The repatriation of Human Remains from France: 20 years of (mal)practice

## Introduction

The repatriation[[1]](#footnote-1) of human remains has been at the forefront of claims by Indigenous peoples since the nineteenth century.[[2]](#footnote-2) Some of these claims have been successful: the British Museum in England has repatriated more than a hundred sets of remains.[[3]](#footnote-3) German museums repatriated 45 remains to Australia in November 2019.[[4]](#footnote-4) In contrast, in the last 20 years, French accredited museums have repatriated the remains of two individuals and 21 Mokomokai that are Maori tattooed and shrunk heads. A collaboration to discuss the repatriation of Aboriginal remains between France and Australia was announced in 2014, but has not yet been followed up.[[5]](#footnote-5) Another promise has been made to repatriate remains of Algerian soldiers killed at the end of the 19th century and whose remains are currently held in the Museum of Natural History and research is taking place to identify those remains.[[6]](#footnote-6) Indeed, an important practical obstacle to repatriation is their correct identification. Some skeletal remains were separated from their contexts when initially taken for sale or exhibition purposes, existing reports are inadequate and do not refer to the provenance, context or original Indigenous Peoples, and different museums might identify different Indigenous Peoples as the rightful holder of the remains.[[7]](#footnote-7) Hence, there might be a complete lack of information on the whereabouts of the remains as is the case with King Toera’s that have not yet been identified despite research undertaken in the archives of the Museum of Natural History in 2008 and 2012.[[8]](#footnote-8) Notwithstanding these practical difficulties, the main obstacle is the lack of clear policy and guidance regarding the process of repatriation which the Savoy Sarr Report, with its focus on African artefacts, highlighted again.[[9]](#footnote-9)

The advantages of repatriation of human remains are now well established by a variety of studies. Firstly, it addresses the wrongs of a scientific classification of races/the colonized as less advanced, less human, less civilized that supported the narrative of the superiority of the European colonizer over the peoples living in these “newly found/discovered” lands, as illustrated by the cases of Saartje Baartman and Vamaica Peru. These studies are now disowned but the remnants of these classifications are displayed in our museums. Secondly, repatriation contributes to the re-humanisation of remains that are no longer exhibited objects but traces of people who once lived.[[10]](#footnote-10) This re-humanization also heals communities and exorcize the past sometimes in conjunction with the descendants of grave-robbers.[[11]](#footnote-11) It gives an opportunity for closure to the traditional custodians and relatives of the deceased, and provides for the spiritual and cultural needs to properly bury the dead whose spirit is not at rest.[[12]](#footnote-12) Next, repatriation contributes to the safeguarding of cultural identity. The righting of a wrong, the repatriation of the remains of an Elder to its community, mends the psychological and physical consequences of the loss.[[13]](#footnote-13) It can lead to a cultural revival for the communities, better cohesion and a sense that injustices have been resolved. This wrong is acutely felt as human remains are a sui generis category of cultural heritage that are “spiritually alive.”[[14]](#footnote-14) Finally, it improves collaboration and discussion between museums and communities, it encourages intercultural understanding and obliges museums to communicate with Indigenous Peoples and can foster new exchanges, as was the case between France and New Zealand after the repatriation of the Mokomokai.[[15]](#footnote-15)

In contrast, arguments against repatriation of human remains rely on two main arguments: the role of museums as protector of Mankind’s History and the universality of scientific knowledge derived from the study of human remains.[[16]](#footnote-16) Thus, museums become the guardians of samples from which data is extracted for the purpose of Knowledge. A strong proponent of this position was John Merryman who defined the terms cultural nationalists and cultural internationalist.[[17]](#footnote-17) More recently, Tiffany Jenkins has drawn on Merryman’s position to argue that museums’ foundational purpose is “to extend our knowledge of past people and their lives” and that, therefore, they should keep their treasures, including human remains.[[18]](#footnote-18) Hence, repatriation is presented as an issue of exclusivity, us/museums against them/claimants, an all or nothing approach where the interest of Humankind/History/Knowledge supersede the interest of communities but does not question who defines these interests and on whose interests they are defined. This approach is also in contradiction with several international instruments.

