The European Journal of International Law Vol. 34 no. 4

Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome

Hanna Eklund*

Abstract

In 1957, when the Treaty of Rome was signed, founding the European Economic Community (EEC), which later became the European Union (EU), four out of six of the original member states were colonial powers. This article uses archival material from the Treaty of Rome negotiations to interrogate ways in which the colonial politics of the time shaped the drafting of legal categories describing individuals: those of peoples, inhabitants and workers. As the Treaty of Rome 'associated' colonized territories to the EEC, this article shows how the treaty simultaneously arranged its legal categories to exclude individuals who lived in colonized territories from legal benefits and representation. This article situates the EU as an example of a post-World War II international organization, with its founding legal texts shaped by colonialism.

1 Introduction

In 1957, when the Treaty of Rome was signed, founding the European Economic Community (EEC), which later became the European Union (EU), four out of six of the original member states were colonial powers.[1] France was by far the largest, while Belgium and the Netherlands controlled significant areas of territory, and Somaliland was a United Nations (UN) Trusteeship under Italian administration. This article uses archival material from the Treaty of Rome negotiations to interrogate the ways in which the power dynamics and ideologies underpinning the colonial legal politics of the time shaped the construction of the Treaty of Rome's

* Assistant Professor of Constitutional Law, University of Copenhagen, Denmark. Email: hanna.eklund@jur.ku.dk. This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie Grant Agreement no. 892766. I wish to thank Karim Fertikh.

[1] Treaty Establishing the European Economic Community (Treaty of Rome) 1957, 298 UNTS 3.

legal categories describing individuals: the categories of peoples, inhabitants and workers. These legal categories remain unchanged in the Treaty of Lisbon, which is currently in force.[2]

In 2005, Antony Anghie argued that 'colonialism profoundly shaped the character of international institutions at their formative stage, and that by examining the history of how this occurred we might illuminate the operations and character of contemporary international institutions'.[3] Following his example, the character of European legal systems and organizations should be examined with the same openness to the potential imprints of the centuries-long practice of European colonialism on 20th-century European institutions. This article is concerned with the EU's legal order, which sits as an example among other interlinked instruments, institutions and areas of European law that should be, and increasingly are being, further examined with attentiveness to their immanent colonial imprints.[4] Notable among these are the Organization for European Economic Cooperation, created in 1948; the Council of Europe, created in 1949, and its 1950 European Convention of Human Rights;[5] and the European Coal and Steel Community, created in 1952.[6]

Scholars from disciplines other than law have examined the foundation of the EU in relation to European colonialism. Historians of European integration and intellectual history have, with increasing diligence, noted how colonialism determined political

[2] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Treaty of Lisbon) 2007, OJ 2007 C 306. What is referenced as European Union (EU) law today is conventionally referred to as European Economic Community (EEC) law for the period between 1957 and 1967 when the Treaty establishing a Single Council and a Single Commission of the European Communities (Brussels Treaty or Merger Treaty) 1965, 1967 OJ 152/1 entered into force, creating the European Communities (EC) and EC law until 1993 when the Treaty on European Union (Maastricht Treaty) 1992, OJ 1992 C 191, entered into force, creating the European Union.

[3] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 117.

[4] Important inroads into, and related to, the topic of EU law and colonialism have been made by J. Scott, *Development Dilemmas in the European Community* (1995); Caruso and Geneve, 'Melki in Context', in F. Nicola and B. Davies (eds), *EU Law Stories* (2016) 506; Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?', 24 *University of California Los Angeles Journal of International Law and Foreign Affairs* (2020) 163; N. El-Enany, *(B)ordering Britain: Law, Race and Empire* (2020); Larsen, 'European Public Law after Empires', 1 *European Law Open* (2022) 6.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222; M. Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (2017); Moor and Simpson, 'Ghosts of Colonialism in the European Convention on Human Rights', 76 *British Yearbook of International Law* (2006) 121; A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2004). Duranti's research on the origins of the ECHR shows very clearly the wilful exclusion of colonized peoples from the protection offered by European human rights law.

[6] The European Coal and Steel Community did not formally 'associate' or otherwise include the colonies. The first paragraph of Article 80 of the Treaty of Paris stated that the treaty was applicable to the European territories of the high contracting parties. The second paragraph, however, opaquely indicates that the contracting parties should extend to other contracting parties benefits, in the area of coal and steel, it may have from its non-European territories. Treaty Establishing the European Coal and Steel Community (Paris Treaty) 1951, 261 UNTS 140.

bargaining during the Treaty of Rome negotiations.[7] The political scientist Véronique Dimier has unveiled how actors who once populated the administration of European colonialism reappeared as agents in, and shaped procedures of, what are today EU institutions.[8] The political scientists Kalypso Nicolaïdis and Aline Sierp have described the EU's wilful political and institutional amnesia with respect to its colonial past.[9] What is still missing from this ever richer picture, as scholars from different disciplines draw lines between Europe's colonial history and the construction of what became the EU, is how EEC law, later to become EU law, was shaped at the outset by colonial politics.

The Treaty of Rome was negotiated during the Intergovernmental Conference (IGC) of 1956–1957. The archives of the IGC are publicly available and include forms of preparatory work such as different versions of draft treaty text, reports, letters and statements from the heads of delegation.[10] This article will show how this archive contains the important and under-appreciated story of who was meant to be included, and who was meant to be excluded, from the emerging EEC as well as what role law played in constructing these inclusions and exclusions.

In reading the archival material of the IGC with the aim of finding answers to the question of who the treaty drafters imagined should benefit from the laws of what was then the EEC, one finds a way of thinking and a mode of societal organization that does not start from the premise that all human beings deserve equal protection under the laws to which they are subjected. EEC law was designed to draw distinctions between individuals affected by the construction of its new legal order, to include and exclude them according to rationales prevalent in the colonial politics of the time. According to such politics, people who were not considered ethnically and racially Europeans, but who were subjected to, or were indeed citizens of, a member state through colonialism, were excluded from legal benefits and equal political representation.

In contrast to the picture that emerges from the IGC archive, the moment in which the EU was created is usually understood and taught in schools and universities in Europe as a moment of resolute serenity. It is understood above all as a historical moment that is the embodiment of a peace process for the European continent after World War II. But, as an increasing number of historians of European integration now point out, the moment of 1957 was also a moment of unravelling colonial power

7 M. Brown, *The Seventh Member State: Algeria, France, and the European Community* (2022); K.K. Patel, *Project Europe: A History* (2020); P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (2014); G. Garavini, *After Empires: European Integration, Decolonization, and the Challenge from the Global South 1957–1986* (2012); M.-T. Bitsch and G. Bossuat (eds), *L'Europe unie et l'Afrique: de l'idée d'Eurafrique à la Convention de Lomé I* (2004).

8 V. Dimier, *The Invention of a European Development Aid Bureaucracy: Recycling Empire* (2014).

9 Nicolaïdis, '"Southern Barbarians"? A Postcolonial Critique of EUniversalism', in K. Nicolaïdis, B. Sebe and G. Maas (eds), *Echoes of Empire: Memory, Identity and Colonial Legacies* (2014) 283; Sierp, 'EU Memory Politics and Europe's Forgotten Colonial Past', 22 *Interventions* (2020) 686.

10 The collection from the Intergovernmental Conference (IGC) has been digitalized by the Archives of the Council of the European Union (ACEU). All translations from French to English are the author's own. Page numbers refer to the digital files.

as well as one characterized by efforts to keep the colonial order in place.[11] The immediate context from 1956 to 1957, when the Treaty of Rome was drafted, should also be viewed and taught in Europe as a dynamic, energized, violent and unsettled moment. Appreciating the way in which efforts to decolonize and determined resistance to decolonization co-existed with a resolute inter-European peacefulness constitutes an entry point through which to re-evaluate the meaning of EU legal categories that are still in force today.

