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FLAWED CONSENSUS AND SOFT LAW: FROM THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE TO A FUTURE PEACE CONFERENCE ON UKRAINE

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ABSTRACT: This contribution to the Liber discipulorum dedicated to Prof. D.J. Liñán Nogueras evaluates the resolutions adopted by the United Nations General Assembly in the aftermath of Russia's war of aggression in Ukraine. This critical analysis serves to present the changes that have taken place in the power, normative and interpretative structures in the international order, highlighting among these changes the flawed consensus reached in the UN General Assembly, the return to automatic majorities and the choice of *soft law* as a normative response of limited intensity. While the crisis of consensus that manifests itself in norm-creating processes and also in political processes and agreements is at the origin of soft *law*, it is also a symptom of the frustrated normative vocation of international organisations. This analysis leads to a reflection on how soft law instruments could be used to seek peace in the Ukrainian war, albeit with a flawed consensus. In the case of the 1975 Conference on Security and Cooperation in Europe (CSCE), consensus made détente possible; now, consensus, however flawed, can also be an avenue for future solutions, with *soft law* instruments as a first step.

KEYWORDS: Flawed consensus, soft law, automatic majorities, UN General Assembly resolutions, Russia's war of aggression in Ukraine.

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CONSENSO DEFECTUOSO Y SOFT LAW: DE LA CONFERENCIA SOBRE SEGURIDAD Y COOPERACIÓN EN EUROPA A UNA FUTURA CONFERENCIA DE PAZ SOBRE UCRANIA

RESUMEN: Esta contribución al Liber discipulorum dedicado al Prof. D.J. Liñán Nogueras evalúa las resoluciones adoptadas por la Asamblea General de las Naciones Unidas tras la guerra de agresión de Rusia en Ucrania. Este análisis crítico sirve para presentar los cambios que se han producido en las estructuras de poder, normativa e interpretativa en el orden internacional, destacando entre dichos cambios el consenso defectuoso que se alcanza en la Asamblea General de las Naciones Unidas, la vuelta en ella a las mayorías automáticas y la elección del *soft law* como respuesta normativa de intensidad limitada. Si bien la crisis del consenso que se manifiesta en los procesos de formación de normas y también en los procesos y acuerdos políticos está en el origen del *soft law*, también es un síntoma de la vocación normativa frustrada de las organizaciones internacionales. Este análisis lleva a una reflexión sobre cómo podrían ser los instrumentos de *soft law* que sirvan para buscar la paz en la guerra de Ucrania, aunque sea con un consenso defectuoso. En el caso de la Conferencia sobre la Seguridad y la Cooperación en Europa (CSCE) de 1975, el consenso hizo posible la détente, ahora, el consenso aunque defectuoso también puede ser una vía para soluciones futuras, con instrumentos de *soft law* como primer paso.

PALABRAS CLAVE: Consenso defectuoso, soft law, mayorías automáticas, resoluciones de la Asamblea general de Naciones Unidas, guerra de agresión de Rusia en Ucrania.

CONSENSUS IMPARFAIT ET DROIT MOU: DE LA CONFERENCE SUR LA SECURITE ET LA COOPERATION EN EUROPE A UNE FUTURE CONFERENCE DE PAIX SUR L'UKRAINE

RÉSUMÉ: Cette contribution au Liber discipulorum dédié au professeur D.J. Liñán Nogueras évalue les résolutions adoptées par l'Assemblée générale des Nations unies à la suite de la guerre d'agression menée par la Russie en Ukraine. Cette analyse critique sert à présenter les changements qui ont eu lieu dans les structures de pouvoir, normatives et interprétatives de l'ordre international, en soulignant parmi ces changements le consensus imparfait atteint à l'Assemblée générale de l'ONU, le retour aux majorités automatiques et le choix de la *soft law* comme réponse normative d'intensité limitée. Si la crise du consensus qui se manifeste dans les processus de formation des normes ainsi que dans les processus et accords politiques est à l'origine de la *soft law*, elle est également un symptôme de la vocation normative frustrée des organisations internationales. Cette analyse conduit à une réflexion sur les instruments de *soft law* qui pourraient être utilisés pour rechercher la paix dans la guerre d'Ukraine, même si le consensus est imparfait. Dans le cas de la Conférence sur la sécurité et la coopération en Europe (CSCE) de 1975, le consensus a rendu possible la détente; aujourd'hui, le consensus même imparfait peut également être une voie vers des solutions futures, avec des instruments de *soft law* comme première étape.

MOT CLES: Consensus imparfait, *soft law*, majorités automatiques, resolutions de l'Assemblée Générale des Nations Unies, guerre d'agression de la Russie en Ukraine.

I. INTRODUCTION

I acknowledge the teaching of Prof. Diego J. Liñán Nogueras in each of the research works that I have carried out in my academic career. The foundations of his works and his teachings can even be found in those of

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my works that deal with subjects far removed from his academic taste, such as International Environmental Law, the General Principles of International Law, military occupation or *Soft Law*. For this reason, with this work, I would like to pay tribute to one of his best works, although it is not one of his best known, because its reading in order to understand the limits of consensus in the processes of norm formation and also in political processes and agreements, is highly topical. I am referring to his article *Consensus and Legitimacy in the Conference on Security and Cooperation in Europe* published in the *Revista de Estudios Internacionales* in 1981. This study, as he himself acknowledges, was a pretext to address two issues that will define his approach to International Law from then on: consensualism and the —decreasing— normative intensity that can be found in international normative instruments[2]. Thus, consensualism and normative intensity will be the axes that will allow me to address consensus and *soft law* at the threshold of international law's normativity, as a result of what I will call a *flawed consensus*. His work will serve to make a proposal on how *soft law* instruments could be used to seek peace in the Ukrainian war, albeit with a flawed consensus. In the case of the 1975 Conference on Security and Cooperation in Europe (CSCE), Prof. Liñán Nogueras argued that it was consensus that made possible *the détente*, the détente achieved by its Helsinki Final Act[3]. He spoke of consensus in that

[2] Of enormous importance is also his idea of the functionality of normative instruments, which was expressed in his study Liñán Nogueras, D.J., "Algunas consideraciones sobre la evolución de la conciliación", in Pérez González, M. (Coord.), *Hacia un nuevo orden internacional y europeo: estudios en homenaje al profesor don Manuel Díez de Velasco*, Tecnos, Madrid, 1993, pp. 439-456. In it, he argues that the function of peacefully settling international disputes has been affected, in its exercise, by the fragmentation of the international legal system. He therefore considers that "Each normative legal instrument in today's international society tends to construct its own model, its own system for the peaceful settlement of disputes. Thus, each instrument, as if it were a legal universe, establishes its own rules on the peaceful settlement of disputes that may arise with respect to its interpretation and application. There is, inevitably, a clear rejection of the idea of a universal 'system' of dispute settlement, i.e. a system comprising the normative as well as the institutional and procedural element, which is generally applicable. Thus, logically apart from the United Nations system for disputes endangering international peace and security, the general system is reduced to its normative element constituted by the principles of the obligation of peaceful settlement and freedom of choice of means". All the Spanish and French works cited in this chapter have been translated into English.