Several international instruments have recognised the particular status of human remains and their close relationship with human rights as well as the significance of culture and heritage for indigenous peoples who “have a right to have the objects that are essential for the preservation of their own cultural identity returned to them.”[[19]](#footnote-19) Article 27 of the International Covenant on Civil and Political Rights,[[20]](#footnote-20) and Article 15 of the International Covenant on Economic, Social and Cultural Rights have recognised a strong link between the preservation of the cultural identity of a community and their effective enjoyment of human rights.[[21]](#footnote-21) An important step in the recognition of a strong link between cultural heritage and peoples by the international community is the 1982 Mexico City Declaration on Cultural Policies.[[22]](#footnote-22) The association between the protection of tangible and intangible heritage of communities is found in the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage,[[23]](#footnote-23) and the 2005 on the Protection and Promotion of the Diversity of Cultural Expressions.[[24]](#footnote-24) The interconnection between human rights and cultural identity, in particular of Indigenous peoples, has been underlined by the Human Right Committee,[[25]](#footnote-25) the Committee of the Rights of the Child,[[26]](#footnote-26) the Committee on the Elimination of Racial Discrimination,[[27]](#footnote-27)and the Committee on Economic, Social and Cultural Rights.[[28]](#footnote-28) Finally, Article 12(2) of the United Nations Declaration on the Rights of Indigenous People provides positive measures to allow Indigenous Peoples to claim for the repatriation of cultural objects and human remains.[[29]](#footnote-29) It states that “states shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned”.

The principles of these instruments are embodied in different codes of practice. The ICOM Code of Practice recognises the importance of human remains in the management of museum collection, promotes dialogue between museums and communities, encourages museums to exhibit remains with decency and respect for the believes of different communities, requires museums to address requests for the removal from public display of human remains or material of sacred significance from the originating communities with respect and sensitivity (Article 4-4), provides that museums should cooperate to repatriate remains exported or transferred in violation of the principles of international and national conventions when the remains are part of the country or people’s cultural heritage (Article 6-3). This is particularly relevant for requests for the repatriation of human remains that were taken during colonisation, more often than not, without the consent of the family or the community. The Vermillion Accord on Human Remains, adopted by the World Archaeological Congress (WAC) in 1989 following a suggestion by the International Law Association’s Committee on Cultural Heritage Law, encourages archaeologists and scientists to consult with and to demonstrate the value of the research to Indigenous Peoples prior to undertaking research on human remains.[[30]](#footnote-30) The agreement has six provisions that emphasise the importance of respect and consent for research, display and the future of the remains. The Tamaki Makau-rau Accord on the Display of Human Remains and Sacred Objects, adopted in 2006,[[31]](#footnote-31) endorses six principles for the display of human remains based on consent, respect and dignity. Finally, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, adopted in New Zealand in 1993, goes further as it clearly states that “[a]ll human remains and burial objects of indigenous peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner” (para 2.12).[[32]](#footnote-32) All these instruments, hard or soft, concur to the recognition of the importance of human remains for Indigenous people and that repatriation should occur.

Treating communities of origin with dignity requires to have an open process whereby they can request the repatriation of their Ancestors’ remains, which is far from being the case in France. The practice of repatriation has created opacity and inequality of treatment between Indigenous Peoples, Maoris and non-Maoris, in violation of the international instruments mentioned above. Thus, this article aims to contribute to the growing debate on repatriation by exploring France’s (lack of) practice in the last 20 years. There is a sense of urgency with this issue following the publication of the Savoy Sarr report. Firstly, the three cases of repatriation are set in the context of the discussion on repatriation.[[33]](#footnote-33) Secondly, the article will analyse how the heritagization of remains has led to their reification, to their transmutation into artefacts that can be owned by collectors, institutions or museums. Thirdly, it will discuss the lack of engagement of the *Commission Nationale des Collections* created by statute in 2002 and which purpose, amongst many, was to address the issue of repatriation. This will be done by drawing on parliamentary debates and parliamentary reports. Finally, the article will critically assess the different criteria that have been put forward to allow for the de-accession of human remains or to put in differently, their re-humanization.

## Three cases of repatriation

Since 2002, there has only been three cases of repatriation of human remains following different models: the repatriation of Saartje Baartman to South Africa in 2002, the repatriation of the Mokomoaki to New Zealand in 2010, both statutory repatriation and the rarely mentioned case of Vamaicu Peru whose remains were repatriated to Uruguay in 2002 and which is the only case of repatriation by an accredited museum following an administrative process.

