the framework of consensus, two mutually exclusive and collectively exhaustive situations arise: the factual version and the hypothetical version. Both seek a rationality that they underpin as a substrate of legitimacy.

For the aforementioned author, whom I shall follow in the ensuing reflections, both the factual and the hypothetical versions serve as a starting point for the grounding of the political legitimacy of democracy. Nevertheless, as he points out, "merely factual consensus is the result of a strategic rationality that can lead to the most aberrant results, and the hypothetical, at best, an unnecessary dramatization in which individually indistinguishable beings participate"⁴. Following Diego J. Liñán Nogueras' analysis of the Helsinki Final Act, the power dynamics of the international community render consensus a decision-making process "marked by pact-like connotations, in the political sense, more akin to situations of necessity and utility than to legitimizing intentions"⁵.

³ GARZÓN VALDÉS, E., *Derecho, ética y política*, Centro de Estudios Constitucionales, Madrid, 1993, p. 13. Also, GARZÓN VALDÉS, E., "Consenso, racionalidad y legitimidad", *Isegoría*, No. 2, 1990.

⁴ GARZÓN VALDÉS, E., "El consenso democrático: fundamento y límites del papel de las minorías", *Isonomía*, No. 12, 2000, México, p. 15. https://www.scielo.org.mx/scielo.php?script=sci_issuetoc&pid=1405-021820000001&lng=es&nrm=iso.

⁵ LIÑÁN NOGUERAS, D. J., "Consenso y legitimación en la Conferencia sobre Seguridad y Coor-

Authors like Niklas Luhmann, James S. Fishkin, and Jürgen Habermas advocate for the factual version, whereas James Buchanan, John Rawls, and David Gauthier favor the hypothetical version. However, it remains to be seen to what extent consensus, in either form, can provide a foundation for the political legitimacy of democracy⁶.

According to Luhmann⁷, in the context of factual consensus, each political system establishes its own grounds for legitimacy by seeking a basic consensus on the acceptability of the procedure, manifested in an unmotivated and evident acceptance of binding decisions. In this way, ideological positivism would allow for the self-referential justification of any ideological system, and since the genesis of the motivations for consensus does not matter, “the possibility of manipulation of those who must provide it would not be excluded”⁸. However, unlike Luhmann, Habermas frames factual discourse with transcendental conditions, with the idea of ensuring an ideal reading of discourse in order to avoid the manipulation of society members, which places him in a position to perform a double reading, between the factual and the hypothetical.

The third position on consensus, grounded in the factual version, invites us to examine Fishkin’s⁹ concept of a “self-reflective political culture”. Fishkin proposes that those subjects to State authority should be able to evaluate that authority “from within” to determine its justifiability. This self-reflection could prevent indoctrination and the rise of totalitarianism. However, the question remains whether this model is sufficient to establish the legitimacy of a State.

Within the rigorous examination carried out by Garzón Valdés, the other version of consensus is the one based on hypothetical situations. According

peración en Europa”, *op. cit.*, p. 649.

⁶ GARZÓN VALDÉS, E., “El consenso democrático: fundamento y límites del papel de las minorías”, *op. cit.*, p. 15.

⁷ LUHMANN, N., *Legitimation durch verfahren*, Darmstadt/Neuwied, 1970, cited in GARZÓN VALDÉS, E., “Consenso, racionalidad y legitimidad”, *op. cit.*

⁸ GARZÓN VALDÉS, E., “El consenso democrático: fundamento y límites del papel de las minorías”, *op. cit.*, p. 14.

⁹ FISHKIN, J. S., “Bargaining, Justice and Justification”, *Social Philosophy & Policy*, Vol. 5, No. 2, 1988, p. 46 *et seq.*, cited in GARZÓN VALDÉS, E., “Consenso, racionalidad y legitimidad”, *op. cit.*

to Buchanan¹⁰, the State is justified by a rational, hypothetical consensus “subject only to respect for the individuality of each person”¹¹, aiming for a constitutional contract that minimizes wasteful spending on offense and defense. This model would justify what Buchanan calls a “slavery contract”, such as a disarmament agreement where the weak produce goods for the strong in exchange for retaining something more than mere subsistence, which could generate a model of legitimation in which individuals obtain what they desire with the only condition being a mutual agreement. Consequently, Garzón Valdés argues that “it is difficult to accept this rational and consensual basis for a State that originates in a hypothetical situation, where mere consensus is the sole source of legitimacy, with no other normative constraint than respect for individual rights as determined by natural distribution”¹².