Giving the archival material centre stage, supported and enriched by secondary literature from multiple fields, this article will start by explaining the rationales underpinning the way in which the colonies were formally regulated in the Treaty of Rome. As euphemistically expressed in the final version of the Treaty of Rome's Article 131, 'the Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands'. The association regime subjected the colonized territories to provisions governing both investment and trade.[12] In explaining the structure of the association regime, the word 'association' will first be framed as a use of coded colonial language. Second, it will be contextualized briefly within the structure of the post-war European debate about European colonialism. Third, its legal content will be explained, and fourth and finally, it will be analysed as an example of a mindset that allowed the drafters to regulate colonialism amidst decolonization.

The reasoning that the drafters followed to reach agreement on 'association' helps us understand how the drafting of specific legal categories describing individuals was constructed to exclude people living in colonized territories from EEC law. Building on this background, the article then turns to its central argument, which is concerned with the ways in which colonial politics shaped the drafting of the legal categories of peoples, inhabitants and workers. Using the archival material from the IGC, as well as literature from history, political science and law, to understand colonialism as part of the constitutive context of the Treaty of Rome deepens our knowledge of the way in which the EU has regulated people throughout its history. The drafting of the categories of peoples, inhabitants and workers in different ways relates to the colonial legal distinctions between people who were considered ethnically and racially European citizens and people who were not but who were subjected to, or were citizens of, a member state. By understanding how colonialism forms part of the drafting history of the Treaty of Rome, a more nuanced knowledge of the character of foundational EU law can be achieved. The list of 'associated overseas countries and territories' has shrunk since 1957, and the numbering of articles has changed, but, otherwise, the legal language has remained unaltered through various treaty iterations leading up to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which together constitute the Treaty of Lisbon.[13] Understanding more about how colonialism shaped the drafting of the Treaty of Rome is not only an

[11] Brown, *supra* note 7; Garavini, *supra* note 7; Patel, *supra* note 7.

[12] Treaty of Rome, *supra* note 1, Arts 132, 133.

[13] Treaty on European Union (TEU), OJ 2010 C 83/13; Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/47.

important historical exercise; it also has the potential to constitute a starting point for an examination of EU law of today.

2 The Formal Regulation of Colonialism

A *Coded Language: 'The Overseas Countries and Territories'*

Reviewing the research field of law and colonialism in the early 1990s, the late anthropologist Sally Engle Merry defined the core of colonialism as a 'relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavours to impose its cultural order on the subordinate group(s)'.[14] In developing this definition, Merry also explained the processes through which colonialism becomes expressed in the coded language of trusteeship, development and modernization.[15]

Another example of such coded language for colonialism is the term 'overseas countries and territories', which is used throughout the drafting process and in the final version of the Treaty of Rome. In France, the word 'colonies' had been swapped for 'overseas territories' since the beginning of the Fourth Republic in 1946, and, in the archives from the IGC, it is clear there is a policy to refer to the colonies as 'the overseas countries and territories'.[16] Yet, in an instance that stands out in the archival collection, on 12 March 1957, the head of the Belgian delegation, Count Snoy et d'Oppuers, uses language such as 'the social aspect of colonialisation' and the 'resources of the colonies' when arguing for the benefits for all member states of associating Congo to the EEC.[17] Count Snoy et d'Oppuers' intervention is one of the very few times in the IGC's archival material in which the coded language is broken open. The language of 'overseas countries and territories', rather than colonies, has remained until today, both in legal scholarship and as used by the EU institutions.[18] In this way,

[14] Merry, 'Law and Colonialism', 25 *Law and Society Review* (1991) 889, at 890.

[15] *Ibid.*, at 896; Garavini, *supra* note 7, at 47 (who explains the same trend).

[16] F. Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa, 1945–1960* (2014). It should be noted that some colonies – generally, those more integrated with France – were departments, and not territories, such as Algeria, Réunion and Guyana.

[17] ACEU CM3 NEGO1.186, 'Conférence intergouvernementale: Résolutions adressées à la conférence et discours prononcés au cours des négociations'.

[18] D. Kochenov (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (2011). The most comprehensive English language work on the 'overseas countries and territories regime', Dimitry Kochenov's edited collection *EU Law of the Overseas*, consists of a total of 485 pages, yet the index has no entry for 'colonialism' or 'postcolonialism' and only one entry for 'decolonization'. Out of 20 chapter titles in this edited book, one refers to colonialism – namely, Antenor Hallo de Wolf's chapter 'Benign Territorial Human Rights Colonialism? The Application of Human Rights Treaties in Overseas Countries and Territories'. De Wolf explains on page 324 that the main purpose of his chapter is to analyse 'the human rights obligations of states towards their OCTs'. To illustrate the EU institution's contemporary use of this terminology, recital 5 in the preamble to 'Council Decision 2013/755/EU of 25 November 2013 on the Association of the Overseas Countries and Territories with the European Union' ('Overseas Association Decision'), which seeks to provide clarification as to the meaning of 'association', states that 'solidarity between the Union and the OCTs should be based on their unique relationship and their belonging to the same "European family"'.

it apparently constitutes a convenient linguistic barrier, even if ever so frail, against acknowledging the way in which European colonialism shaped the Treaty of Rome and is still reflected in current EU law.

B *A Legal Form for an 'Economic, Political and Psychological Problem'*

The foreign ministers of the six negotiating states met for three days in late January 1957 to discuss the participation of the 'overseas countries and territories' in the Common Market. On 30 January, a summary of the state of negotiations was issued from the presidium of these meetings outlining the main reasons no agreement had been made. It read in part: 'It must be noted that the problems posed by the question are as important as they are difficult to resolve and the obstacles to overcome are economic, political and even psychological.'[19] The problem of how to maintain a colonial order while negotiating a new form of European economic and political integration was framed by the negotiators as being of an existential nature, especially for France. How should what was then the French Union be fitted into the new EEC? It is clear merely from reading the archival materials of the IGC, which is a small fraction of a global history of the defiance of France and Belgium as colonial powers in the 1950s and 1960s, that controlling colonial territory was a European state of being. The question of how to continuously regulate and administer this colonial order from within the new EEC appears to have had not only a political and economic dimension but also a psychological one.

As Kiran Klaus Patel and Peo Hansen and Stefan Jonsson note in their respective works, the Treaty of Rome negotiations took place in an intellectual and historical context in which the concept of 'Eurafrica' was profuse in political and public debate.[20] The idea of the two continents being intertwined – the African continent relying on Europe for its development, economic, political, cultural and social, and the European relying on the African continent for resources – originated in France but was also accepted in Dutch and German debate.[21] This idea, in fact, was written into the Schuman Declaration of 9 May 1950, the prelude to the European Coal and Steel Community, which in turn was followed by the Treaty of Rome and is the reason Europe Day is celebrated on 9 May. According to the Schuman Declaration, European integration would enable Europe 'to pursue the achievement of one of its essential tasks, namely, the development of the African continent'. So, while Belgium and France pushed for a version of participation of the colonies in the Common Market, the problematic heritage of the 'European belief in expansion and superiority', as Patel puts it, was thoroughly sedimented in western European debates at this time.[22]

[19] ACEU CM3 NEGO1.196, 'Conférence intergouvernementale: Documents classés dans l'ordre chronologique, Janvier 1957', at 46.
[20] Hansen and Jonsson, *supra* note 7; Patel, *supra* note 7.
[21] Patel, *supra* note 7, at 249.
[22] *Ibid.*, at 249.

The historian Giuliano Garavini further explains how such a belief in European superiority remained intact after the chaos, destruction and atrocities of World War II.[23] He describes a European public consciousness in which France, Italy, the Netherlands and the United Kingdom combined a post-World War II reckoning with anti-Semitism and the monstrosity of the Holocaust with the conviction of white supremacy that underpinned European colonial projects.[24] Garavini outlines how, within France and Belgium in particular, the imperial imaginary was still greater than a European integrationist vision in the 1950s.[25] Reading the full collection of the IGC, the starting point of the drafting process was that the colonies, while in undeniable transformation, formed part of the current world order. The colonies were viewed as a facet of a burdensome, though potentially lucrative,[26] European responsibility to modernize the world through new institutions.