### Saartje Baartman

Saartjie Baartman was born in South Africa in 1789 under the occupation of the Boers, her mother was from a Bochiman tribe and her father from the Hottentots tribe. From her birth, she was submitted to the oppression of the colonizer, her first name was in Dutch, Saartjie (Sarah), as was the tradition then; her surname was Baartman (“bearded” in Dutch), which was given to her by Alexander Dunlop when he took her to London in 1810.[[34]](#footnote-34) She was exhibited in a human zoo because of her race, her small stature and her steatopygia which is an accumulation of large amounts of fat on the buttocks. In 1814, she was sold to a Frenchman who exhibited her in Paris under the name “*Vénus hottentote*”.[[35]](#footnote-35) She died of pneumonia two years later and her body was transported to the Museum of Natural History at the request of Georges Cuvier who moulded her entire body in plaster before dissecting it and extracting her skeleton which was soon after exhibited in the Museum and from 1937 in the *Musée de l’Homme*. Her remains were used as evidence of the superiority of the white race; theories nowadays disowned.[[36]](#footnote-36) In 1994, François Mitterrand (then President of France) promised Nelson Mandela (then President of South Africa) to repatriate Saartjie Baartman to her native country.[[37]](#footnote-37) Unfortunately, the *Musée de l’Homme* did not follow up on this promise and delayed the decision to return her remains because of a strong opposition from museum curators.[[38]](#footnote-38) Finally, Nicolas About MP introduced a private members’ Bill in 2001, with one article authorising the deaccession of her remains and their repatriation to South Africa to be buried. The Statute was enacted on May 4, 2002[[39]](#footnote-39) and her remains returned to South Africa shortly after.[[40]](#footnote-40)

Saartje Baartman’s repatriation was presented as an act of generosity by the French state as well as repentance for the objectification of different races and their display in human zoos. In parliamentary debates, Schwartzenberg, Secretary of State for Research, stated that it was time to treat her remains with decency and to finally give her justice for the sexism and racism that she endured while alive.[[41]](#footnote-41) He also mentioned three important dates in French constitutional history: the Revolutions of 1789 and 1848 that enshrined the moto “*Liberté, Égalité, Fraternité”* (freedom, equality, brotherhood) and 1946 (the year of the constitution of the Fourth Republic after Nazi occupation and World War 2) and described France as a “democratic and free” state that recognized the liberation of South Africa from Apartheid;[[42]](#footnote-42) hence by agreeing to repatriate Saartjie Baartman’s remains, the French republic honoured the principles of liberty, equality and fraternity between people. Moudelino’s analysis of the last section of the debates is pertinent:

“the return of Baartman’s remains comes to symbolize an act of true French Republican generosity, analogous to the abolition of slavery (as the reference to Schoelcher suggests), to the defence by Zola of Dreyfus (the French Jewish soldier falsely accused and convicted of treason in 1894), and even to the Revolution itself, all within a broader framework structured around a longer history of Enlightment and the defence of Human Rights.”[[43]](#footnote-43)

Hence, parliamentary debates show that this repatriation was a political act rather than a general policy for the repatriation of human remains.[[44]](#footnote-44) However, concomitantly to this discussion, a long awaited reform on museum management was finally adopted. This major reform acknowledged the need to deaccess some objects in order to improve collection management and set up the *Commission Scientifique Nationale des Collections* (thereafter Commission) whose mission was to oversee such process. [[45]](#footnote-45) It is however remarking to note how easily MPs focuses exclusively on the repatriation of Saartje Baartam’s remains to the exclusion of remains of other people who had similar experiences.

### Vamaica Peru

Concomitantly to the much-publicised repatriation of the remains of Saartje Baartman to South Africa, the remains of Vamaica Peru were repatriated to Uruguay in 2002. The circumstances of the collection and display of the remains bear similarities to the case of Saartje Baartman. Vamaica Peru and three members of his tribe, the Charruas, were made prisoners following the war of Independence. They had been bought to be exhibited in human zoos and arrived in France in 1831/32 where they should have been “studied” by Georges Cuvier, had he not passed away a few weeks before their arrival.[[46]](#footnote-46) After Vamaica Peru’s death in 1833, his corpse was dissected and his remains were kept in the Natural History Museum for 200 years.[[47]](#footnote-47) The decision to repatriate his remains was made by the Museums with the approval of the Secretary of State for Research following the legal framework in force at the time.[[48]](#footnote-48) Hence, this case shows that museums could have engaged more widely with repatriation if they had the will to do so.