[3] In the Helsinki Final Act, the participating States affirmed: "Animated by the political will, in the interests of the peoples, to improve and intensify their relations, to contribute to peace,

> a "procedure for adopting agreements of a particular nature" which apart from its technical aspect as such a procedure, has a material content referring to the structuring of values and basic rules, the support of political power or, as in our case, of a balance of power. A sense of the latter impregnated *with pacifist* connotations, in the political sense of the term, although closer to situations of necessity and utility than to legitimising intentions[4].

On the notion of consensus, Prof. Liñán Nogueras considered it to be "ambiguous, multifaceted and poorly defined". When he wrote his study on it, it was then considered a novel category[5], which today is already essential for understanding International Law. For this reason, I believe it is necessary to adjectivise the term consensus in order to convey the needs to which it must now respond, as well as the difficulties it must overcome in order to achieve its political and normative purposes. Thus, I propose to examine a defective, imposed, contested consensus, a cooperative consensus, a *consensus ad idem*, a "vital consensus", a *consensus omnium*, a *consensus nationum,* "a consensus si possible" and a permissive consensus[6].

I will also bear in mind that for Prof. Liñán Nogueras, International Law is marked by historicity both in its norms and in its normative processes, and this

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security, justice and co-operation in Europe, as well as to rapprochement among themselves and with the other States of the world, Determined accordingly to give full effect to the results of the Conference, and to secure the benefits flowing from those results among their States and throughout Europe, and thus to broaden, deepen and make continuous and lasting the course of détente", available at https://www.osce.org/files/f/documents/7/b/39506.pdf

[4] Liñán Nogueras, D.J., "Consenso y Legitimidad en la Conferencia sobre la Seguridad y Cooperación en Europa", *Revista de Estudios Internacionales,* 1981, p. 649.

[5] Thus, in the introduction to the issue devoted to the Consensus by the journal *Pouvoirs*, its editors asked "Consensus? Who ten years ago, or even five years ago, was using this term? Today it has joined the jargon of other expressions that have had a sudden and dazzling success: mutation, speech, reading... Their success is such that it makes you wonder how we ever managed without them", Ardant, Ph. and Avril, P., "Le Consensus", *Pouvoirs, Revue française d'études constitutionnelles et politiques*, Vol. 5, 1978, p. 5.

[6] In an attempt to look up all the existing definitions of consensus in dictionaries, R. Pucheu includes the concept of "vital consensus" from physiology as "a somewhat vague term that we apply ordinarily to the cooperation and interdependence of the parts of the organism". The term consensus was also taken from philosophy, defined as universal consent by Cicero and Aristotle as "the agreement of all men on certain propositions considered as proof of their truth", Pucheu, R., "À la recherche du 'consensus'", *Pouvoirs, Revue française d'études constitutionnelles et politiques*, Vol. 5, 1978, pp. 16-20.

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positions it against the legal formalism that denies the effects of change on them. The historicity of the norms of international law and their formation procedures makes it possible to recognise the reflection of changes in the power structure of international society in the normative structure. Stability and change have always been present in the normative structure of international law[7]. Thus, in relation to the theory of sources it is necessary to distinguish the creation and modification of norms from the creation and modification of situations, among other reasons because, as M. Bourquin states, the problem of peaceful change arises fundamentally in relation to particular situations and not to general norms[8]; and now, Russia's recourse to war makes it necessary to return to the peremptory norms of general international law (*jus cogens*) and to the interpretative and application structure that must re-establish their respect in a situation of aggression.

From this perspective, Prof. Liñán Nogueras has always thought of norms as historical categories that are the technical and normative product of the historical phenomenon, assuming the political discourse of their time without being tinged by the subjectivity of states. However, the international crises of recent decades have had a particularly strong impact on consensus both as a process of norm adoption and as an outcome. The permanent crisis

[7] In 1938, this author made a reflection on the normative phenomenon that can be applied today: "It is perhaps worth noting at the outset that the times in which we live are not conducive to developing a sense of regularity. The habits acquired during the war certainly have something to do with it. Consciously or unconsciously, we still carry traces of them today. The casualness with which we now shake up acquired rights, contracts and constitutions; this contagious tendency to use violence as a normal means of action: all this can be seen, to a certain extent, as an extension of the ways of life that the war taught us. But war is far from being solely responsible for this state of affairs, which has deeper causes. We must not forget that humanity is currently going through one of the most turbulent phases in its history, and that the conditions of its existence are undergoing a prodigious upheaval in all areas. Whether in technology, science, mores or ideologies, the world is in the midst of a revolution. Social frameworks are breaking down, traditions are disintegrating, and the ideas that underpinned our customs and that we accepted as postulates are being called into question. Is it any wonder that such effervescence, with the disarray it provokes and the passions it unleashes, obliterates the meaning of the law and leads to a kind of collapse of legal morality? It is periods of stability that are most conducive to respect for standards; we are in a period of crisis, decomposition and birth", Bourquin, M., "Stabilité et Mouvement dans l'Ordre Juridique International", *Recueil des Cours de l'Académie de Droit International*, 1938-II, pp. 351-473.

[8] Bourquin, M., *loc. cit.,* p. 357.

that the international order is experiencing and that keeps it in a process of continuous change and development has been exacerbated. Diplomacy and parliamentarianism within international organisations have been affected by the crisis of the order established after Second World War, in which the United Nations was perceived as a great alliance against the other great alliance, the Soviet Union[9]. In the context of the Cold War, the UN served as a sounding board in which states defended their national interests and socialised for the pursuit of common interests, renouncing war —at least in their territories[10]. Subsequently, following the crisis of the United States as hegemon and the positions adopted by Russia and China vis-à-vis the established international order, not only the power structure but also the normative structure and the interpretative structure of international obligations have been called into question[11].

And this is not to forget that the normative structure can influence the power structure. This is precisely what explains the position of China and the countries of the Global South, which it leads, vis-à-vis international normative processes, and their growing resistance to accepting international instruments of a binding nature. These countries want to return to a conception of sovereignty such as the one that emerged after the Peace of Westphalia. According to this idea of sovereignty, in 1648 no state or group of states could impose its religion on others, but in 2022, what China and the countries of the Global South and also Russia and many other states referred to as illiberal want to resist is the canon of civilisation that Europe made universal after the Second World War with its values, purposes and principles, the idea of

[9] Morgenthau, H.J., "The Yardstick of National Interest", *Annals of the American Academy of Political and Social Science*, Vol. 296, 1954, pp. 77-84.

[10] At the time, H.J. Morgenthau stated that "The United Nations is today an instrument through which its members try to protect and promote their respective national interests. Whether it be disarmament or collective security or Korea or Palestine or trusteeships or East-West trade, these issues do not change their nature because they are raised within the United Nations rather than without. They owe their existence as controversial issues to conflicting national interests. Their being raised in one of the forums which the United Nations provides may mitigate or aggravate their controversial nature, facilitate or hamper their peaceful settlement; it cannot sever their organic connection with the interests of the nations concerned", *ibidem,* p. 77.

[11] The need to reflect on the interpretative structure came to me from my colleague Pablo Martín Rodríguez.

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democracy or the rule of law[12]. Their rejection also requires that the current model of legitimacy, which is enshrined in the UN Charter and complemented by the main resolutions of the UN General Assembly, be emptied of values and human rights.