C *Association: Neither Included nor Excluded and Never Heard*

From the outset of the negotiations, it was decided that a Drafting Group on the Overseas Countries and Territories should be set up to address how member states' colonies should participate in the Common Market.[27] There were two poles in the negotiations over the participation of 'overseas countries and territories'. France and Belgium were on one side arguing for closer participation, and the Netherlands and West Germany took a more sceptical position, which focused on cost. West Germany, in particular, did not want to invest disproportionately in France – that is, in its colonial territories. On 11 October 1956, the Franco-Belgian Report on the Participation of the Overseas Countries and Territories to the Common Market was circulated among the negotiating states. In a meeting between the heads of delegation on 16 November of that same year, France made a statement on the essential points of that report.[28]

One the one hand, the French representative declared that the 'overseas countries and territories' could not be 'excluded' from the Common Market.[29] Such an exclusion was not possible because the 'overseas countries and territories' were an integral part of the member states' constitutional systems. A particular problem was that France would be split between two completely separate unions – the French Union and the EEC – were such an exclusion to be enacted. 'On the other hand', the French representative continued, 'the overseas countries and territories cannot be included pure

[23] Garavini, *supra* note 7.

[24] *Ibid.*, at 51–56.

[25] See also Anghie framing the same tendency in the post-war period formation of international law. Anghie, *supra* note 3, at 193.

[26] See, in great detail, S. Saul, *Intérêts économiques français et décolonisation de l'Afrique du Nord (1945–1962)* (2016); for further context, see Haleh Davis, 'Colonial Capitalism and Imperial Myth in French North Africa', in J. Beinin, B. Haddad and S. Seikaly (eds), *A Critical Political Economy of the Middle East and North Africa* (2020) 161.

[27] ACEU CM3 NEGO1.113, 'Conférence intergouvernementale: Réunion des chefs de délégation, Bruxelles, 29.11.1956', at 11.

[28] ACEU CM3 NEGO1.252, 'Conférence intergouvernementale: Historique de l'article 131 du traité instituant la CEE'.

[29] *Ibid.*, at 5.

and simple either'.[30] France went on to list reasons why inclusion was not possible and mentioned most importantly the 'difference in economic structure' between the future member states and 'the overseas countries and territories'; the 'under-developed character' of these regions; and the different legal statuses that these 'overseas countries and territories' had within the future member states.[31] For these reasons, the French statement concluded, it was preferable to work with the concept of 'association' going forward in the negotiations.

The concept of 'association' is not new in French colonial administration. Mohammad Shahabuddin traces the use of association in the context of colonialism back to the early 1900s.[32] Shahabuddin writes that the 'idea of association emphasized the importance of considering local needs; instead of universalism and centralisation, it focused on the variation in colonial practise depending on the colonies' geographic and ethnic composition as well as their level of socio-cultural development'.[33] Shahabuddin highlights the French sociologist René Maunier's definition, whereby association is not equality 'but there is humanity and moderation. … there is collaboration and cooperation, but of superior and inferior'.[34] On 18 December 1956, the Drafting Group on the Overseas Countries and Territories listed the benefits of association in explicitly economic terms: 'Economically speaking', the future member states were said to have a fundamental need for cooperation and for the 'contributions which the overseas countries and territories can offer – particularly those in Africa – for the long-term stability of the European market. The abundance of natural resources, which the overseas countries and territories possess, will for the whole of the Common Market be indispensable for economic growth'.[35]

These long negotiations found resolution in the last weeks of March 1957 with the formula noted above – namely, that the member states would agree 'to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and Netherlands'. Concretely, this meant, first, a close trading relationship between the EEC and the 'associated countries and territories' and, second, the creation of the European Development Fund for associated African countries, which was to be administered by the new EEC Commission. Patel calls this legal arrangement the 'association of Africa', which he explains was 'rooted in paternalistic understanding of politics under which Africa had to be secured for Europe – and Europe for Africa – and all on European conditions'.[36] The close trading relationship meant that the 'associated countries and territories' were to be gradually included in the EEC's tariff system, with the consequence that the aim of association was an open trade area controlled by the terms decided in Brussels. It was further

[30] *Ibid.*, at 5.
[31] *Ibid.*, at 5.
[32] M. Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (2016), at 88; see also Cooper *supra* note 16, at 37.
[33] Shahabuddin, *supra* note 32, at 88.
[34] *Ibid.*, at 89; see further René Maunier, *The Sociology of Colonies*, translated by E.O. Lorimer (1949), at 297.
[35] ACEU CM3 NEGO1.252, *supra* note 28, at 87–88. The same point was made by the head of the Belgian delegation, ACEU CM3 NEGO1.186, *supra* note 17.
[36] Patel, *supra* note 7, at 249.

decided in the negotiations that other issues regarding trade between the EEC and the 'associated countries and territories' – on which the six future member states could not agree – would be settled in a separate trade agreement between the EEC and the 'associated countries and territories' within the next five years.

The European Development Fund received a lot of attention in the negotiations. The fundamental disagreement regarding the fund was that West Germany did not want to agree to invest in the French 'overseas countries and territories', thereby investing in France. The solution was that a principle of non-discrimination regarding access to tenders for different investment projects supported by the fund was agreed upon.[37] This meant that West German as well as Italian, Belgian, Dutch and Luxemburgish companies could compete for investment opportunities in the French colonies on equal terms with French companies.[38] During the negotiations, this was referred to as 'equal access to natural resources'.[39] The principle of non-discrimination, which until this day has been a cornerstone of the EU legal order, found application as a framework principle for the extraction of resources from territories that the EEC member states had colonized.[40]

In no way and at no point during the negotiations over the shape and form of this 'association' were the colonized countries and territories concerned politically represented. The only time the idea of political representation was mentioned was in relation to future trade agreements between the EEC and the 'associated countries and territories'.[41] In this future context, it was stated that 'a certain representation of the overseas countries and territories' may be required in accordance with 'their systems of public law'.[42] In contrast, during the IGC negotiations, political representatives of Portugal and the United Kingdom were consulted by the Drafting Group on the Overseas Countries and Territories in their capacity as European colonial powers.[43]

After long negotiations between the six future member states, during which the vast territories under colonial rule and the people living there remained silent, it was decided that Algeria and the French Overseas Departments would be regulated separately in Article 227,[44] and the 'associated countries and territories' appeared in a list in Annex IV of the final version of the Treaty of Rome:

[37] Dimier, *supra* note 8, at 22; see also Dimier, 'Eurafrica and Its Business: The European Development Fund between the Member States, the European Commission and European Firms', 23 *Journal of European Integration History* (2017) 187 (where she explains that even if 'OCT companies' were allowed to compete in the call for tenders these companies were often effectively run by France).

[38] Dimier, *supra* note 8.

[39] ACEU CM3 NEGO1.243, 'Conférence intergouvernementale: Historique des articles 107, 108 et 109 du traité instituant la CEE', at 53.

[40] Dimier, 'The European Development Fund, a Dowry for French Companies?', in V. Dimier and S. Stockwell (eds), *The Business of Development in Post-Colonial Africa* (2020) 241.

[41] Article 2 of the Implementing Convention on the Association of the Overseas Countries and Territories, 1957 11957E/CNV/PTOM, which, for five years, regulated the operation of the Development Fund, refers to 'the representatives of the populations' of the overseas countries and territories.

[42] ACEU CM3 NEGO1.252, *supra* note 28, at 41.

[43] ACEU CM3 NEGO1.117 'Conférence intergouvernementale: Réunion des chefs de délégation, Bruxelles, 04-05.01.1957', at 8.

[44] See sections 2.4 and 5.1.