The weakness of such an approach is the lack of public debate surrounding the decision making process. The consequence is that this process does not contribute to the definition of a wider policy framework on repatriation which then leads to further opacity and discrimination in identifying which remains will be repatriated or not.

### The Mokomokai

The story of the repatriation of the 21 Maori preserved tattooed head, Mokomokai or Toi Moko, started with the one in possession of the Museum of Rouen in 2007.[[49]](#footnote-49) It unfolds as follows: a man named Drouet came in its possession in the 19th century under unknown circumstances when trafficking was fierce as Mokomokai were collected by Europeans to exhibit in their *cabinets de curiosités*. Drouet bequeathed it to the museum of Rouen in 1875 where it was exhibited until 1996 when the museum closed for refurbishment. When it was “rediscovered” in the storeroom in 2007, Rouen City Council contacted the ambassador of New Zealand in Paris.[[50]](#footnote-50) The official decision to repatriate the remains was taken by the City Council on the 19th of October 2007 and an agreement was signed with the Museum of Te Papa Tongarewa of Wellington to prepare for its reburial.[[51]](#footnote-51) All was well, until the Government’s local representative (*préfet*) applied for judicial review at the demand of the Secretary of State for Culture.[[52]](#footnote-52) In December 2007, the Administrative Tribunal of Rouen voided the Council’s decision and, consequently, the agreement with the Museum of Te Papa Tongarewa, on the ground that the formal process for deaccession of an artefact from a public collection had not been complied with.[[53]](#footnote-53) The City Council did not follow the process set up by a 2002 Statute that required the approval of the *Commission National des Collection* before agreeing to repatriate the Toko Moko; approval that would not have been granted because it had been bequeathed by Drouet in 1875. The Tribunal's decision was confirmed by the Administrative Court of Appeal of Douai in July 2008.[[54]](#footnote-54)

Concomitantly to the judicial review process, the MP for Rouen, Mrs Morin-Desailly (who was also a city councillor), introduced a private member’s Bill to allow for the deaccession of all Maori preserved tattooed head held in accredited museums.[[55]](#footnote-55) The Bill, supported by the Government, was later amended to modify the deaccession process of all artefacts held in public museums. The statute was finally enacted on the 18th of May 2010, and deaccessed all Mokomokai kept in collections of accredited museums in order to repatriate them to their original communities, including those bequeathed to the State.[[56]](#footnote-56) Rouen’s Mokomokai was returned on May, 9th 2011 to New Zealand, and others in 2012.[[57]](#footnote-57)

At a political level, French Parliament was being seen as doing the right thing, MPs adopted the Bill with an overwhelming majority (457 for and 8 against[[58]](#footnote-58)), and aimed to untarnish France’s reputation after the initial refusal to repatriate the Mokomokai. The statute also had a memorial aspect, MPs talked of a duty to repatriate (*veritable devoir*),[[59]](#footnote-59) to redress the wrongs of colonialism (many described at great length and in detail the trade of these heads in the 19th century), of the need to comply with the principle of human dignity, ethics and respect between cultures of living peoples.[[60]](#footnote-60) However, the legal principle of inalienability was not questioned during the debate; most MPs approved of the repatriation in the case of the Maori remains but also repeated several times that this repatriation was an exceptional situation and that the integrity of public collections was not in question, that the principle of inalienability was not diminished and that the floodgate of restitution had not been opened.[[61]](#footnote-61) None but one MP, Huguette Bello, discussed the possibility to repatriate human remains to other communities. Mrs Bello highlighted that deaccessioning only Maori remains discriminated against other Indigenous Peoples and mentioned two set of remains that also deserved to be returned: the skull of chief Ataï from New Caledonia and the skull of King Toera from Madagascar who had a similar fate in 1897.[[62]](#footnote-62)