That this canon of civilisation, as Europe has interpreted it, poses a threat to Russia's security or existence, as President Vladimir Putin has argued, can in no way justify the violation of the most basic principles of international law[13]. The solution to the war of aggression in Ukraine from the point of view of the consensus that will be necessary to reach a ceasefire and perhaps peace, and its impact on international law, will be the subject of my reflection after presenting the different definitions of consensus and its impact on the normative and power structures of international society. To this end, I will use consensus as a pretext to reflect on the changes in international law, the return to automatic majorities in the United Nations General Assembly, and the rationale for *soft law* as a normative instrument and for the formulation of global agreements and policies. While I consider that the crisis of consent and consensus is at the origin of *soft law*, it is also worth asking whether *soft law* is not also a symptom of the frustrated normative vocation of international organisations[14]. Given

[12] On the Rule of Law, see the work directed by Liñán Nogueras, D.J. and Martín Rodríguez, P., *Estado de Derecho y Unión Europea*, Tecnos, Madrid, 2018.

[13] When Russia voted against the General Assembly Resolution condemning its war of aggression with 141 in the affirmative, 35 abstentions and 5 votes against —along with Russia, Belarus, Syria, North Korea and Eritrea— it stated that: "there is nothing in the draft resolution about the fact that for the past eight years the United States and Europe have been pumping weapons into Ukraine to help the Maidan regime kill civilians in Donbas, as well as justifying the complete disregard of Kyiv authorities loyal to them of the Minsk agreements and their sabotage of Security Council resolution 2202 (2015). Finally, the draft resolution is an obvious attempt by those who over the past decades have carried out countless aggressions, military operations in violation of international law, and coups, including the Maidan coup in Ukraine, to present themselves as champions of international law". See the minutes of the 5th plenary meeting of the Emergency Extraordinary Session, issued on 2 March 2022, A/ES-11/PV.5 and the press release General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, available at https://press.un.org/en/2022/ga12407.doc.htm.

[14] See Fajardo Del Castillo, T., *Soft Law*, *Oxford Bibliographies*, Oxford University Press, 2014 and Fajardo Del Castillo, T., "El Acuerdo de París sobre el Cambio Climático: Sus aportaciones al desarrollo progresivo del Derecho Internacional y las consecuencias de la retirada de los Estados Unidos", *Revista Española de Derecho Internacional,* Vol. 70/1, 2018, pp. 23-51.

that certain acts of international organisations and Conferences of the Parties (COPs) are accepted as sources of international law that are integrated —with or without problems— into Article 38 of the Statute of the International Court of Justice, it is necessary to see how consensus has served to go beyond the mandates and competences of international organisations to exercise normative action, which requires an examination of recent practice.

Furthermore, if we apply this reflection on consensus, automatic majorities and *soft law* to the process of adopting UNGA resolutions since the beginning of Russia's war of aggression in the framework of its Eleventh Emergency Special Session, this will allow us to assess the political and normative meaning of these resolutions and their impact on consensus, as a procedure and result, which extends beyond the General Assembly itself and has already affected other international organisations and institutions and the Conferences of the Parties to conventions with a universal vocation.

II. CONSENSUS AS A PRETEXT FOR REFLECTING ON CHANGES IN INTERNATIONAL LAW

Consensus as the sum of states' consents, which is the ultimate foundation of international law and which is the origin of international rule-making processes, has been affected by consensus as a mode of decision-making in which there is no recourse to a formal voting procedure. In this sense, as Guy De Lacharrière characterises it, consensus is as much a decision-making process that takes place in an institutionalised framework as the decision that is taken[15]. We thus find ourselves with a *consensus ad idem* that contains behind it an aggregate of *contrahendi* wills, which solves —or only conceals and postpones to the moment of application— the problem of identification between the *contrahendi* will and the *consensus ad idem* of the states. This aggregation is the *process* that allows for the organisation of international relations and the establishment of a body of norms that reflects general and common interests, even if it does not achieve unanimity. And in this sense, Prof. Liñán points out

[15] In 1968, Guy de Lacharrière defined consensus as "a decision-making procedure, exclusive of voting, consisting of ascertaining the absence of any objection presented as an obstacle to the adoption of the decision in question", De Lacharrière, G., "Consensus et Nations Unies", *Annuaire Français de Droit International*, Vol. 14, 1968, pp. 9-14. See also De Lacharrière, G., "Le consensus: Essais de definition", *Pouvoirs, Revue française d'études constitutionnelles et politiques*, Vol. 5, 1978, p. 34.

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in a dialogue with G. De Lacharrière, the author of reference for his work *La Politique Juridique Exterieure*[16] that

> Consensus is thus a more flexible rule than the unanimity rule, which requires the affirmative vote of each and every one of the participants in the decision. A rule which —as [De Lacharrière] points out— can be accompanied by reservations, by the indication that in the event of a vote the participant in question will abstain, or even by the affirmation that he dissociates himself from the consensus. The flexibility of consensus as a decision-making technique is a means which, in the final analysis, aims to meet the requirements of effectiveness and solidity that the unanimity rule presupposes, while avoiding the paralysing effect that a dogmatic application of unanimity can have[17].

This does not prevent states from demanding a "certain degree of unanimity" from consensus[18] when the progressive development of international law is being pursued in the current period of crisis. It is in this case that the states that *could be opposed* to a consensual General Assembly resolution rebel against the proposal by calling for a vote, in order to formulate their objection along with their negative vote.

Therefore, in the United Nations General Assembly, consensus is both the procedure for adopting resolutions in which states abstain from calling for a vote, and the resolution itself —which, being adopted by consensus, will be invested with a normative quality that will make it possible to crystallise the *opinio iuris* or, where appropriate, trigger its formation process, or only the adoption of a *soft law* instrument that includes the common principles

[16] De Lacharrière, G., *La Politique Juridique Extérieure, Economica*, Paris, 1983.

[17] Liñán Nogueras, D.J., *loc. cit.,* pp. 650-651.

[18] And to refer to unanimity, Prof. Liñán Nogueras would refer to Carrillo Salcedo to emphasize that "The flexibility of consensus as a decision-making technique is a means which, in short, aims to cover the requirements of effectiveness and solidity which the unanimity rule implies, avoiding the paralysing effect which a dogmatic application of unanimity can have; this is what Professor Carrillo Salcedo stated when he said that the unanimity rule" ... "can only be understood as an incentive to negotiation and not as a dogma which, in a totally negative vision, only serves to veto and to obstruct, or a fetishism of the type which made it affirm at the First Hague Conference in 1899 that a certain decision had been adopted unanimously with two votes against and one abstention", and he adds further on, "...it is certainly true that the progressive development of international law calls for a certain unanimity, *but only a certain unanimity*". Perhaps consensus is in this order of matters no more than "a certain unanimity", since it seeks to cover that flexibility which unanimity certainly does not know", Liñán Nogueras, D.J., *La integración: factor de modificación del concepto de soberanía*, doctoral thesis, unpublished, University of Granada, 1978, p. 651.

and rules that reflect the political, social and economic needs of a given moment. Thus, the debate on the normative capacity of these Assembly resolutions can also be considered from the point of view of the historicity of international law. Thus, depending on the historical moment in which we situate ourselves, General Assembly resolutions have acquired greater or lesser normative intensity as a consequence of the crisis of consent and consensus. This crisis has led to a decrease in the number of international treaties that are negotiated and concluded and to an increase in the number of resolutions that are adopted either by consensus or by "automatic" majorities. In this sense, it is worth considering, as J. Castañeda stated in 1969, that "General Assembly resolutions do not create law, but rather attest to the proof of its existence"[19]. Today, however, their normative intensity has grown in the framework of a normative procedure extended over time and which can trigger a customary process and also a conventional procedure, if States support them with their practice and turn them into a universal or regional treaty in a subsequent process of negotiation . Regional conventions have also recently been seen to inspire the adoption of General Assembly resolutions, causing the flow of normative influence from the top down, from the UN to states and regional organisations, to change direction, as in the case of the resolutions on the protection of personal data that are inspired by national rights and the Council of Europe's Convention 108 that are the benchmark of what could become in the future a rule of law of the privacy in the digital era[20].