French West Africa: Senegal, French Sudan, French Guinea, Ivory Coast, Dahomey, Mauritania, Niger, and Upper Volta;
French Equatorial Africa: Middle Congo, Ubangi-Shari, Chad and Gabon;
Saint Pierre and Miquelon, the Comoro Archipelago, Madagascar and dependencies, French Somaliland, New Caledonia and dependencies, French Settlements in Oceania, Southern and Antarctic Territories;
the Autonomous Republic of Togoland;
the trust territory of the Cameroons under French administration;
the Belgian Congo and Ruanda-Urundi;
the trust territory of Somaliland under Italian administration; Netherlands New Guinea

D *Regulating Colonialism amidst Decolonization*

The concepts and ideas used to regulate colonialism by the drafters of the Treaty of Rome were not new in 1957. The concept of 'association' and the idea of the 'dual mandate' of ensuring 'economic development and native wellbeing' were well founded in European colonial policy-making.[45] What distinguishes the IGC's process of regulating colonialism and fitting it into the EEC is that it happened at the height of decolonization, with processes of colonized countries gaining independence unfolding simultaneously with the IGC, especially on the African continent. In this context, the way in which the heads of delegation and the Drafting Group on the Overseas Countries and Territories codified 'association' without involving any form of political representation from the countries that were to be associated stands out as a noteworthy expression of a European mindset determined to remain in control and to continue, in some form, a centuries-long practice of colonialism.

The negotiation of the Treaty of Rome happens during the same time frame as, for instance, the Algerian War of Independence in 1954–1962; the Suez Crisis in 1956; Tunisian independence from French colonial rule in 1956; and partial independence from French colonial rule in Morocco in 1956. These events are not referenced during the IGC, although key actors in the drafting were clearly concerned by, and argued against, political developments that initiated processes of decolonization. The Suez Crisis prompted the Belgian foreign minister and socialist Paul-Henri Spaak, a central figure in the drafting of the Treaty of Rome and often referred to as the chief architect of its Common Market, to publish an article in *Foreign Affairs* asking the question: 'Where are the men of clear mind and resolute will that the West needs desperately to save its precious inheritance?'[46]

In the same spirit, countries that had become independent in the immediately preceding years were also considered candidates for 'association' with the EEC. In the archival material of the IGC, former colonies were referred to as a drafting problem, and different solutions were proposed. In February 1957, and in subsequent

[45] Anghie, *supra* note 3, at 150, 158.

[46] Spaak, 'The West in Disarray', 35 *Foreign Affairs* (1957) 184. Paul-Henri Spaak, clearly taken aback by the ongoing politics of decolonization, delivered a condemnation of what he considered the United Nations' (UN) lenience towards the Egyptian President Gamal Abdel Nasser. For further information on Spaak, see Garavini, *supra* note 7, at 50.

discussions, it was suggested that a special clause would perhaps make it possible to associate, or, alternatively, to provide a special status with regard to trade, with countries such as Tunisia, Morocco, Cambodia, Laos and Libya, which had all become independent states since 1949.[47] The drafters also discussed whether it would be possible to construct a third category between 'associated countries and territories' and 'third country', into which newly independent former colonies of the member states could be categorized.[48] This discussion, although such a third category or special legal status was never created, again illustrates a frame of mind amongst the member states in which decolonization was more about reforming colonial legal statuses than a complete discontinuation of a colonial relationship.

The historian Megan Brown has illustrated this same point in relation to Algeria, which in 1956–1957 was considered an integral part of France and, as such, was not listed in the Treaty of Rome's Annex IV but regulated separately in its Article 227. Megan Brown writes a history of Algeria as the EEC's seventh member state, underlining how France envisioned a reform of the colonial relationship, including through its partial inclusion in the Common Market, rather than an end to colonial rule. Article 227 placed Algeria, together with the French Overseas Departments, more closely within the Common Market by asserting that, most notably, freedom of movement of goods and services as well as certain provisions regarding agriculture would apply to these territories. As Brown points out, this special regulation of Algeria happened as the Algerian War of Independence was ongoing, without the War of Independence ever being mentioned during the negotiations of the IGC.[49]

Reading the archival collection of the IGC, the disconnect between the determined diligence with which colonialism was regulated and the loudness with which colonialism was rejected, and defended, around the globe is informative. It shows the ways in which the initial steps in EEC law-making were used as a complicated method through which a colonial relationship could be continued through 'association'. Tellingly, there is no provision in the Treaty of Rome outlining a procedure to handle the independence of any of the 'associated countries and territories'. Observing the paradox of the position taken by the drafters of the Treaty of Rome does not require the benefit of hindsight. The UN's Economic Commission for Africa was established by the UN Economic and Social Council in 1958. One of the commission's first tasks was to write a report on the 'Impact of Western European Integration on African Trade and Development'. This 100-page report was published in December 1960 and, in

[47] ACEU CM3 NEGO1.127, 'Conférence intergouvernementale: Réunion des chefs de délégation, Paris, 20.02.1957', at 13; ACEU CM3 NEGO1.128, 'Conférence intergouvernementale: Réunion des chefs de délégation, Bruxelles, 28.02-03.03.1957', at 7; ACEU CM3 NEGO1.130, 'Conférence intergouvernementale: Réunion des chefs de délégation, Rome, 24–25.03.1957', at 17. In these documents, the Dutch delegation also discussed the appropriate designation of Suriname and the Netherlands Antilles, both still under Dutch colonial rule.

[48] These discussions also involve a special category for newly independent countries still using the franc as their currency. ACEU CM3 NEGO1.181, 'Conférence intergouvernementale/Comité intérimaire: Documents de base regroupés par matières', at 15, 115 and 158. See also ACEU CM3 NEGO1.252, *supra* note 28, at 47.

[49] Brown, *supra* note 7, at 124.

essence, concluded that the much-needed diversification of African economies was made more difficult through association with the EEC and that it should be underlined that the economic interests of the EEC did not appear to straightforwardly coincide with those of the associated African countries.[50] The commission expressed subdued bewilderment with respect to the Treaty of Rome's regulatory mindset. The conclusion reached by the commission read in part:

> It seems clear that the Implementing Convention of the Treaty of Rome was not drawn up to deal with a situation – such as it exists at present or will exist in the near future – in which the associated African countries would have acquired autonomy in their political and economic policies. The African countries derived their membership from their special ties with the metropolitan powers. On the other hand, there is no provision in any of the Treaty documents whereby the associate membership of dependent territories would cease when they gain independence.
> …
> the treaty provisions dealing with tariffs and quotas are like those relating to the Development Fund relatively clear and leave little room for differences in interpretation. However, they suffer from the fact that they were conceived in view of passive association of overseas territories and do not take into account the changes in their political status.[51]

The Treaty of Rome's silence on the possibility of independence of the 'associated countries and territories' is never remedied despite several 'associated countries and territories' becoming independent in the years immediately following the treaty's ratification. An oblique acknowledgement of the independence of several of the countries listed in Annex IV was made in 1967 in a two-page *avis au lecteur*, which was added to the Treaty of Rome.[52] This understated note explains to the reader that, due to recent political events and the gaining of independence of a certain number of countries and territories, a series of changes to Annex IV should be noted.[53] This mixture of exerting

[50] Economic and Social Council, Economic Commission for Africa: Impact of Western European Integration on African Trade and Development, Third Session, Provisional Agenda Item 6(a), Doc. E/CN.14/72, 7 December 1960.

[51] *Ibid.*, at 10, 17. In a footnote on page 10, it is remarked that, if it had been the intention of the Treaty of Rome to deal with the situation of independence, 'the inclusion of the Trust territories of the Cameroons and Togo among the associated countries and territories would have had little meaning since it was known at the time the Treaty was signed that the particular relations those countries had with France would cease to exist in 1960. In another case – that of the Italian Trust Territory in Somaliland – it was recognized that the particular links with Italy would be discontinued in December 1960'.

[52] Neither the Archives of the Council of the European Union or the EU Publications Office knows exactly how the 'Avis au Lecteur' appeared, only that it is not considered part of the original text of the treaties.

[53] This note to the reader also mentions the trade agreements, which are the next aspect of the way in which interactions between the EU and the member state's former colonies were organized, alongside the 'association' regime, which still remains in place. The Yaoundé Convention (Convention d'association entre la Communauté économique européenne et les États africains et malgache associés à cette Communauté 1969, OJ 1970 L 282) was the first trade agreement between the EU and former colonies and was later followed by the Lomé I Convention (ACP-EEC Convention of Lomé 1975, OJ 1976 L 18, in force between 1975–2000, and the Cotonou Agreement (Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part 2000, OJ 2000 L 317), which is still in force. These trade agreements can be studied, as has been pointed out, as iterations of a colonial power structure. See, e.g., Odijie, 'Unintentional Neo-Colonialism? Three Generations of Trade and Development Relationship between EU and West Africa', 44 *Journal of European Integration* (2022) 347.

colonial power and linguistic elusiveness, which is emblematic of the legal framework of 'association', was the context in which the legal categories of peoples, inhabitants and workers were drafted.