An effective programme of repatriation of human remains cannot take place through ad hoc statutes because of the number of remains, several thousands, in French accredited museums, which would require on the one hand considerable parliamentary time, which is a highly valued commodity, and on the other hand political consensus for each set of remains that is being voted on. This consensus might not be present when it is not supported by foreign diplomacy, or as was the case of Saartje Baartman by the President himself. Furthermore, the adoption of ad hoc statutes for the repatriation of specific sets of remains creates an inequality of treatment between claimants, in this case Maoris and other Indigenous Peoples wishing to claim for the repatriation of their ancestors’ remains. Repatriation by statute also heighten the political process that becomes dependent on party politics, MPs’ personal interest - such as Nicolas About and Catherine Morin Desailly, the two MPs who introduced private members bill for the repatriation of Saartje Baartman and the Mokomokai of Rouen- national lobbying by foreign states. This approach does not contribute to a transparent policy on repatriation which certainly contributes to the lack of requests for repatriation.[[63]](#footnote-63) It seems to be, however, the preferred solution in the short term, this method will be used for the restitution of one sword to Senegal and of 26 objects from the treasure of Behanzin to Benin, which Stephane Martin, then Director of the Museum of Quai Branly – Jacques Chirac, had approved.[[64]](#footnote-64) These claims only further highlight the need to develop a clear policy for the repatriation of human remains as well as for the restitution of culturally significant cultural property.

# The heritagization of the body

The repatriation of Saartje Baartman, Vamaica Peru and the Mokomokai represent a drop in comparison to the thousands of ‘anthropological artefacts’ and a few hundred ‘cultural anthropology artefacts’ currently held in French museums.[[65]](#footnote-65) These remains have been heritagized, have become artefacts owned by museums to be displayed for the public’s interest. The process of heritagization transforms the remains in artefacts that become part of a nation’s heritage whereas the body of a living person cannot be considered as an object that can be disposed of.

In French law, there is a clear distinction between the body of the living and the corpse of the dead. The body is protected, as the physical envelope of a person, against unwanted interference; a living person has rights, including the right to consent to physical, medical and chirurgical acts. In civil law, the body of a living person, its parts and components (organs, blood, semen) are *extra-commercium*, which means that they can be subjected to neither proprietary nor possessory rights regardless of the person’s consent (section 16-1 Civil code[[66]](#footnote-66)). Hence, a contract, where a seventeen-year-old had an Eiffel tower and a rose tattooed on her right bottom during a film production and which was removed two weeks later, is void. Notwithstanding the issue of the validity of consent of a minor, the contract was void as it breached public order and the principle that there is no right to dispose of one‘s own body according to the principle of non transferability (*principe d’indisponibilité)* which is now codified in section 16-1 of the Civil code.[[67]](#footnote-67)

In contrast, human remains are considered as body parts, soft tissues, osteological material, objects not persons. There is, however, a transitional period, during which remains/corpses are still considered as an extension of the living and are not yet seen as artefacts. Before remains are heritagized, they are commonly thought to be of a different kind than “normal” objects and cannot be appropriated, sold nor purchased.Section 16-1-1 of the Civil code requires decency and respect when dealing with a corpse, but does not address the question of property rights.[[68]](#footnote-68) This Section was applied in 2009 to ban the touring exhibition “Our Body” which presented plastinated body in natural positions such as walking, playing, horse riding.[[69]](#footnote-69) This exhibition has been shown with great success in New York, London, Berlin and many other cities around the world. It was banned in France on the ground that the organisers could not show that the remains had been legally acquired and that when alive, the people had agreed to their bodies being exhibited in such manner after their death.[[70]](#footnote-70) Conversely, if the organisers had successfully demonstrated that the people had consented to the exhibition, then their remains would have been legally acquired. According to the Court of Appeal, individuals are able to decide that their remains can be publicly exhibited after their death whereas other and more “traditional” ways of disposing of one’s remains are strictly regulated. Indeed, the choice of living persons to dispose of their body after their death is limited to agreeing to organ donation, organising their funerals, being either buried or cremated and if the latter whether to dispose of the ashes or to keep them as long as it is not in a private dwelling such as the family home.[[71]](#footnote-71) Therefore, the decision of the Court of Appeal gives greater weight to the will of the living person to publicly display his/her dead body than the law does. This is the position for the remains of the recently dead which contrasts with the position for the remains of the ancient dead.