In the case of General Assembly resolutions, the attempt to adopt them by consensus is in itself a declaration of normative intent, which can be frustrated when a state requests that it be put to a vote. This has happened on numerous occasions in recent years and not only in the General Assembly but also in other international institutions that have consensus as a decision-making

[19] Castaneda, J., *Legal Effects of United Nations Resolutions*, Columbia University Studies in International Organization, Columbia University Press, New York, 1969, pp. 168-169.

[20] See Resolution 77/211 of 15 December 2022 on the right to privacy in the digital age, adopted by consensus by the General Assembly which in its first paragraph "1. Reaffirms the right to privacy, according to which no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, and the right to the protection of the law against such interference, as set out in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights", *A/RES/77/211* of 5 January 2023.

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procedure and also in the Conferences of the Parties to universal conventions, although in the latter case there may be differences. And, of course, it has been the case with the Resolutions adopted by the General Assembly at its Eleventh Emergency Special Session[21] as a consequence of the war of aggression in Ukraine, and whose vote Russia requested in order to make impossible the consensus sought to validate and support the peremptory international rules that are the object of its violation —this call for a vote being thus comparable to the veto exercised in the Security Council, which deserves a section of its own.

Consensus can also be classified in terms of its results between a *normative consensus* and a *political consensus* if the aim is the adoption of a norm or a political agreement, as was the case in both cases in the Helsinki Final Act, which reached a political agreement with normative principles that applied those of the United Nations Charter to seek *détente* between the countries of the Soviet bloc and the Western bloc. It will be these principles and those that are now incorporated in Resolution of 23 February 2023 on the Principles of the Charter of the United Nations on which a comprehensive, just and lasting peace in Ukraine is based[22], and which I will analyse later insofar as this resolution did not reach the consensus of the Helsinki Final Act, but a consensus that we can describe as *flawed*, but undoubtedly *necessary* to preserve the unity of the international normative order.

If consensus is not reached, without a call for a vote, it may end up being reached in its version of a *flawed consensus* that is left to its own devices and dependent on its subsequent implementation by states, especially in crisis situations such as the one provoked by Russia, but also when the instruments adopted are destined for incorporation into domestic legal systems. With a *flawed or imposed consensus*, uncertainty over the normative intensity of the adopted decision only becomes clear when it is interpreted and subsequently applied by international institutions and in the practice of states. And it is precisely in these cases that a *cooperative consensus* will be necessary to ensure the necessary assistance to promote compliance with norms that pursue community interests or the restoration of peace. An example of this *flawed consensus*, beyond the

[21] See the resolutions of the 11th emergency special session available at https://research.un.org/en/docs/ga/quick/emergency.

[22] A/RES/ES-11/6.

Ukraine crisis, occurred at the recent 15th CoP of the Framework Convention on Biological Diversity held in Montreal under Chinese chairmanship[23]. The so-called Kunming-Montreal Resolution was adopted by the conference chair with a sledgehammer blow that resonated strongly with a group of dissenting states that lodged allegations against this *imposed consensus*[24]. Furthermore, accepting that it had been adopted by consensus, the Democratic Republic of Congo, Uganda and Cameroon submitted reservations to an agreement that has no binding character, but which clearly has a normative and political vocation: that of being the global policy on biodiversity protection through the new 2030 Biodiversity Strategy and the Kunming-Montreal Targets, whose formulation has been led by China[25].

A different situation arises when the rules of procedure of the international organisation or the CoP provide for or choose consensus as the decision-making procedure and this paralyses its traditional governance system. In recent negotiation processes, at the last CoP to the Ramsar Convention on Wetlands of International Importance, at the Arctic Council or at the

[23] COP15 Kunming-Montreal has been held in December 2022 in Montreal with a two-year delay due to the outbreak of COVID19 in China, which was to be the host country.

[24] On the celebration of COP15, IISD reporters recorded that "Procedural concerns were raised over the 'rapid' adoption of the compromise package after reservations were expressed by the Democratic Republic of the Congo (DRC). The DRC stressed that he is 'unable to support the adoption of the GBF in its current state' due to concerns regarding the financial mechanism and resource mobilization. Mexico made an appeal for flexibility to adopt all documents as a package, followed by applause. After a small recess, President Huang announced that the six documents would be approved as a whole and, by lack of immediate objection, signaled adoption by gavel. The DRC, Cameroon, and Uganda made reservations about the procedure of adoption of the package 'by force of hand', with the latter requesting a reflection of his statement in the report. The Secretariat explained that the rules of procedure under the Convention had been observed, since some comments, but no formal objection had been raised. The controversy was resolved later on Monday, 19 December. Following informal consultations, Ève Bazaiba, Minister for the Environment, DRC, reiterated her country's participation in the constructive negotiations and its involvement in the development of the GBF. Congratulating the meeting on adoption of the GBF, she requested that DRC's reservations related to GBF Target 19 (financial resources) and the decision on resource mobilization be recorded in the report of the meeting". See IISD, "UN Biodiversity Conference Highlights: Tuesday, 13 December 2022", *Earth Negotiations Bulletin,* Vol. 9, No. 796, 22 December 2022, p. 3.

[25] The Strategy is more ambitious than the past strategy and the Aichi Targets, which are now extended with the new Kunming-Montreal Targets.

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World Trade Organisation, Russia's position has, in the first case, broken 50 years of functioning by consensus; in the second, it has led to a regionalism that renounces cooperation; and in the third, it has exacerbated an already existing identity crisis, in which consensus was sought to be replaced with exceptionalism based on the capacity of influence of states that took into account their *per capita ratio* or economic power.

III. CONSENSUS VERSUS AUTOMATIC MAJORITIES IN THE UNITED NATIONS GENERAL ASSEMBLY

In the case of the UN General Assembly, consensus as a decision-making procedure was not provided for in the Charter and was incorporated into its procedures as a reaction to the automatic majorities that began to be adopted when the composition of the Assembly was enlarged to include states born of the self-determination of peoples under colonial domination[26]. These majorities complied with the procedural rules, but left out of the final decision a part or a whole bloc of states that were in favour of a different, if not antagonistic, rule to the one adopted. These automatic majorities have since been seen as a normative and political problem that requires a response based on cooperation and solidarity expressed precisely through consensus, which makes it possible to iron out the most paralysing differences and differences. Thus, De Lacharrière considers that consensus requires recourse to negotiation and the renunciation of the facilities of "automatic majorities"[27].