3 Peoples

A *The Subject of European Integration*

Perhaps the most famous phrase of EU law throughout its history is that the EU is meant to create 'an ever closer union among the peoples of Europe'. This formula opens the preamble of the Treaty of Rome, and, today, it is found in Article 1 of the TEU and in the preamble of the TFEU. In this section, the drafters' choice of words will be read in the context of colonial citizenship laws in force in 1957. Through this contextual reading, it becomes visible that, in the Treaty of Rome, the 'peoples of Europe' as the subject of European integration designates the ethnically and racially European population, not all who were governed by the member states. The phrase 'an ever closer union among the peoples of Europe' therefore captures an internal European effort to unify 'European peoples', while simultaneously excluding people who were governed by France, Belgium, the Netherlands and Italy and subjected to its laws through colonialism.

During the drafting of the preamble, which took shape over the course of a few weeks with several different wordings being discussed, the concepts of 'state' or 'citizens' were never contemplated as the subject of European integration.[54] There are few clues in the archival records of the IGC negotiations as to why 'peoples of Europe' was chosen, but it is clear that in 1957 the terms 'citizens' or 'states' would have designated a far greater number of people. France, Belgium, the Netherlands and Italy all had citizenship laws, which in different ways encompassed people in the colonized territories. The most important example comprises the sprawling colonial citizenship laws of France. In 1957, certain selected groups of people – for instance, the non-Muslim part of the Algerian population and certain categories of people in Senegal – held full citizenship status in France. The majority of people living in territories under French colonial control, however, had different forms of citizenship status that were distinguishable from the status held by French citizens who were considered ethnically and racially French.[55]

With respect to the Dutch colonies, a second-rate citizenship status known as 'Dutch Subject, non-Dutch National' was repealed in 1951 in most of the Dutch colonies.[56]

[54] ACEU CM3 NEGO1.182, 'Conférence intergouvernementale: Documents concernant le préambule et les dispositions initiales du traité instituant la CEE'; ACEU CM3 NEGO1.204, 'Conférence intergouvernementale: Documents classés dans l'ordre chronologique, février 1957' and ACEU CM3 NEGO1.216, 'Conférence intergouvernementale: Historique des articles 2, 3, 4, 5 et 6 du traité instituant la CEE'.

[55] See also Cooper, *supra* note 16, at 5, 21.

[56] H. Ahmadali and N. Chun Luk, Report on Citizenship Law: Suriname, EUDO Citizenship Observatory, Doc. 2015/17; R. Van Oers, B. De Hart and K. Groenendijk, Country Report: The Netherlands, EUDO Citizenship Observatory, Doc. 2010/19.

This meant that in Suriname, for instance, most Surinamese became Dutch citizens.[57] Looking at what in 1957 was still Belgian Congo, Bronwen Manby explains how the Congolese became Belgian citizens while 'firmly divided into categories, according to race and civil status'.[58] Similar racial hierarchies had been built into the citizenship laws of Italian Somaliland, which later became Italian East Africa during the Italian fascist regime, and 'only those who were white or of mixed race, and fulfilled further conditions showing their assimilation to Italy, had the possibility of acquiring Italian citizenship'.[59] In 1950, when Somaliland became a UN trusteeship under Italian administration, Sabina Donati explains that the status of these individuals 'remained uncertain from a juridical point of view as they stopped being Italian colonial subjects and Italian colonial citizens but no new citizenship status could be defined for them in a precise way'.[60]

These brief examples from French, Belgian, Dutch and Italian colonial citizenship laws illustrate that the terms 'citizens' or 'states' would have included those individuals who had established colonial legal links – though they were complex – with the French, Belgian, Dutch and Italian states in 1957. Thus, there was a difference between designating the subject of European integration as the 'peoples of Europe' rather than 'citizens of Europe', 'citizens of the member states' or 'member states'. In this contextual reading, the 'peoples of Europe' as the subject of European integration appears to avoid denoting all the citizens of the future member states, or all those who are subjected to its laws and institutions, but to instead identify those who belong to an ethnic and racial meaning of nation.

B *The Difference between 'Member States' and 'Peoples of Europe'*

Colonial legal politics uses an ethnic and racial understanding of nation as a means to create legally distinct categories of citizen. The legal techniques of colonial citizenship law privileged those considered to belong to European nations by virtue of their ethnicity and race. It is by taking the colonial era ethnic and racial idea of nation into account that we understand the meaning of the phrase 'peoples of Europe', and in so doing new light is cast on the distinction between 'peoples of Europe' and 'member states' in EU legal studies. In their respective work, Manby and Emmanuelle Saada have pointed out that the main commonality of colonial citizenship law was that only white Europeans possessed both citizenship and nationality status. Saada uses the specific example of the way in which French colonial law regulated children of mixed race to show how being legally classified both as of French nationality and as a French

[57] Ahmadali and Chun Luk, *supra* note 56, at 2.

[58] B. Manby, *Citizenship in Africa: The Law of Belonging* (first paperback edn, 2021), at 255. Bronwen Manby explains that the 'possibility of adopting a law that would formally recreate "Congolese nationality" as a type of Belgian nationality, and who exactly would qualify for it, was under debate among Belgian scholars right up to the moment when the question became irrelevant' (at 226). Congo became independent in 1960; since 1964, it has been the Democratic Republic of the Congo.

[59] Manby, 'Study on Citizenship and Statelessness in the Horn of Africa', *UN High Commissioner for Refugees Report* (2021) at 10.

[60] S. Donati, *A Political History of National Citizenship and Identity in Italy, 1861–1950* (2013), at 249.

citizen required possession of what were considered French racial, cultural and religious traits.[61]

Differently from those considered ethnically and racially Europeans, people living in the colonized territories, depending on specific historical and political developments, could either have a version of citizenship or be designated as, for instance, 'French' or 'Belgian' subjects without having full citizenship in France or Belgium.[62] This shows the complex way in which citizenship laws of the colonial era were organized so that people from the colonies who had citizenship in the colonizing state were excluded from being considered members of the colonizing European nation. When people from the colonies were designated as a nationality, such as 'French' or 'Belgian', it was not as citizens with rights to equal treatment but, rather, as subjects of France and Belgium. Several authors have pointed out how colonialism racialized the idea of nation.[63] Saada describes the colonial construction of the idea of nation as a break with the past. The way in which race, religion and culture were used to define 'French' in colonial law represented a different vision to that promoted by the 'most influential French political thinkers, from Jean-Jacques Rousseau in the eighteenth century to Ernest Renan in the nineteenth century, where a "people" or a "nation" is an association based on will'.[64] Using Germany and France as examples, Shahabuddin shows how, throughout the 19th century, the construction of the idea of nation as a European ethnic identity happens in relation to, and in fact is reinforced by, the colonial projects. Shahabuddin frames the processes as the 'projection of the ethnic "self" on the colonial "other" through exclusion'.[65]

As colonial legal politics uses an ethnic and racial understanding of nation, it reinforces the difference between state and nation. When read in the context of colonial law and politics, 'member states' and the 'peoples of Europe' are not overlapping concepts. The distinction between 'peoples of Europe' and 'member states' can be seen more clearly in the context of a colonial legal order and imagination in which European states orchestrate expansive control over large territories and their societies, while the construction of the idea of nation encompasses only those of European ethnicity and race. This idea provides an important nuance to the understanding of the relationship between 'peoples of Europe' and 'member states' within EU legal studies. Habitually, the phrase 'an ever closer union among the peoples of Europe' is used by scholars and taught to students of EU law as a representation of the process of European integration and as an expression of the fact that there is no one European people – demos – in the EU but several different and distinct European peoples coming together.[66] As such, the phrase has been proffered as a framing of the greatest obstacle

61 E. Saada, *Empire's Children: Race, Filiation and Citizenship in the French Colonies* (2012), at 96.

62 Manby, *supra* note 59, at 10.

63 For general definitions of the idea of nation, which are not tied to race or ethnicity, see B. Yack, *Nationalism and the Moral Psychology of Community* (2012), at 70; É. Balibar, *We, The People of Europe?: Reflections on Transnational Citizenship* (2009), at 16.