Within this hypothetical discourse, John Rawls¹³ proposes a hypothetical situation as a starting point for rational consent among individuals whose motivations have been filtered through the “veil of ignorance”¹⁴, which, however, leaves many unanswered questions. It is important to clarify, given the potential for misunderstandings, that the purpose of the “veil of ignorance” is to seek impartiality as the initial position of participants, where they are ignorant of the role each other plays in society and, therefore, in this situation of ignorance, they could consider formulating principles, through a rational decision, that could be just for all¹⁵.

Conversely, David Gauthier¹⁶ advocates for more stringent normative

¹⁰ BUCHANAN, J. M., *The Limits of Liberty*, Chicago/Londres, 1975, cited in GARZÓN VALDÉS, E., “Consenso, racionalidad y legitimidad”, *op. cit.*

¹¹ GARZÓN VALDÉS, E., *Derecho, ética y política, op. cit.*, p. 17.

¹² *Ibid.*, p. 18.

¹³ RAWLS, J., *A Theory of Justice*, Cambridge, Mass, 1971. cited in GARZÓN VALDÉS, E., “Consenso, racionalidad y legitimidad”, *op. cit.* Also in spanish, *Teoría de la Justicia*, translation by María Dolores González, Editorial Fondo de Cultura Económica, México, 2012.

¹⁴ GARZÓN VALDÉS, E., *Derecho, ética y política, op. cit.*, p. 13. He adds that “one might wonder whether the proposal of a consensus among the future members of a society in a hypothetical situation does not constitute, as Hare would say, a dramatization that adds nothing substantially to the classic resource of the impartial observer”, p. 19.

¹⁵ *Ibid.*, p. 19.

¹⁶ GAUTHIER, D., *Morals by Agreement*, Oxford, 1986, cited in GARZÓN VALDÉS, E., “Consenso, racionalidad y legitimidad”, *op. cit.*

constraints, grounded in Locke's proviso which forbids "benefiting by harming another"¹⁷. This would preclude hypothetical contracts like those between masters and slaves, where one party coerces the other. However, for Garzón Valdés, we are not free from the danger of indoctrination or even, he adds, "perverse paternalism"¹⁸. Therefore, it is difficult to develop a satisfactory concept of legitimacy. Thus, it should be noted that the legitimacy of a political system is strengthened when the prevailing norms of behaviour coincide with those of a civic ethic.

According to Guy de Lacharrière, the scope of the concept of consensus needs to be refined, given its dual nature in the international framework: on the one hand, as a decision-making procedure and, on the other, as the embodiment of the decision itself. Consensus, "in its strictest sense, is defined as a decision-making process, excluding voting, which consists in the absence of any objection raised as an obstacle to the adoption of the decision in question. However, it is sometimes officially understood as a synonym for 'general agreement' or even 'broad consensus'"¹⁹. Moreover, he states that "the term consensus sometimes refers to the document adopted through this process"²⁰, particularly when the specific format of the text differs from the organization's standard types of documents (such as a presidential summary that is not a formal resolution).

For Liñán Noguerras, following Lacharrière, consensus as a decision-making technique is not exactly the same as unanimity, that is to say that "consensus is, when compared to the unanimity rule that requires the affirmative vote of each and every participant in the decision, a more flexible rule"; therefore, the flexibility of consensus as a decision-making technique is a means that, ultimately, "aims to meet the demands of effectiveness and solidity that the unanimity rule implies, avoiding the paralyzing effect that a dogmatic application of unanimity can have"²¹.

Nevertheless, it is pertinent to recall Maurice Duverger when he affirms

¹⁷ LOCKE, J., *Second Treatise of Government* (1690), Harlan Davidson, 1982.

¹⁸ GARZÓN VALDÉS, E., *Derecho, ética y política*, *op. cit.*, p. 18.