After some time, remains lose their connection with the person who lived. This dis-connection usually coincides with the fading memory of the family, which is considered in French law to be three generations, approximately 100 years.[[72]](#footnote-72) Once the dead is forgotten, their remains are de-humanised and can be heritagized. The dis-connection between the person who lived and their remains is much quicker if the living never belong to the nation where the remains are, which was the case for the remains of Saartje Baartman and Vamaica Peru who were ‘brought’ to France to be exhibited, who were considered as objects even in their lifetime, whose bodies were dissected immediately after their death to be studied and then exhibited as ‘samples’ of different races. These heritagized ‘objects’ are then subjected to other peoples/institutions' rights, including a right of ownership, rather than being subject of rights themselves. [[73]](#footnote-73) When human remains are heritagized, they become commodified objects that can be owned by private individuals/institutions or public institutions/museums. Shrunk tattooed heads, skulls, flutes made of femur, or indeed complete corpses (Egyptian mummies) are found in the art market, either legally or illegally.[[74]](#footnote-74) This commodification is not new, in the Middles Ages in Europe, the remains of saints, kings or queens (fingers, toes, skulls, hair, nails…) were routinely given, sold and displayed in reliquaries in churches or in personal chapels and many are still on display today in churches, or in museums such as the Cluny museum in Paris.[[75]](#footnote-75)

If human remains are privately owned, there is nothing that prevents their owner to decide to relinquish their ownership title to repatriate them, as was the case with the repatriation of the skull of Atai by the *Société Anthropologique de Paris*. Ataï, his doctor and many others were killed in 1878 during the colonisation of the island of New Caledonia by French troops. Ataï and his doctor’s heads were severed and sent to Paris to be studied, as was common practice at this time.[[76]](#footnote-76) King Toera from Madagascar had a similar fate in 1897, albeit his remains are now lost in the Museum of Natural History.[[77]](#footnote-77) In 2013, The Prime minister promised to the Indigenous people of New Caledonia, a French semi-autonomous territory, that Atai’s remains would be returned by the Museum of Natural History.[[78]](#footnote-78) However, the remains were not owned by this institution but by the *Société Anthropologique de Paris,* a private institution, that had ‘lent’ them to the Museum. The *SAP* repatriated the remains shortly afterwards following its own internal process.[[79]](#footnote-79)

In contrast, French museums that have been accredited by the label *Musée de France* are not governed by private law but by public law and by the Cultural Heritage Code (thereafter CHC) including rules of the *domaine public* or public ownership laws.[[80]](#footnote-80)The conflict between private and public rules is illustrated by the case of Saartje Baartman and the Mokomokai. During parliamentary debate discussing the repatriation of her remains, Schwartzenberg, then Secretary of State for Research, relied on the principle of section 16-1 of the Civil code to argue one the one hand that it applied to the State as well as private individuals, i.e. that no one, including the State, could own a human body and, one the other hand, that it applied to a person’s body wherever she was alive or dead. As a consequence, a statute to de-access Saartje’s remains was not needed since they were never within State’s ownership.[[81]](#footnote-81) Schwartzenberg also introduced an exception to this principle, a scientific interest to keep the remains. In that case, the remains should be kept in the collection. The fear of floodgate of claims for restitution of all skeletons found in faculty of medicines as well as museums explains this exception. His argument shows its limits since he argues that human remains cannot be owned as they are *extra commercium* but that if they do have a scientific interest, then they can be owned by a museum. Similarly, for the restitution of its Mokomokai, Rouen City Council argued that section 16-1 of the Civil Code set a public policy principle that excluded any proprietary right on human remains including one to the benefit of the State. Therefore, the Mokomokai could not “belong” to the Council and there was no need to comply with the de-accession procedure found in the CHC to repatriate it. The courts did not follow this argument and although recognised that according to section 16-1 the remains had to be kept in decent condition, even in a museum, the remains ‘belonged’ to the Nation.[[82]](#footnote-82) MPs debates show their effort to the re-humanize the remains, to link them to people who were alive rather than treating them like objects exhibited in museums. Fortunately, this lead to the adoption of ad hoc statutes for their repatriation but not to a broader discussion on the display of human remains of foreign origin in French museums. Hence, human remains held in accredited museums are part of the public domain. Therefore, the only option is to end the principle of *domanialité publique* through *déclassement* or deaccession which involves either a statute or an administrative decision.