64 Saada, *supra* note 61, at 16.

65 Shahabuddin, *supra* note 32, at 71.

66 Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403, at 2433.

to substantial democratization of the EU.[67] In such accounts, 'peoples of Europe' and the 'member states' are treated as overlapping concepts.[68] In contrast, a historically aware contextual reading shows that the picture remains incomplete if we treat 'peoples of Europe' as the lyrical synonym of 'member states'.

When read in its constitutive context, the phrase 'peoples of Europe' in the preamble of the Treaty of Rome refers to those considered to belong by virtue of ethnicity and race to a European nation, not necessarily to those who are 'just' citizens of, or otherwise subjected to, European states. Indeed, emphasizing this point, the Treaty of Rome's preamble ends by reaching beyond those individuals considered French, Belgian, Dutch, Luxemburgish, German and Italian people but not to the peoples of the 'associated countries and territories'.[69] Instead, the last part of the preamble calls 'upon the other peoples of Europe who share their ideal to join in their efforts'.[70] To the story of the proclamation of 'an ever closer union among the peoples of Europe' as an expression of the process of European integration, it should be added that, as the phrase designated the peoples of Europe, it functioned to exclude individuals who were subjected to the member state through colonialism. Reading 'peoples of Europe' in the context of the colonial legal politics of 1957 helps us interpret its meaning in a way that offers a more nuanced understanding of the foundational character of EU law. Yet the question of the complex use of the word 'peoples' in the Treaty of Rome emerges even more fully when the preamble, and the documents from the history of its drafting, are read in full.

4 Inhabitants

A *French Reservations*

In the first draft version of the preamble from 10 January 1957, the 'overseas countries and territories' are not mentioned. This is also the case for the subsequent five draft versions. Late in the negotiations on 8 March, the 'overseas countries and territories' was inserted into the preamble, and the draft version reads: '[T]o contribute, in accordance with the principles of the Charter of the United Nations, to ensure the development and prosperity of the peoples of the overseas countries and territories to which they have special relations.'[71] France, the archival material shows, expressed a

[67] Bellamy, '"An Ever Closer Union among the Peoples of Europe": Republican Intergovernmentalism and Democratic Representation within the EU', 35 *Journal of European Integration* (2013) 499.

[68] See, e.g., 'Editorial Comments: Withdrawing from the "Ever Closer Union"?', 53 *Common Market Law Review* (2016) 1491, at 1497. Generally speaking, the concepts of peoples and states are clearly distinguishable as 'the former refers to the human substrate of a polity, whereas "state" refers to the institution'. Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (2015), at 31.

[69] See section 4.

[70] Writing on African attitudes to the EEC in 1963, Ali Mazrui observes that, while 'the issue of race [is] undiscussed in the counsels of Europe, that issue is still, in the estimation of many Africans, implicit in the logic of European plans. Inevitably, Europeans have both a regional and a racial identity'. Mazrui, 'African Attitudes to the European Economic Community', 39 *International Affairs* (1963) 24, at 27.

[71] ACEU CM3 NEGO1.204, *supra* note 54.

reservation to this wording, and, in the final version of the preamble to the Treaty of Rome, the reference to 'peoples' was taken out and the paragraph reads: '[T]o confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations.'[72]

Alongside the removal of 'peoples', the word 'binds' was inserted, which gestures towards an imagined longevity of the connection between the member states and the colonized territories. The final version also speaks of 'development of their prosperity' rather than 'the development and prosperity'. By referring to development and prosperity separately, the version prior to the French reservation could have been read to refer to political development and self-determination. In the final version, however, development refers only to prosperity, a vague notion that excludes the possibility of reading the text as referring to political self-determination.

While the motivation behind the French desire to rephrase the preamble, and, specifically, to erase the reference to 'peoples', is not explained in the documentation from the treaty negotiations, it is explainable in the context of French colonial politics at the time and with reference to the contemporary legal interpretation of 'peoples'. As Frederick Cooper summarizes, during the drafting of the Constitution of the Fifth Republic in 1958, beginning just a year after the Treaty of Rome was signed, the link between the term 'peoples' and the right to self-determination was acknowledged by the drafters of the French Constitution and elite lawyers involved in reviewing the drafting process.[73] Reluctance to use the word 'peoples' when referring to the colonies is a feature of the French position during the IGC and can be read in light of the fact that 'peoples' was explicitly framed as an expression of self-determination in the context of the drafting of the French Constitution.

In terms of the state of French colonial politics in this period, the French constitutional debate centred on how to construct a version of a federated system. This meant that the French posture did not promote the independence of colonized territories but, rather, increased the political representation of the people living in the territories within the French institutions.[74] During the drafting of the Constitution of the Fifth Republic in 1958, different options for increased political representation in the political institutions of metropolitan France – not to be equated with equal access to political institutions and representation – were discussed.[75] As Cooper further explains, in the last years of French colonial rule, prominent West African leaders such as Léopold Senghor, later the first president of Senegal, argued within this debate about the construction of some form of federation, aiming to achieve full participation in the French institutions, together with greater coordination between the emerging African states, rather than the independence and sovereignty of each individual territory. Others such as Sourou-Migan Apithy, the second president of Dahomey (later Benin), argued

[72] ACEU CM3 NEGO1.182, *supra* note 54. This formula appears, unchanged, in the preamble to the TFEU.
[73] Cooper, *supra* note 16, at 292.
[74] *Ibid.*, at 279.
[75] *Ibid.*, at 289.

for a way to ensure absolute independence and sovereignty within some version of a French federation.[76] The structure of this debate, which was concurrent to the formation of the EEC in metropolitan France about how to reform French colonial rule rather than discontinue it, contextualizes the French reluctance to use the word 'peoples' to describe those who were supposed to be integrated or 'assimilated' into what was in 1957 the French Union.[77]

B *With Reference to the UN Charter*

The French unwillingness to use 'peoples' to describe those living in colonized territories also played out in relation to the way in which the UN Charter was cited in the Treaty of Rome. Behind the preamble's reference to 'the principles of the Charter of the United Nations' lay a debate during the IGC over whether to refer explicitly to Article 75 of the UN Charter on the establishment of the trusteeship system and Article 76 on the basic objectives of the trusteeship system or to not refer to the UN Charter at all.[78] In a footnote in a document summarizing the discussion of the heads of delegation on 28 February 1957 regarding a very early draft version of Article 131 of the Treaty of Rome, the question of how to cite the UN Charter, if it was to be cited at all, was referred to as controversial.[79] The West German delegation pushed for an explicit reference to both Chapter 11 on non-self-governing territories and Chapter 12 on the trusteeship regime (Articles 75–85) of the UN Charter.[80] The West German delegation wanted these chapters, and later, at a minimum, Articles 75 and 76 of the UN Charter, cited in the preamble as well as in Article 131 of the Treaty of Rome, which is the central article on association. The French wanted no reference at all to the UN Charter, whether in the preamble or in Article 131 of the Treaty of Rome.[81]

What was at stake and what would an explicit alignment with the UN trusteeship regime have signalled? Anghie describes the formal function and rationale of the trusteeship regime in this period in the following way:

> The doctrine of self-determination, that had been developed in the inter-war period principally in relation to the peoples of eastern Europe, was now adopted and adapted by the United Nations to further and manage the transformation of colonial territories into independent, sovereign states. Virtually every facet of the UN system participated in this project: the provisions in the UN Charter that dealt with non-self-governing and trusteeship territories, the famous General Assembly Resolutions articulating the right to self-determination and the opinions of the International Court of Justice (ICJ).[82]

[76] *Ibid.*, at 294.
[77] ACEU CM3 NEGO1.192, 'Conférence intergouvernementale: Documents classés dans l'ordre chronologique, Janvier 1957'.
[78] ACEU CM3 NEGO1.252, *supra* note 28, at 37.
[79] *Ibid.*, at 6.
[80] *Ibid.*, at 234.
[81] *Ibid.*, at 246 and ACEU CM3 NEGO1.194, 'Conférence intergouvernementale: Documents classés dans l'ordre chronologique, Janvier 1957', at 68.
[82] Anghie, *supra* note 3, at 196.