These automatic majorities have also jeopardised the functioning of other UN bodies, such as the Human Rights Council, which in its early years adopted decisions on the violation of human rights by Israel by automatic majorities, without taking into account France's request to seek consensus, which conditioned the subsequent development of this fundamental body. In its decision-making procedures and especially for special sessions, it provides that "[t]he sponsors of a draft resolution or decision should hold open-ended

[26] Consensus emerged in the United Nations as a result of the application of Article 19 of the Charter to France and the then Soviet Union. The refusal of both powers to contribute to the organisation's expenses had led to the application of this article, which provided for the suspension of the voting rights of those in arrears in the General Assembly. In this situation, the alternative was to adopt decisions by a non-objection procedure. See Charpentier, J., "La procédure de non objection. A propos d'une crise constitutionnelle de l'ONU", *RGDIP*, Vol. 70, 1966, pp. 862 *et seq.*

[27] De Lacharrière, G., "Consensus et ..", *loc. cit.*, p. 35.

consultations on the text of their draft resolution(s) or decision(s) with a view to achieving the widest possible participation in its consideration and, if possible, consensus thereon"[28].

The adoption of decisions through simple majorities provided for in its procedure, when consensus cannot be reached, led to the polarisation of an intergovernmental body of restricted composition such as the Human Rights Council, seriously damaging its capacity to carry out its mission of generating a common vision by "promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner"[29]. In this case, simple majorities end up being automatic and reflect only the values of a bloc of states —which has led to the United States leaving the Human Rights Council on occasions or Russia leaving minutes before the end of the vote in which its expulsion was sought. For all these reasons, it is important to remember the imperative need to seek consensus because, as J. Rigaud said:

> The idea of consensus does not mean renouncing the prerogatives of a formal majority, but rather the will to go beyond them. Consensus is the rejection of confrontation; it is not, however, the expression of a doctrine advocating peace at all costs; far from denying oppositions, splits and the risks of rupture, it assumes them and represents a will, not to resolve them artificially or to annihilate them, but to transcend them...[30].

Consensus thus transcends the majority, although depending on the rules laid down in the multilateral institution it will have to be resorted to or yielded to, because in any case "the search for consensus is only a preliminary procedure. If consensus is impossible, the rule of majority voting, which

[28] See Human Rights Council Resolution 5/1 on Institution-building of the Human Rights Council, adopted without a vote on 18 June 2007. It provides for consensus and in the absence of consensus, simple majority voting with regard to the Universal Periodic Review Mechanism and the special procedures: thus in the complaint procedures, the working groups "shall operate, to the greatest extent possible, on the basis of consensus. In the absence of consensus, decisions shall be taken by simple majority vote" (paragraph 90). In the case of the Working Group on Situations, "All decisions shall be duly justified and shall indicate the reasons for discontinuing consideration of, or recommended action on, a situation. Any decision to discontinue consideration of a matter should be taken by consensus or, if this is not possible, by a simple majority vote" (paragraph 99).

[29] See paragraph 2 of the mandate given to it by the UN General Assembly in its resolution 60/251 of 15 March 2006 and its website https://www.ohchr.org/es/hr-bodies/hrc/about-council.

[30] De Lacharrière, G., "Consensus et ..", *loc. cit.*, p. 9.

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would have been relegated to the background, will apply"[31], and it will also apply when one of the member states of the organisation or of the states parties to the CoP requests a vote.

Consensus can be used both for the adoption of resolutions relating to a policy or work agenda of the institution, as well as for the adoption of instruments of the normative and interpretative structure. It has been used, for example, for the adoption of General Assembly resolutions in support of the reports of the International Law Commission on crimes against humanity seeking clarification[32]. It is therefore necessary to distinguish between normative action through consensus taken by international organisations and CoPs that complement a conventional instrument that their member states or parties have adopted. In this case, it must be considered that the normative action of the international organisation or CoP can reform, modify, complete and develop a conventional instrument not only as normative action but also as interpretative action. In the case of the United Nations, this has given rise to an interpretative structure linked to implementation, in addition to the power structure and the normative structure[33]. These three structures have in common the national interests that are expressed, compete and adjust within the international organisation. And this is not safe from tensions and conflicts such as the one that transcends resolutions on terrorism or sanctions that have generated blocs within the General Assembly that have once again

[31] De Lacharrière, G., "Consensus et ..", *loc. cit.*, p. 35.

[32] See Resolution 77/249 on Crimes against Humanity of 30 December 2022.

[33] Moreover, I have found in the writings of Guy De Lacharrière the most obvious reason for this, when he states that: "Indeed, the majority that dominates an international organization has the possibility, assuming that this organization can create law by means of a resolution, not only to define the substance of this law but also to have the interpretation of its application verified by the organs of the organization, in which, by hypothesis, this majority is found. In the event of the creation of convention law, the interpretation and application of the convention are often entrusted to judges, tribunals or arbitrators. The fact that the control of the interpretation and application is entrusted to independent third parties does not allow the majority to recover, at this level, the docility to their views that is found at the level of the creation of the law. No such inconvenience remains if the control of interpretation and application is attributed to the international organisation. The domination of the majority, which is already manifested at the moment of the determination of the legal rule, will have the possibility, if it is opportune for it to do so, to manifest itself again with regard to the interpretation and application", De Lacharrière, G., *La Politique Juridique…, op. cit.*, pp. 49-50.

generated automatic majorities, in favour of Russia in Resolution 77/214 on *human rights and unilateral coercive measures*[34], or in favour of Russia and China and the global South, in Resolution 77/215 on *the Promotion of a democratic and equitable international order*, or Resolution 77/174 on *a New International Economic Order* proposed by the Group of 77 and China, which was opposed by 50 states, including the most developed ones[35]. The value of these resolutions adopted at the 77th ordinary session of the General Assembly does no more than convey tension and an ambition to change the international normative order, without taking into account the bloc of states against which such a change is proposed. We are thus faced with a consensus as a bloc process, for which it is necessary to recall Torres Bernárdez's criticism of consensus in the sense that it contributes to maintaining the fiction of "blocs as the driving force behind the development of international law to the detriment of the primary subjects of this law, namely the states"[36].

Had it been adopted by consensus, at other times more favourable to normative action for the protection of common interests and depending on the intentionality of the states manifested during the process, Resolution 77/174 on the *New International Economic Order* could have been considered as an instrument of crystallisation of *the opinio iuris* of a custom, almost 50 years after the first resolution was adopted in 1974[37]. At the present time

[34] See Resolution 77/214 Human rights and unilateral coercive measures of 15 December 2022, which in its first paragraph "1. Urges all States to cease adopting or implementing unilateral measures not consistent with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature, as well as all extraterritorial effects thereof, which create obstacles to trade relations among States, thereby impeding the full realisation of the rights set forth in the Universal Declaration of Human Rights 22 and other international human rights instruments, in particular the right of individuals and peoples to development", A/RES/77/214, 5 January 2023.

[35] Resolution 77/215 on the Promotion of a democratic and equitable international order of 15 December 2022.

[36] Torres Bernárdez, S., "Réponse au questionnaire relative au rapport sur le Rôle et signification du consensus dans l'élaboration du droit international", *AIDI*, Vol. 67, 1997, p. 47.

