1. **INTRODUCTION**

The expression *mutatis mutandis* comes from Latin and literally means that what needed to be changed has been changed. In a legal context, it applies where a provision is taken from an instrument and repeated in another with some adjustments that do not change its substantive content and its scope.\(^1\)

After having approved in 2001 the draft articles on the responsibility of States for internationally wrongful acts (the 2001 Draft), the International Law Commission approved in 2011 the draft articles on the responsibility of international organizations (the 2011 Draft). While the first draft deals with the responsibility of a State towards another State, the second relates to the responsibility of an international organization towards a State or another international organization.\(^2\) It is inevitable that in the elaboration of the second draft a certain role was played by the *mutatis mutandis* approach. This was due not only to the desire of not reopening the Pandora box of discussions which had already been made, but also to the great, though not always generally accepted, contribution that the 2001 Draft has provided to the progressive development of international law. In several cases, the 2011 Draft is based on the substantive choices already made

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1. In A.X. Fellmeth and M. Horwitz, *Guide to Latin in International Law* (Oxford, 2009), 189, *mutatis mutandis* is translated as ‘with the necessary changes’ and explained as ‘a phrase denoting that a statement applies to matters or things other than those mentioned, with appropriate alterations or adjustments as to the particularities or details’.

in the articles on State responsibility,\(^3\) including the most controversial ones, such as those on the invocation of responsibility by a State or an international organization other than an injured State or international organization (article 49 of the 2011 Draft, corresponding to article 48 of the 2001 Draft) or on the measures taken by States or international organizations other than an injured State or organization (article 57 of the 2011 Draft, corresponding to article 54 of the 2001 Draft).

*Mutatis mutandis* is a field where prudence is required, as recalled by the Special Rapporteur Giorgio Gaja:

> the Commission’s work on State responsibility cannot fail to affect the new study. It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text.\(^4\)

This essay aims at presenting some considerations on the role that the *mutatis mutandis* approach has played, as a drafting technique, in the redaction of the 2011 articles.

2. **Within *Mutatis Mutandis***

Besides those provisions that do not need any textual change,\(^5\) in several cases the articles of the 2011 Draft are almost identical to those of 2001, except for the replacement of the word ‘State’ with the words ‘international organization’, as it occurs in the following examples:

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\(^3\) This applies also to the decision not to include something in the draft that may have been included. For example: ‘Again as in the case of States, damage does not appear to be an element necessary for international responsibility of an organization to arise. In most cases an internationally wrongful act will entail material damage. However, it is conceivable that the breach of an international obligation occurs in the absence of any material damage. Whether the damage will be required or not depends on the content of the primary obligation’. (*ILC Commentaries*, para. 3, *sub* art. 4.)


\(^5\) Identical are, for example, art. 34 of the 2011 Draft and art. 34 of the 2001 Draft: ‘Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.’