The ways in which the UN was seen as managing and providing a forum for decolonization is an important context in relation to which the negotiation of the IGC should be situated. After negotiating the formulation of the preamble's reference to the 'overseas countries and territories', together with the wording of Article 131, a compromise was reached. The preamble would reference the UN Charter without explicitly citing the Charter's provisions on non-self-governing territories or the trusteeship regime. As part of the same compromise, the last section of Article 131 read: 'In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.'

According to the compromise reached, the formula '[i]n accordance with the principles set out in the Preamble' was meant to be an oblique reference to the UN Charter.[83] The wording of the last part of Article 131, cited above, should be read alongside, and compared to, Article 76(b) of the UN Charter on the objectives of the trusteeship regime as the last section of Article 131 of the Treaty of Rome imports parts, but notably not all, of its language. The last section of Article 76(b) of the UN Charter reads:

> [T]o promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.

The concession to the French request that the UN Charter be excluded altogether had the result that, while the UN Charter was cited in the preamble and indirectly referenced in Article 131, the reference to 'political' advancement was not included in Article 131 as the aim of 'association', nor were the words 'peoples', 'self-government' or 'independence'. With the reference to peoples having also been taken out of the preamble, as described above, Article 131 is the only time in the Treaty of Rome in which the people living in countries and territories that had been colonized by member states are mentioned.[84] In Article 131, those who live in the 'overseas countries and territories' are inhabitants, without any reference to the possibility of existing as a people with a right to self-government.[85]

The Treaty of Rome therefore consciously negates the possibility of connecting a collective voice and political representation to individuals living in the colonized territories. EEC law, contemporaneously to debates on the UN methods of decolonization, takes a stand and excludes any reference to forms of government other than a continuation of colonial rule. Anghie notes how the UN trusteeship regime merely 'follows the familiar pattern of the colonial encounter, the division between civilized and

[83] ACEU CM3 NEGO1.252, *supra* note 28, at 6.
[84] Implementing Convention, *supra* note 41.
[85] ACEU CM3 NEGO1.129, 'Conférence intergouvernementale: Réunion des chefs de délégation, Bruxelles, 07-08.1957', at 8.

uncivilized, the developed and the developing, a division that international law seeks to define and maintain using extraordinarily flexible and continuously new techniques'.[86] Thus, the UN trusteeship regime may have described the route from colonial rule to independence while still maintaining colonial-era hierarchies. Yet EEC law was not willing to even go so far as to use any of the legal vocabulary associated with the processes of decolonization in the post-war period. Rather, due to the insistence of France, the EEC's largest colonial power, the other parties to 'association' are framed as passive inhabitants, without any countenancing of a route out of this passivity. To follow a simplification of Anghie's argument, if the UN trusteeship regime was in substance neo-colonial, then the drafters of the Treaty of Rome were still preferring the formal legal language of colonialism proper to describe those who lived in the colonized territories. This language has remained completely unchanged, despite several treaty reforms, in what is now Article 198 of the TFEU.

5 Workers

A *An Implementation Problem*

As remains the case in contemporary EU law, the Treaty of Rome's central individual rights holder is the worker, who has the right to circulate freely within the Common Market. During the IGC, the question of whether people living in the colonized territories were to be included in this new status of 'worker' posed problems. Italy, in particular, expressed strong concern that workers from the colonial territories would take job opportunities in French and Belgian industries at the expense of Italy's southern population.[87] Unemployment was high in the south of Italy, and the new Common Market provided a way out of poverty for people living in this region, or so ran this line of reasoning.[88] During the IGC, Italy made the strongest argument for the exclusion of workers from 'the overseas countries and territories'.

At the same time, France recognized that the freedom of movement of workers provision in relation to the 'overseas countries and territories' could cause an 'implementation problem', and it did not take a strong unified position regarding access to the legal category of worker for people living in all of its colonized territories.[89] As pointed out earlier, and as embodied in the French preference for the word 'association', each colonized territory had a different constitutional status as well as arrangements for rules governing workers' statuses. Also of concern was the question of how to handle the freedom of movement rules in a way that would guarantee the rights of settlers in the colonies, as these too differed from place to place. For France, the question of Algerian

[86] Anghie, *supra* note 3, at 140.

[87] Garavini, *supra* note 7, at 126; ACEU CM3 NEGO1.229, 'Conférence intergouvernementale: Historique des articles 48, 49, 50 et 51 du traité instituant la CEE'.

[88] ACEU CM3 NEGO1.97, 'Conférence des ministres des affaires étrangères, Paris, 18.02.1957, Conférence des chefs de gouvernement et des ministres des affaires étrangères, Paris, 19-20.02.1957', at 20.

[89] ACEU CM3 NEGO1.254, 'Conférence intergouvernementale: Historique des articles 133, 134, 135 et 136 et de protocoles du traité instituant la CEE'.

workers was particularly complex precisely because Algeria was considered an integral part of France.[90] On the one hand, during the IGC, France had insisted on access to freedom of movement for Algerian workers while, as Brown puts it, 'maintaining a settler-hierarchical French Algeria and continuing to wage war against Algerian nationalists'.[91] Ultimately, the EEC law status of Algerian workers remained purposefully ambiguous. In Article 227 of the Treaty of Rome, which regulated the integration of Algeria and the French Overseas Departments into the Common Market, the freedom of movement of workers provision was not included, nor is any reference to workers.

B *'National Workers'*

With the exception of the perplexing treatment of Algeria and its population, the overall consensus of the IGC on the question of whether to include or exclude workers from the colonized territories, encompassing both Italian resistance and French diversification between its colonies, comes out in the drafting history of the second paragraph of the freedom of movement of workers provision. Once final, the freedom of movement of workers provision consisted of the right to work anywhere within the Common Market without being discriminated against based on nationality. In the Treaty of Rome's Article 48, as today in the TFEU's Article 45, the article's second paragraph reads: 'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

Throughout the Treaty of Rome's drafting period from the summer of 1956 until early March 1957, the freedom of movement of workers provision's second paragraph had the word 'national' placed before workers and read: '[A]bolition of any discrimination based on nationality between national workers of the Member States.' In multiple archival documents, this draft formulation is followed by a footnote, which reads: '[W]e will define national workers in relation to how we resolve the problem of the overseas countries and territories.'[92] The drafting problem throughout 1956 and well into the spring of 1957 concerned how to write the freedom of movement of workers provision, possibly in synergy with the provisions governing 'association', in such a way as to exclude workers from the colonized territories. The potential method of doing so was to add the adjective of 'national' to draw distinctions between workers from the members states' European territories and workers who were citizens of, or in different ways subjected to, a member state but from a colonized territory.[93] The drafters of the Treaty of Rome sought a way to abolish not discrimination based on

[90] ACEU CM3 NEGO1.129, *supra* note 85, at 15, ACEU CM3 NEGO1.254, *supra* note 89, at 100.

[91] Brown, *supra* note 7, at 152.

[92] ACEU CM3 NEGO1.123, 'Conférence intergouvernementale: Réunion des chefs de délégation, Bruxelles, 26–28 1957', at 14; ACEU CM3 NEGO1.150, 'Conférence intergouvernementale: Réunion du groupe du marché commun, Bruxelles, 07–12.01.1957', at 21; ACEU CM3 NEGO1.194, *supra* note 81, at 58; ACEU CM3 NEGO1.198, 'Conférence intergouvernementale: Documents classés dans l'ordre chronologique, Février 1957', at 20 and ACEU CM3 NEGO1.229, *supra* note 87, at 115.