[37] See the principles set out in the Declaration on the Establishment of a New International Economic Order and the Programme of Action on the Establishment of a New International Economic Order, contained in resolutions 3201 (S-VI) and 3202 (S-VI), respectively, which the UN General Assembly adopted at its sixth special session on 1 May 1974, without being able to reach consensus. Former Mexican Ambassador Rosario Green summed up the negotiation process by standing out that "Although the possibility of a global agreement was repeatedly

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when states are resisting all international obligations or subjecting them to their national interests and circumstances, we are only dealing with a *soft law* instrument that enunciates general principles for global economic policies whose funding requirements by developed states can condition the adoption not only of subsequent General Assembly resolutions but also of CoP resolutions and international treaties. This has been the case of the last CoPs on the Framework Conventions on Climate Change and Biodiversity, in which the Global South has demanded financial support from developed countries as a precondition for the adoption of new commitments.

We are thus in a situation very similar to that of half a century ago when the Helsinki Final Act was adopted and détente began between the Eastern bloc and the Allies, and when the countries of the Third World found their voice in the UN General Assembly. It should be remembered, as E. Suy pointed out, that the countries of the East and West were in a minority compared to the majority of Third World countries, and the latter accepted the consensus technique for two important reasons:

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raised during the New York consultations, it eventually faded away in the face of serious difficulties in reconciling certain positions that were very close to the national interest, such as the one concerning the category into which investment agreements concluded between States and individual companies should fall (international law according to the view of developed countries and domestic law according to that of developing countries), and that relating to nationalisation and the terms of compensation (denied in the case of some developing countries, which also did not accept any reference to customary law on the grounds that there was no single rule on the subject, nor the interference of courts other than national courts in the event of a dispute, all issues contested by the developed countries). The New York consultations thus ended with the hope of presenting the General Assembly with a document reflecting a genuine consensus. A vote was the only way out. The Third World countries prepared for this by drafting a version of the Charter of Economic Rights and Duties of States that included the agreements unanimously accepted by the Working Group during its various meetings and, for the areas of disagreement, those variants that, having been introduced by the G-77, better reflected their position and even incorporated points of view expressed by some other groups. The document thus consisted of a 13-paragraph preamble, a first chapter containing 15 fundamental principles of relations between states, a second chapter which in 28 articles expresses the main economic rights and duties of states, a third chapter containing two articles setting out the responsibility of states towards the international community in terms of safeguarding the common heritage of mankind, and a fourth chapter with four articles which, as final provisions, point out, among other issues, the real interdependence of all the states that make up the international community, the interaction between economic problems and the consequent interrelation between the various provisions of the Charter".

> First of all, this (majority) realises that decision-making by vote would be such as to alienate the minority whose collaboration is essential for the proper functioning of the Organisation. Indeed, frustrated by the systematic minoritisation —or minority status— the Eastern and Western states, which contribute the lion's share of the Organisation's budget, might one day review their attitude towards the Organisation. The majority in number therefore realises that it is a minority in terms of both financial contributions and political weight. There is no point in winning the vote if the cooperation of the significant minority is not assured. The technique of consensus has thus become indispensable to maintain dialogue and thus a minimum of effectiveness in the world organisation.
>
> The second reason (...) is to be sought in the necessity imposed on (the majority) to obtain concessions from the minority. Indeed, this minority has, to a large extent, dominated the evolution of the creation of the law of international relations before the accession to independence of the states belonging to the majority. Believing that, in almost all areas, the existing order needed to be adapted to take into account the aspirations, interests and requirements of the new States, it is essential to maintain a dialogue with the minority in order to convince it of the need to establish a new order (...)[38].

In any case, there have also been many General Assembly resolutions adopted by consensus during the 77th regular session in 2022, such as those aimed at *strengthening international cooperation in the field of human rights*[39], those on the peaceful uses of outer space and their impact on sustainable development[40], or on support for the future strategy of the Convention on Biological Diversity[41] or on the *right to privacy in the digital age*[42].

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[38] Suy, E., "Role et signification du consensus dans l'élaboration du Droit international", in *Le Droit international a l'heure de sa codification. Études en l'honneur de Roberto Ago*, Tome I, Giuffrè, Milan, 1987, pp. 521-542, 524-525.

[39] Resolution 77/213 on Enhancement of international cooperation in the field of human rights of 15 December 2022.

[40] International Cooperation in the Peaceful Uses of Outer Space resolution 77/121 of 12 December 2022.

[41] Resolution 77/167 on the Implementation of the Convention on Biological Diversity and its contribution to sustainable development, adopted on 14 December, A/RES/77/167 of 28 December 2022.

[42] Resolution 77/211, adopted on 15 December, A/RES/77/211 of 3 January 2023.

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IV. CONSENSUS AND LEGITIMACY MODEL

Underlying the normative structure of international law is a model of legitimacy in which all the principles and values that have historically been present from the Peace of Westphalia, through the Congress of Vienna, up to the San Francisco Charter, come together. The normative consensus and the political consensus are what determine the model of legitimacy at any given moment in time. After Second World War, legitimacy as an attribute of the model was achieved as a result of the renunciation of the use of force and war, and was based on common purposes and principles, those of the San Francisco Charter. Since then, consensus has also been a prior phase for the formulation of the legitimacy model. Prof. Liñán Nogueras argues that consensus lies behind international norms. Consensus must therefore also be understood as the way in which the ideological elements, social expectations and values that converge in the normative structuring of an international society at a given moment are expressed. Historicity, the concept of sovereignty and the model of global legitimacy are expressed through consensus, both when it is achieved and when it is not possible, which conveys a conflict or an attempt at change that also has a normative impact. At the present time, the difficulties in reaching consensus or the imposition of automatic majorities within the General Assembly also imply a questioning of the legitimacy model and the concept of sovereignty by Russia, China and the countries that lead either the Group of 77 or the Global South. Their ultimate manifestations seem to be aimed at stripping legitimacy of the achievements made after Second World War.

And now, to return to the idea of sovereignty that emerged from Westphalia and to the legitimacy model of that peace after a thirty-year war is a step backwards, a subtraction of principles and values and rights that have been achieved and that have characterised our time up to now. Therefore, the automatic majorities in the General Assembly are an expression of the new power structure that scorns negotiation and cooperation, which could lead to a greater fragmentation of the normative order and to a period of paralysis of the few attempts at normative development of international law that were still going ahead. And from the point of view of values and principles, the changes being called for reflect a step backwards. But it is not only a return

to the past to which we must react, it is also an attempt to revise the possible future together.

The rejection of emerging principles and rights in the making as part of the progressive development of international law has also become a major issue within multilateral bodies such as the UN General Assembly or the CoPs of conventions with a universal vocation. From this rejection also arises the *defective or imposed consensus*, insofar as the opinion of the dissident to which a new international, normative and power order is imposed, express their will to remain outside the new normative currents. And in the present situation of conflict, the currents that can be distinguished are those supported by Russia, China and the Group of 77 against the United States and the developed countries, including the EU Member States.

All of this means that in the case of *defective consensus*, not only *soft law* instruments proliferate, but also instruments of flexibility and exceptions to the rules, which also condition and undermine the legitimacy of the latter, depending on who decides to apply them, how and in what circumstances. When there is consensus, Prof. Liñán affirms that this allows for the legitimacy that is fundamental in the conceptualisation of International Law. However, without disagreeing with him, it is necessary to add that a *flawed consensus* also makes it possible, even if this is at the cost of paying the price of its normative intensity.