¹⁹ LACHARRIÈRE, G. DE, (1978) "Le consensus: Essais de définition", *Pouvoirs, Revue française d'études constitutionnelles et politiques*, No. 5, 1978, p. 35.

²⁰ *Ibid.*, p. 35.

²¹ LIÑÁN NOGUERAS, D. J., "Consenso y legitimación en la Conferencia sobre Seguridad y Cooperación en Europa", *op. cit.*, p. 651.

that

“no political society can subsist without consensus, that is, without a basic agreement on the form of government, its relationship with citizens and the relations among them. No political society can subsist solely on consensus without resorting to a certain degree of coercion. The relative proportions of consensus and coercion define authoritarian and liberal regimes”²².

Ultimately, returning to Garzón Valdés, none of the six possible justifications of a political system “prove to be satisfactory”²³, thus it could be stated that legitimacy is only sustained when the principle of equality among all members of a community is upheld and attempts are made to redress or transcend existing inequalities within a democratic and pluralistic framework.

This is where the dilemma posed by Hans Kelsen²⁴ arises, between the “principle of the majority” and the “rule of the majority”, and the question is raised as to whether the dissent of the minority, as such, should also be respected. It is along these lines that Javier Muguerza has worked on the idea of the “discursive relevance of dissent”²⁵ and his reflection on the types of dissent is very enlightening, given that, as part of its own discourse, dissent must oppose a consensus. Nevertheless, dissent becomes illegitimate when it contravenes fundamental principles of morality and civility, such as opposing the Universal Declaration of Human Rights, in contrast to legitimate dissent, such as that which opposes the extermination of a minority or apartheid. Even within these two perspectives, there will be rational dissent when, for example, certain human groups have considered the Universal Declaration of Human Rights to be excessively Eurocentric and not having considered other cultural realities; in contrast to an inadmissible dissent where a certain group opposes apartheid against blacks but considers it possible to apply it against

²² DUVERGER, M., (1978) “Le consensus: Essais de définition”, *Pouvoirs, Revue française d'études constitutionnelles et politiques*, No. 5, 1978, p. 27.

²³ GARZÓN VALDÉS, E., *Derecho, ética y política, op. cit.*, p. 19.

²⁴ KELSEN, H., *Vom Wesen und Wert der Demokratie*, Tubinga, 1929, p. 28, cited in GARZÓN VALDÉS, E., “El consenso democrático: fundamento y límites del papel de las minorías”, *op. cit.*

²⁵ MUGUERZA J., “La obediencia al derecho y el imperativo de la disidencia. (Una intrusión en un debate)”, *Sistema*, No. 70, 1986. Also, MUGUERZA J., *Desde la perplejidad*, Fondo de Cultura Económica, México/Madrid/Buenos Aires, 1990, pp. 27-40.

Romani people.

Along these lines, we return to Garzón Valdés' thought when he states that "it is interesting to note that what the dissident seeks is for others to reach a consensus in accordance with his dissent"²⁶, so the final situation he aims for is one of consensus. In this regard, he cautions that dissent is a transitional stance bounded by two consensuses: the one that is rejected and the one that is sought to be established²⁷. Consequently, the moral significance of dissent will be grounded in understanding against which type of consensus it is directed, as it will be necessary to ascertain whether it is aimed at a factual or hypothetical consensus and to evaluate the moral character of the dissent.

It follows that it would be justifiable, both for those in consensus and those in dissent, to uphold the ethically sound principle of respecting fundamental human rights. Consequently, Garzón Valdés advocates for a "protected sphere" where fundamental, inalienable rights must be preserved, as an essential prerequisite for representative democracy; a stance that unquestionably enhances the legitimacy of power. In this sense, "only outside this 'protected sphere' is dissent, negotiation, and tolerance possible. Anyone who attempts to breach the 'protected sphere' and subject fundamental rights to dissent and negotiation undermines democracy's capacity to fulfil its moral obligations"²⁸. He recalls that, according to Hans Kelsen, genuine democracy is opposed to equating the "majority principle" with the "rule of the majority", and that the "majority principle" necessitates the existence of a minority, in that the concept of a majority is meaningless without a minority; thereby preventing the domination of one group over another. According to Kelsen, the paramount role of a parliamentary system is to shape the State's will via a collective body chosen by the people through universal and equal suffrage,

²⁶ GARZÓN VALDÉS, E., "El consenso democrático: fundamento y límites del papel de las minorías", *op. cit.*, p. 17.