[93] For accounts of the same process when the United Kingdom joined the EU in 1973, see El-Enany, *supra* note 4; I. Patel, *We're Here Because You Were There* (2021).

nationality period but, rather, discrimination based on nationality for workers considered national. In the drafting of the concept of workers, the use of 'national' is understood to be potentially able to exclude people living in the colonized territories and include those who belonged to an ethnic and racial meaning of French, Italian, German, Dutch, Belgian or Luxembourgish.

As described in section 3, it is a general commonality in the opaque field of colonial citizenship law that the status of both citizenship and nationality was reserved for the white population. Therefore, if a person in a colonized territory held citizenship in a future member state, the quality of 'national', from the drafters' point of view, could potentially still be used to delimit white Europeans living in continental Europe. Yet the solution of using 'national worker' was ultimately deemed unsatisfactory after having been used in consecutive drafts for over a year. The concept of national was used in ambiguous ways in the idiosyncratic patchwork of colonial citizenship law.[94] For instance, and as discussed in section 3, nationality – that is, 'French' or 'Belgian' – was used in certain colonial territories, however unsystematically, to designate colonial subjects while not treating them as being on par with those individuals considered to be ethnically and racially French or Belgian citizens. Saada frames this tenet of French citizenship law by observing that 'French nationality ceased to be a monolithic category and began to be interpreted in terms of degrees'.[95] Put simply, to use 'national' to regulate the denial of access for workers from the colonized territories would ultimately not have been conclusive.

Further complicating the task of using the freedom of movement of workers provision to sort out who should be included and excluded from this new category of 'worker' were white settler populations living in the colonized territories. The colonial metropoles had an interest in controlling migration between the mainland and the colonies as well as in keeping the privileges of white settler populations distinct from people living in these territories. Drawing on national archives from the time of the IGC, the French political scientist Karim Fertikh explains how the reluctance to apply the EEC freedom of movement of workers provision to workers from 'associated countries and territories' was an extension of a French and Belgian preference for maintaining a difference in treatment between its European population and its colonized population with regard to workers' mobility and social security rights as well as an interest in controlling European migration to Africa.[96]

The legal-technical ambition of demarcating workers from the 'associated' territories and from the European territories of member states proved to be too multifaceted to fit into the freedom of movement of workers provision. In the end, in March 1957, the drafters constructed a more blunt legal solution to this 'problem' by inserting a new Article 135 in the treaty's section on 'association'. Article 135 states that freedom of movement 'within Member States for workers from the countries and

[94] See section 3.

[95] Saada, *supra* note 61, at 103.

[96] Fertikh, 'Free Movement of Workers and European Social Law: Bordering the EEC', in H. Eklund (ed.), *Colonialism and the EU Legal Order* (forthcoming). Karim Fertikh's chapter illustrates an interesting avenue of further research – namely, how colonialism shaped secondary legislation.

territories, and within the countries and territories for workers from Member States', will be governed separately and outside of the Treaty of Rome.[97] The term 'national worker' was then taken away from the freedom of movement of workers provision. It is noted that the heads of delegation concluded that the 'adjective "national" could be taken out as Article 135 sufficiently solved the application problem of Article 48(2) to workers from the overseas countries and territories'.[98] This observation confirms that the drafters considered the qualification 'national' to be superfluous once the free movement of workers between the Common Market and the member states' colonized territories had been foreclosed.[99]

The Treaty of Rome settled with using two main categories of workers who are citizens in, or are subjected to, a member state, one to be found in Article 48 and one to be found in Article 135. There was one category for workers 'from a Member State' and another category that remained outside the benefits offered by the treaty for workers who were from a territory colonized by a member state. With the drafters taking away the word 'national' once Article 135 had been drafted, the ambiguous informality in Article 135 of the word 'from' further appears to indicate that this was not a question of dividing between workers with or without citizenship or other formal legal status. 'From' indicates the origin and ethnicity of the worker – a belonging to an ethnicized meaning of nation rather than a legal connection to a state. As the drafters failed to successfully frame 'national worker' as a legal status that maps on to the ethnicized meaning of national belonging and excludes workers from colonized territories, the drafters again resorted to more ambiguous terminology that represents categories of ethnic belonging like 'from' or 'of Europe'. The drafting of the legal category 'workers' followed the same pattern as the drafting of 'inhabitants' and 'peoples of Europe'. It sought a legally constructed separation between workers who were considered racially and ethnically European and workers who were not but who were subjected to European states through colonialism.

6 Conclusion

This article has been concerned with showing how the EU provides an example of a post-World War II international organization with founding legal texts shaped by colonial politics. In the context of late-stage colonialism in 1957, the drafting material from the IGC, when read together with the growing body of multidisciplinary research on the origins of the EU, shows that the legal categories of peoples, inhabitants and workers in the Treaty of Rome separated people who were considered ethnically and racially European citizens from people who were not considered ethnically and racially

[97] ACEU CM3 NEGO1.229, *supra* note 87.

[98] ACEU CM3 NEGO1.229, *supra* note 87, at 5.

[99] Fertikh adds further nuance by emphasizing that Article 135 conceals a further distinction between low-skilled and high-skilled workers. Low-skilled workers are excluded from the Treaty of Rome through Article 135, but within the context of the European Development Fund a selected group of high-skilled, often white settler, workers are included as 'technical assistance' carrying out 'development projects and programmes'. Fertikh, *supra* note 96.

Europeans but who were subjected to, or citizens of, a member state.[100] The archives of the IGC illuminate how these three foundational categories drew distinctions between individuals affected by the construction of its new legal order, to include and exclude them to fit a view of the world that still relied on a colonial logic. When understood in the context of the colonial legal politics of 1957, the category 'peoples of Europe', chosen as the subject of European integration, designates not citizens of the future member states and not those who are subjected to its laws and institutions but, rather, those who belong to an ethnic and racial meaning of nation. In this way, the phrase 'peoples of Europe' speaks not of who the Treaty of Rome regulates but, instead, who is supposed to benefit from the legal rights that the system offers. The archival material from the IGC reveals how the term peoples was at the same time deliberately not used to describe those who live in the colonized territories. Instead, and until this very day, those who live in the colonized territories are inhabitants. This is a textual choice that could meaningfully be reconsidered in the next EU treaty reform so that, in the text of the EU's primary law, the possibility of self-determination is unambiguously recognized. The last example of the same pattern is the category of worker, a central rights holder, which, at the very end of the IGC, just before the Treaty of Rome was signed, was divided into two: one category consisted of workers 'from a Member State' who were included in the Common Market and one category of workers not from a member state but from a place colonized by a member state, who was excluded.

These categories, which excluded peoples in the colonized territories from legal rights and representation, were drafted alongside the Treaty of Rome's chapter on the 'association of the overseas countries and territories', which included provisions on member states' investments in colonized territories through the European Development Fund as well as how colonized territories could trade. This legal drafting and the debates of the IGC happened at the same time as processes of independence from colonial rule were unfolding in multiple places and public debates about decolonization were omnipresent, not least in various UN institutions. Strikingly, the Treaty of Rome regulates colonialism amidst decolonization.

Understanding colonialism as part of the constitutive context of the Treaty of Rome deepens our knowledge of the character of EU law, nuances its foundational narrative of being solely about peace in Europe and teaches us something about the way in which it has sought to regulate people. The annex listing the 'overseas countries and territories' looks different now and is much shorter when compared to 1957, but, otherwise, the provisions discussed in this article remain unchanged today in the Treaty of Lisbon, albeit with different numbering. The next important set of questions to seek to answer is therefore how the drafting history of the EU's first treaty relates to the development and current application of EU law.[101] How does the history of the way in which the Treaty of Rome was drafted affect the everyday lives of people living in the EU today and of people living in societies that EU law touches?

[100] Moreover, it should be noted that consulting national archives may provide even richer material on the reasoning behind the drafting of the Treaty of Rome.

[101] See the contributions from different disciplinary backgrounds addressing this question in Eklund, *supra* note 96.