Consensus can be flawed for several reasons: the first is because dissenting states are disregarded, and the second is because common values are disregarded. In the first case, it is necessary to remember —obvious as it may seem— that consensus is not unanimity, nor even a quasi-perfect consensus. The second reason for the flawed nature of the current consensus is that, if the idea of the rule of law, democracy and human rights is dispensed with because they are described as European, in order to achieve a global consensus, then it is also a flawed consensus —and not only for Europeans. This also explains the adoption by an automatic majority of Resolution 77/215 on the *Promotion of a democratic and equitable international order*[43]. This Resolution 77/215 was adopted with the votes in favour of 117 countries including China, Russia and the Group of 77, 54 votes against by the United States, the European countries

[43] Resolution 77/215 of 15 December 2022. See also the report submitted on the *Promotion and protection of human rights: human rights issues, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, A/77/463/Add.2.

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and "their allies" and ten abstentions. In it, human rights are interpreted as the rights of individuals and peoples and in a manner adapted to differences[44]. The conceptual clash that was not overcome in the drafting of is due to some of the sections on the principles of sovereign equality of States, non-intervention and non-interference in internal affairs[45] and also on the need for a new international economic order when interpreting democracy and an equitable international order[46].

Thus, the crisis of consensualism is now caused by the rejection of the canon of civilisation and also by the proposal for a new international economic order in which the developed countries' economic debt to the developing countries is reiterated. However, the greatest cause for crisis is Russia's war of aggression in Ukraine and what this means for the principles of the United Nations Charter and for the organisation, which implies a questioning of the model of legitimacy, stripped of many of the attributes acquired in the previous half-century, and which comes from China and Russia, who need the renunciation of making the contents of values explicit, despite the risk of this

[44] Thus, paragraphs 7 and 8: "7. Stresses the importance of preserving the rich and diverse nature of the international community of nations and peoples, as well as respect for national and regional particularities and various historical, cultural and religious backgrounds, in the enhancement of international cooperation in the field of human rights; 8. Also stresses that all human rights are universal, indivisible, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis, and reaffirms that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms for all".

[45] See paragraph 9.

[46] See paragraphs 12 and 13: "12. Underlines that attempts to overthrow legitimate governments by force disrupt the democratic and constitutional order and affect the legitimate exercise of power and the full enjoyment of human rights, and reaffirms that every State has the inalienable right to choose its own political, economic, social and cultural system, without interference of any kind by other States; 13. Reaffirms the need to continue to work urgently for the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation of all States, irrespective of their economic and social systems, that redresses existing inequalities and injustices, to eliminate the widening gap between the developed and developing countries and to ensure peace and justice and steadily accelerating economic and social development for present and future generations, in accordance with its relevant previous resolutions, programmes of action and major conferences and summits in the economic, social and related fields".

further fragmenting multilateralism. Criticism of the Eurocentric character of international law comes from the fact that it contributes to the permanence of the power structures that the United States and Europe created after the Second World War. This situation can also be explained by pointing out that, given the renunciation of the role of hegemony by the United States, which created and supported the model of universal legitimacy of the United Nations, we are facing a process of change in international society in which multilateralism is being replaced by new formulas of bilateralism —minilateralism— and plurilateralism which are being developed in bodies such as the G20 and the G7, and in which their legitimacy is not questioned. This can be explained by a new vision of international society and its current disarray, insofar as the *global internal policies* of China, the European Union, Russia or of the United States or the Arab countries are now competing and questioning the possibility of reaching a social pact on common interests. The meaning I give to the expression global domestic politics is different from that given to it by the German sociologist Ulrich Beck[47] insofar as I start from the fact that, in the absence of a hegemony, states try to make their domestic politics global, with a staunch defence of their sovereignty that limits the global up to the point of making it fit in with their national circumstances and interests, without seeking a rapprochement through the reciprocal adjustment of interests. The very process of creating international norms as a reciprocal adjustment of interests has been conditioned by this individualistic and divisive vision within the social body from which international law is born

A cooperative consensus, instead of an imposed and flawed consensus, would now be necessary to advance the progressive development of international norms, assuming —which is also a demand of China and the Global South— that this has a cost that must be accepted and borne —which begs the question of who should bear the cost of adopting and implementing norms that solve humanity's political, social, economic and environmental problems in the 21st century: Should the costs be borne by all states or only by those that are considered to be normatively, economically and socially developed? That it should be the developed states that finance the normative

[47] In his book *Chronicles from the World of Global Domestic Politics,* the German sociologist Ulrich Beck coined this term, which he then applied to how a country's citizens are in fact citizens of the world in terms of how they are affected by global risks or by the normative proposals of their states (2009).

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development of international law and, above all, its application has been the demand that has emerged clearly and forcefully at the last CoPs —the Glasgow CoP in 2021 and the Sharm el Sheikh and Kunming-Montreal CoP in 2022— which were to tackle the planet's major environmental problems, climate change and biodiversity loss.

V. IN CONCLUSION, IS A SOFT LAW INSTRUMENT FOR PEACE IN UKRAINE POSSIBLE WITH A FLAWED CONSENSUS?

In his study on *Consensus and Legitimation at the Conference on Security and Cooperation in Europe*, Prof. Liñán Nogueras made an assessment of "the European dimension of the East-West conflict" that may be of interest today in imagining a future peace in Ukraine. He considered that this European dimension of the East-West conflict "has deep and complex historical roots and a current situation in which the internal contradictions of each bloc often weigh more heavily than the opposition between them"[48]. This being so, what now seems evident in the current crisis is that the Russian president has seen the way to overcome his internal contradictions as a breach of peace and international law with the war of aggression in Ukraine. How to rebuild peace without undermining the model of legitimacy of the United Nations Charter is the big question that will have to be articulated through a political declaration that, as a preliminary step, will allow a ceasefire and, probably, an armistice to be initiated. Apart from the strategic-military reasons that have not yet made it possible to end the war, it is clear that the reasons and legal formulas that are accepted for peace will have an impact on the United Nations Charter and its principles. For the time being, we can already say that the first casualty of the Russian war of aggression has been the legacy of the Conference on Security and Cooperation in Europe. The CSCE's great service to peace is unlikely to be repeated, because the achievements on which the longest war-free period in Europe has been built are unlikely to be achieved without regime change in Russia.

Multilateralism and regional formulas have failed up to now. At the last Security Council meeting prior to the first anniversary of the Russian aggression, the representative of the UN Department of Peace Operations stated that its members were well aware that

[48] See Liñán Nogueras, D.J., "Consenso y legitimación…", *loc. cit.,* p. 646.

> in the previous eight years, the United Nations has not been formally part of any mechanism related to the peace process in Ukraine, such as the Normandy format. The UN was not invited to participate in the various Minsk negotiations or in the 2014 and 2015 agreements themselves. Nor did they take part in the implementation efforts led by the Organisation for Security and Cooperation in Europe (OSCE) in the Trilateral Contact Group[49].

None of the regional formulas —neither the Normandy Format with Germany and France negotiating with Russia and Ukraine on the implementation of the Minsk Agreements,[50] nor the OSCE— have made any progress. Nor will the peace plan put forward by China, which has already been rejected for supporting Russia's interests and not openly condemning its act of aggression[51]. Meanwhile, Russia taunts the UN by threatening nuclear force in its speeches and calling for an update of the Toolkit on the Peaceful Settlement of Disputes between States[52].