²⁷ *Ibid.* He adds that, "dissent, unlike consensus, has no aspirations for stability. Dissent tends to eliminate itself by creating circumstances in which it ceases to be necessary", p. 17.

²⁸ *Ibid.* However, he adds that "I believe that this is what happens when we talk about different generations of human rights. This is not about including new premises, but about drawing conclusions from premises already accepted. It is enough to think, for example, of the relationship between the right to life (a human right of the so-called 'first generation') and the right to an uncontaminated environment (a right of the 'third generation') or that between the negative duty not to harm and the positive duty not to withhold assistance when harm can be avoided in this way", p. 20.

thus operating “democratically and according to the majority principle”²⁹.

However, it should not be forgotten that the mere fact that members of a community agree to accept certain patterns of behaviour does not imply, *ipso facto*, that they are ethically permissible as we can observe in many historical examples where totalitarian regimes have been established through democratic means. In this sense, the so-called “illiberal democracy” is a flagrant example of this pernicious model, a neologism coined by Fareed Zakaria to categorize governments that come to power democratically but disregard the constitutional foundations of the State and do not respect individual rights³⁰ that represent primary goods and universalizable interests.

c) In this context, it is important to emphasize the arguments advanced by Diego J. Liñán Noguerras, who suggests that

“if, in fact, the State or sovereignty can no longer be understood through the lens of ‘rationalism’ or ‘positivism’ but must instead be viewed as historical ‘categories’, then International Law cannot be seen merely as a product of the ‘will’ of States; and, without denying the ‘consensual’ foundation of this order, the economic and political mediations of such consensus will enable us to identify a more realistic and complex explanation for International Law”³¹.

This leads us to an analysis of consensus as the pivot of the realities of the international community and as a tool of legitimation. It is interesting to analyse how Liñán achieves a conceptual study, using a legal instrument such as the Final Act of the Helsinki Conference on Security and Cooperation in Europe to delve into the idea of consensus and legitimation.

It is important to note that the focus of this analysis lies in the divergence regarding the value and scope of the provisions of the Helsinki Final Act. Although the Act does not constitute an international agreement, the possibility that its provisions have legal value or relevance cannot be a priori denied.

²⁹ Kelsen, H., *Das Problem des Parlamentarismus*, Viena/Leipzig, 1925, cited in Garzón Valdés, E., “Consenso, racionalidad y legitimidad”, *op. cit.*

³⁰ Faramiñán Gilbert, J. M., de, “Entre pandemia y posverdad: el auge de los populismos”, *Revista AC Asuntos Constitucionales*, No. 1, 2021, p. 47.

³¹ Liñán Noguerras, D. J., *Proyecto docente y de investigación*, Granada, 1986, p. 50. (This is a magnificent work of legal reflection, unpublished, multicopy edition).

Additionally, this is where the concept of *détente* is realized, as distention becomes essential for its legal expression³².

This approach is highly illustrative for delving deeper into the topic at hand, given that within this conference two blocs were irremediably facing each other: the socialist States and the capitalist States. Therefore, jointly defining distention did not imply either regulating or, of course, removing the conflict, but rather achieving a significant political balance through consensus. Thus, the Conference on Security and Cooperation in Europe succeeded in shaping the Helsinki Final Act as the expression of a single bloc's will, "constituting the joint definition of distention achieved by the Conference; in which this achievement was carried out through consensus"³³.

Liñán Nogueras argues that consensus is a specific process for reaching agreements³⁴. Since consensus, beyond its procedural aspect also embodies "a material content related to the structuring of fundamental values and norms, underpinning a political power or, as in our case, a balance of power"³⁵. As Jacques Rigaud would put it, consensus is, in the international framework, the expression of "a will to live in the difficulty of being"³⁶.

We should also consider Jean-Marie Vincent's observations that "as with many terms commonly used in political science, the term 'consensus' is fraught with multiple meanings or connotations, making equivocation relatively easy". As we have already examined in the first section when analysing the factual and hypothetical versions of consensus, it is overly simplistic to compare societies where rulers gain the consent of the governed without any apparent constraints with those where obedience to authority is primarily enforced through coercion or pervasive violence³⁷.