It was finally the United Nations General Assembly that provided the framework for the adoption of a resolution on *Principles of the United Nations Charter on which a comprehensive, just and lasting peace in Ukraine is based*, with a broad consensus —flawed nonetheless— with only seven votes against from Russia, Belarus, North Korea, Syria, Eritrea, Mali and Nicaragua. If conflicting Russian and Ukrainian peace formulas —that of Ukraine without con-

[49] 9262nd meeting of the Security Council held on 17 February 2023, S/PV.9262.

[50] The 2019 Paris Summit Declaration still stated that "the Minsk agreements (the Minsk Protocol of 5 September 2014, the Minsk Memorandum of 19 September 2014, and the Minsk Package of Measures of 12 February 2015) remain the basis for the work in Format Normandy, which the Member States are committed to fully implement. They underline their common aspiration for a comprehensive and sustainable architecture of trust and security in Europe, based on OSCE principles, of which the settlement of the conflict in Ukraine is one of the important steps". However, the latest contacts of February 2023 only confirm its failure, see the Diplomacie Française website https://www.diplomatie.gouv.fr/fr/dossiers-pays/ukraine/evenements/article/ukraine-format-normandie-q-r-extrait-du-point-de-presse-11-02-22 conclusions_agreees__cle45ac98.pdf

[51] See the Chinese Ministry for Foreign Affairs' website: https://www.fmprc.gov.cn/eng/zy/gb/202405/t20240531_11367485.html.

[52] See Proposal by the Russian Federation to recommend that the Secretariat be requested to create a website on the peaceful settlement of disputes and update the Toolkit on the peaceful settlement of disputes between States, A/AC.182/2023/L.7 of 22 February 2023.

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cession of territories supported by the European Union[53] and that of Russia without concession of occupied territories— are judged in accordance with it, only one of them is in line with the normative structure and model of society still in force. These principles of Resolution of 23 February 2023 are also the principles of the Helsinki Final Act[54].

Perhaps a mission like that of the CSCE could be re-established, as D.J. Liñán Nogueras pointed out

> to keep the conflict within non-critical limits by trying to reach an agreement on general principles —the articulation of minimum "rules of the game"— and on the establishment of precarious mechanisms of economic, technical and humanitarian inter-bloc relations —the structuring of a certain degree of cooperation in areas where the paralysing action of the conflict is supposed to be more easily overcome[55].

At the time, the Helsinki Final Act was "configured as the basic element, the point of reference, in the conduct of security and cooperation in Europe and one of the most important instruments for détente in East-West relations", and also as a renunciation of war, without the initially valued formal considerations of recognition of the acquisition of territories in Poland. Moreover, the CSCE was continued over time in the form of a *counter-agreement*, as an open-ended negotiation process that ended up being informally institutionalised with the creation of the Organisation for Security and Cooperation in Europe. These could be Europe's inalienable demands for a future peace: the renunciation of war and the impossibility of acquiring territory through the use of force. Before the current situation can be resolved, this stumbling block must be addressed: how to respond to Putin's demands for peace for territory and

[53] See Statement by the Members of the European Council, dated 23 February 2023, available at https://www.consilium.europa.eu/en/press/press-releases/2023/02/23/statement-by-the-members-of-the-european-council/?utm_source=dsms-auto&utm_medium=e-mail&utm_campaign=Statement+by+the+Members+of+the+European+Council

[54] Recall that its principles were: I. Sovereign equality, respect for the rights inherent in sovereignty; II. Refraining from the threat or use of force; III. Inviolability of frontiers; IV. Territorial integrity of States; V. Settlement of disputes by peaceful means; VI. Non-intervention in internal affairs; VII. Respect for human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief; VIII. Equal rights and self-determination of peoples; IX. Cooperation among States; X. Compliance in good faith with obligations under international law, A/RES/ES-11/6.

[55] Liñán Nogueras, D.J., "Consenso y legitimación…", *loc. cit.,* p. 649.

the untenable premise that international law as law can be "honoured by its violation rather than by its fulfillment" (Hamlet, Shakespeare). This difficult juncture can be addressed first with *soft law* instruments, and then explore the possible adoption of an international treaty, to be enforced by the UN Security Council. Should such a solution prove unattainable, a UN-supervised *counter-engagement pact* would again need to be considered —as any replication of what was carried out by Commonwealth of Independent States peacekeeping operations in Abkhazia or South Ossetia is unacceptable. In any case, the legal solution adopted will have an unquestionable ripple effect on the current normative model —and perhaps also on conflicts that have been dragging on without a normative or political solution for decades, as in the cases of the territories forcibly annexed by Israel, China or Morocco. Following Prof. Liñán Nogueras' proposals, it will also be necessary to consider the ultimate function of the instrument to be adopted: to constitute an exception to international norms, to serve the interpretation of International Law in the light of the post-war context? In this direction, perhaps *consensus* rules could be adopted to serve as an interpretative structure for the United Nations Charter, in order to save the adopted agreement from futility. Its legal effects, or lack thereof, will be under constant scrutiny in the future as a reform of the Charter's normative structure and a questioning of its legitimacy model. What term will reflect the consensus that the word détente then reflected?[56]

In his day, Prof. Liñán Nogueras reflected on the proposals of his contemporaries[57]. In his case, A. Manin came to affirm that the Helsinki Final

[56] In this respect, Prof. Liñán pointed out, following A. Manin, that "détente constitutes the key word of the Final Act, because if it allowed the drafting of this text, it is even more the condition for its application. And this is how a meta-legal notion, that of détente, is configured as the repository of possible answers to the question of the legal value and scope that the Helsinki Final Act may have. However, the very notion of détente poses *ab initio* a problem with respect to its very definition, which will be a permanent guide in the reflections we are about to set out. We are referring to the fact that détente does not have the same significance in the East as in the West. In other words, détente is not a category outside the conflict, but the expression of the conflict itself, which in any case it presupposes. From this perspective, the CSCE tends to define détente as a whole, as a necessary *prius* to make it legally enunciable", Liñán Nogueras, D.J., "Consenso y legitimación…", *loc. cit.,* pp. 648-649.

[57] Mariño Menéndez, F., "Security and Cooperation in Europe - the Helsinki Final Act", *Revista de Instituciones Europeas*, Vol. 2/3, 1975, pp. 639-660; Beglov, S., "Un an après Helsinki",

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Act was neither a peace agreement nor a collective security pact[58]. However, at this stage of the conflict there is no doubt that the war of aggression in Ukraine has served as a trigger to strengthen a collective security pact among European countries, in the framework of the *soft law* formula of the Versailles Declaration that launched a new Political Community during the French Presidency in 2022. As J. Rigaud noted, "in a world of rapid change, the real strength of consensus is not the reconciled past, but a common way of facing the future. What counts from now on is not so much the accumulation of consents it brings as the community of attitudes it engenders"[59], and that is Europe's mission now.

If another Helsinki Final Act is possible, it would undoubtedly constitute a line of research that will lead to the future projection of the teachings of Prof. Liñán Nogueras.

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[58] Manin, A., *loc. cit.*, p. 46.

[59] Rigaud, J., "Réflexions sur la notion de consensus", *Pouvoirs, Revue française d'études constitutionnelles et politiques*, Vol. 5, 1978, p. 13.

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