Therefore, for Liñán, the notion of consensus is "ambiguous, multivocal, and poorly defined"³⁸ and he highlights the instrumental nature of consen-

³² *Ibid.*, p. 649.

³³ *Ibid.*, p. 649.

³⁴ *Ibid.*, p. 649.

³⁵ *Ibid.*, p. 649.

³⁶ RIGAUD, J., "Réflexions sur la notion de consensus", *Pouvoirs, Revue française d'études constitutionnelles et politiques*, No. 5, 1978, p. 8.

³⁷ VINCENT, J.-M., "Le consensus: Essais de définition", *Pouvoirs, Revue française d'études constitutionnelles et politiques*, No. 5, 1978, p. 36.

³⁸ LIÑÁN NOGUERAS, D. J., "Consenso y legitimación en la Conferencia sobre Seguridad y

sus insofar as it becomes a fundamental instrument of the decision-making process. This decision-making process, by its very nature, encompasses two dimensions: a technical one and a material one, which will depend on whether the use of consensus takes place in a previously institutionalized or non-institutionalized environment.

As our author highlights, when consensus emerges within an institutional framework, it becomes a distinct mechanism, differing from both majority rule and strict unanimity. Indeed, as Juan Antonio Carrillo Salcedo points out, “the rule of unanimity cannot be understood as anything more than an incentive to negotiation and not as a dogma (...) for it is certainly true that the progressive development of international law demands a certain unanimity, but only a certain unanimity”³⁹ and Liñán Noguerras reinforces this idea when he indicates that “perhaps consensus, in this order of questions, is nothing more than a ‘certain unanimity’, since it seeks to cover that flexibility which unanimity, certainly, does not know”⁴⁰.

However, our author goes further by considering that consensus, especially when referred to a system in which there has been no prior structuring of values, is something more than a mere technique for reaching agreements. We can observe that when consensus functions in a non-institutionalized setting, it “is essentially configured as a procedure of voluntarist legitimation, in contrast to authoritarian models of legitimation”⁴¹ and it provides the advantage of flexibility as it does not demand a univocal and dogmatic understanding. This makes consensus an especially suitable instrument of legitimation for markedly conflictual international political realities; insofar as, as an instrument of legitimation, consensus possesses the capacity to adapt to changing circumstances, making it particularly well-suited to the dynamics of such international relations, which are always prone to contradiction and conflict.

Perhaps the most illustrative reflection on the true nature of consensus is that rescued by professors García de la Serrana, Murillo Ferrol, and Vallespín Oña within the framework of a communication presented at the Congress of Cooperación en Europa”, *op. cit.*, p. 650.

³⁹ CARRILLO SALCEDO, J. A., “Mayoría y acuerdo general en el desarrollo progresivo del Derecho internacional”, *Revista Española de Derecho Internacional*, Vol. XX, No. 1, 1987, p. 15.

⁴⁰ LIÑÁN NOGUERAS, D. J., “Consenso y legitimación en la Conferencia sobre Seguridad y Cooperación en Europa”, *op. cit.*, p. 651.

⁴¹ *Ibid.*, p. 651.

Political Science held in Moscow in August 1979, in which they indicated the complex nature of consensus by stating that “consensus is dissent, but not public (...) And it is not, we believe, a paradox to say that consensus is also, and fundamentally, dissent, nor is it an isolated case of a concept mediated by its opposite”⁴²; thus, consensus in this way manifests a substantial limitation from a legal perspective and a paradoxical political reality⁴³.

d) Given the foregoing analysis, it is worth considering the possibility of reviving the practice of consensus by adopting this formula of compromise, which accommodates opposing viewpoints yet can serve as a complementary means of mitigating conflicts that are currently escalating with such ferocity, as exemplified by the Russian Federation’s invasion of Ukraine. Indeed, a possible return to the Cold War is being outlined; “the Cold War is back and with a vengeance”, as warned by the United Nations Secretary-General, António Guterres⁴⁴ at the Security Council meeting in April 2018, well before the outbreak of the conflict with Ukraine, which at the time was focused on the crisis in Syria, although the conflict in Ukraine has now become a hotbed.

It is worth asking to what extent consensus can be the appropriate instrument to resolve the international tension that has been generated by the war in Ukraine⁴⁵ and to see how the doors have been gradually closing. For example, the International Monetary Fund’s semi-annual meeting of finance ministers in April 2022 ended for the first time without reaching a consensus, a sign of the tensions created by the Russian invasion of Ukraine, which, along with the COVID-19 pandemic, have threatened global geostrategic stability. In August 2022, Russia announced that the Treaty on the Non-Proliferation of Nuclear Weapons had failed to reach a consensus due to tensions

⁴² GARCÍA DE LA SERRANA, MURRILLO FERROL and VALLESPÍN OÑA, “The consensus (during the Spanish constituent period 1977-79)”, Congreso de Ciencia Política celebrado en Moscú, 12 to 18 August 1979. Multicopy copy cited by LIÑAN NOGUERAS, D. J., “Consenso y legitimación en la Conferencia sobre Seguridad y Cooperación en Europa”, *op. cit.*

⁴³ LIÑAN NOGUERAS, D. J., “Consenso y legitimación en la Conferencia sobre Seguridad y Cooperación en Europa”, *op. cit.*, p. 662.

⁴⁴ GUTERRES, A., “Cold War ‘Back with a Vengeance’ amid Multiple Entrenched Divides in Middle East, Secretary-General Tells Security Council, Urging Efforts to Avert Further Chaos”, *United Nations*, 13 April 2018, <https://press.un.org/en/2018/sgsm18986.doc.htm>.

⁴⁵ FARAMIÑÁN GILBERT, J. M. DE, “Ucrania, sobre la línea roja”, *Real Instituto Elcano*, 30 December 2014, www.realinstitutoelcano.org.

generated around the Zaporizhka nuclear power plant, which is under the control of Russian troops, as communicated by the Russian government at the plenary closing session of the tenth review conference of the Treaty on the Non-Proliferation of Nuclear Weapons. It was indicated that since the gap between the parties had not been bridged, consensus was currently unreasonable. The G20 finance ministers and central bank governors' meeting in Bali, Indonesia in July 2022, were unable to agree on a joint communiqué due to disagreements stemming from Russia's invasion of Ukraine.

We are transgressing the red lines, as previously cautioned by the UN Secretary-General António Guterres, during the Tenth Conference of the Treaty on the Non-Proliferation of Nuclear Weapons. At that time, it was emphasized that the escalating geopolitical tensions have placed the global population at its greatest risk of nuclear annihilation since the end of the Cold War; "Today, humanity is one misunderstanding, one miscalculation away from nuclear annihilation"⁴⁶.

The breakthroughs achieved almost half a century ago in the Helsinki Final Act should be a source of inspiration, as it was envisioned then that policies of distention and security were not mutually exclusive but rather mutually reinforcing, aimed at promoting mutual confidence. Accordingly, as Liñán notes, "consensus, in this regard, should have legitimized that reality without changing the underlying conflict from which all their efforts had sprung"⁴⁷ as something that was external to the conflict and aimed at "mutual benefit".

One of the crucial issues addressed at the Conference was the matter of human rights, which constituted the third part of the Helsinki Final Act and was based on the consensus acceptance of respect for human rights. Let us evoke, following Garzón Valdés, the concept of "untouchable core" where non-negotiable fundamental rights must be protected. In Helsinki, given the flexibility of consensus, an acceptable solution could be achieved⁴⁸. Let us recall that in the case of the conflict in Ukraine, the Russian army

⁴⁶ GUTERRES, A., 2022, <https://www.un.org/es/>.

⁴⁷ LIÑÁN NOGUERAS, D. J., "Consenso y legitimación en la Conferencia sobre Seguridad y Cooperación en Europa", *op. cit.*, p. 659.

⁴⁸ *Ibid.*, he points out that "the States participating in the CSCE are aware that the notion of 'human rights and fundamental freedoms' is also a controversial category that, if one were to try to 'define' it, would immediately tend to reproduce the opposition of the two major conceptions to which it is based, preventing any possibility of agreement", p. 661.

has committed serious violations of human rights that can be interpreted as “war crimes”. Ukrainian Prosecutor General Irina Vendiktova has recorded approximately fifteen thousand cases, highlighting in particular the violations committed in the cities of Mariupol and Bucha. Moreover, the Ukrainian human rights defender Liudmila Denisova has denounced numerous cases of violations by Russian soldiers in the city of Irpín.

We are witnessing a profound geopolitical shift, as Xavier Pons Rafols points out,

“the invasion of Ukraine initiated by the Russian Federation on the morning of February 24, 2022, will undoubtedly be a disruptive factor in the deconstruction of the current international order and the emergence of a new era of global geopolitics, perhaps even more uncertain and insecure than the present one”⁴⁹.

Within the labyrinth of geopolitics, progress is made amid uncertainty, navigating a course between advances and setbacks that must be regularly re-assessed. Between consensus and dissent, a balance of power is sought, which in such cases proves to be a precarious equilibrium. Hence, Liñán points out that “consensus as a tool of legitimation would allow for the joint construction of values on the basis of the very same conflict, but would pose the fundamental problem of making them reappear at the moment when those values demanded a concretization for their effective application”⁵⁰. Therefore, he reminds us that the rationalizing function of the Conference (CSCE) is, “by its very nature, an unfinished, dependent, and mutable process”⁵¹.

Thus, the consensus is best served in a relatively informal environment, and any attempt to institutionalize it would constrain its potential. As consensus is a proteic instrument, it is not subject to rules of interpretation that could lead or shift it towards models of legal instrumentation that involve decision-making which may favor one party and thus generate dissent in the

⁴⁹ PONS RAFOLS, X., “La guerra de Ucrania, las Naciones Unidas y el Derecho Internacional: algunas certezas sistémicas insostenibles”, *Revista Electrónica de Estudios Internacionales*, No. 43, 2022, p. 2.

⁵⁰ LIÑÁN NOGUERAS, D. J., “Consenso y legitimación en la Conferencia sobre Seguridad y Cooperación en Europa”, *op. cit.*, p. 664.

⁵¹ *Ibid.*, p. 664.

other.

In this vein, we wonder whether consensus can be used in Ukraine today, as it was in Helsinki, to narrow the divisions that appear irreconcilable in the midst of war. I acknowledge that these reflections are merely an exercise in analogical reasoning, but I also recognize that successful models can be recycled and reconfigured to yield similar results. As I have already pointed out, “we must consider that we are facing a process of NATO expanding its influence over former Soviet republics, mirroring the buffer zones (Crimea, Donbas, Nagorno-Karabakh, or Transnistria) of the Russian Federation. In my view, both of these expansionist models should be halted immediately”⁵². This interplay of opposing tensions creates the ideal scenario to interpose the method of consensus against belligerent disputes, where détente can serve as a counterbalance. It is important to remember, however, Russia’s illegal annexation of the Ukrainian regions of Donetsk, Luhansk, Zaporizhzhia, and Kherson through questionable referendums, lacking legal legitimacy, which have been rejected by the international community as deliberately contrary to the United Nations Charter.

The recent passing of Mikhail Gorbachev, the architect of *glasnost* and *perestroika*, on 30 August 2022, has highlighted the dichotomy between his open model and the autocratic model of Vladimir Putin, and the need to prevent totalitarian and expansionist drifts from being controlled by intensifying models like those in the Helsinki Accords, which achieved timely détente during complex times.

Let us revisit our previous reflections and, based on them, consider the need to return to the model of consensus as one of the most suitable tools for formulating solutions that can bypass confrontation and reach the necessary equilibrium points to achieve understandings that can soften the frictions between the parties to a conflict. The model examined by Dr. Liñán is still relevant to the current tensions between Ukraine and Russia, which have escalated into armed conflict with global implications. We are considering the possibility of applying the consensus model, where both sides make concessions to achieve a peaceful settlement.

⁵² FARAMIÑÁN GILBERT, J. M. DE, “Ucrania, sobre un trípode inestable”, *El Independiente*, 23 January 2022, <https://www.elindependiente.com/opinion/2022/01/23/ucrania-sobre-un-tripode-inestable/>.

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