# Repatriation: a legislative or administrative process?

During parliamentary debates for the repatriation of Saartje Baartman’s remains and the Mokomokai, it was argued that de-accession was impossible, yet the repatriation of Vamaica Peru illustrates that the laws in place were adequate. In 2002, when Section L52 of the Code of State Property was in force, it applied to all museums’ artefacts, with the consequence that items of collections that belong to public museums were non-transferrable (principle of inalienability). This principle of inalienability has its roots in the Middle Ages and has further evolved in a complex set of rules around its core value now found in Section 3111-1 of the Public Bodies’ Property Code.[[83]](#footnote-83) An exception, called delisting or *déclassement*, exists to avoid a complete paralysis of the Administration. This process is twofold: firstly, the decision to dispose of an item must be taken by the same authority that affected it to the service in question and following the same procedure;[[84]](#footnote-84) secondly, the item must be physically removed from this service. For example, old buildings that are too obsolete to be used as schools or hospitals, are usually sold whereas damaged cars and used military equipment that cannot be disposed of are destroyed. In Vamaica Peru’s case, the Secretary of State for Research (the relevant authority for the Museum) agreed that the remains had no scientific interest and consequently, no public interest, and should be deaccessed (*déclassé*) from the Museum’s collection.[[85]](#footnote-85) His remains were then repatriated to Uruguay and buried in the National Pantheon.

This process was amended in 2002 when a major reform on museum management recognised the legitimacy of deaccession and created the *Commission Scientifique Nationale des Collections* (thereafter Commission) whose mission was to oversee such process. This reform recognised, for the first time, that collections were not static, that museums could not care for everything within their walls, that their aim was to preserve the past but also to invest for the future and that deaccession was necessary to guarantee effective collection management.[[86]](#footnote-86) The Act codified the principle of inalienability as it applies to museums which is now found in Section L 451-5(1) CHC. By exception to this principle, Section L.454-1 (2) allows curators to deaccess artefacts held in public collections whether purchased with public or private funds with the approval of the Commission. There are two exceptions to this exception, firstly works in private collections of accredited museums that were purchased with funding from the State and secondly works that were bequeathed or donated to a public collection cannot be de-accessed (Section L.451-7 CHC). The aim of the latter exception is to re-assure potential donors that their gifts will not be sold unless Parliament authorises it. However, Parliament feared that curators would too easily get rid of their “old stuff” and in order to limit and control this new power, it created the Commissionto oversee the process. The Commission created by the 2002 Act was set up by regulation the same year (Sections L.115-1 et seq. and R. 451-3 CHC). The Commission decides on both accession (acquisition by purchase, gift or donation, s. 451-1 Cultural Heritage Code[[87]](#footnote-87)) and deaccession at the request of the director of a museum; it has met many times to discuss the former but up to 2010 not the latter.[[88]](#footnote-88) Thus, its structure and composition were modified in 2010 to make it more inefficient: its membership was reduced and its decision process simplified. However, this did not suffice to make the Commission able to address the issue of repatriation.

The Commission is and has been in deadlock since its creation because of ambiguities regarding its role as well as political, financial and structural problems. Firstly, there were ambiguities as to its role. Morin Dessailly MP, who supported the repatriation of the Mokomokai, thought that the *raison d’être* of the Commission was to establish criteria for deaccession in order to facilitate the repatriation of human remains.[[89]](#footnote-89) Its president was of a different opinion and underlined that it did not have the authority to discuss criteria for the repatriation of human remains.[[90]](#footnote-90) A working group was set up to discuss the place of human remains in museum collections in general but not their repatriation. It published guidelines for the display of human remains in museums in accordance with the principle of decency, but not much is said about repatriation.[[91]](#footnote-91) Therefore, the issue of repatriation was addressed by neither the Commission nor the working group. Secondly, there was a lack of political leadership in nominating the different members of the Commission, for which Morin-Dessailly MP blames the government.[[92]](#footnote-92) After the Commission’s structure and composition were amended in 2010, it took another three years to nominate its president Jacques Sallois, as well as representatives of both parliament and local authorities.[[93]](#footnote-93) Furthermore, since the five-year mandate of Jacques Sallois ended in January 2018, the Commission has not had a president.[[94]](#footnote-94) The Government lacks of support also shows in its willingness to break up the Commission. A bill currently discussed in Parliament has scheduled its abrogation for the reason that its mission is finished; and that it is superfluous as it would only advise the Secretary of State for Culture rather not make the final decision regarding the de-accession of objects from museum collections.[[95]](#footnote-95) However, the Senate has shown its opposition to the Government since it voted an amendment against the abrogation of the Commission.[[96]](#footnote-96) The bill is currently going through Parliament. The way forward is uncertain, Michel Van Praet suggested the judiciary route to replace the Commission.[[97]](#footnote-97) However, judges, albeit independent, are not the best situated to decide on the criteria to deaccess human remains or cultural objects. The author’s view is that the Commission should remain in place and engage with the issue of repatriation. Thirdly, there was a lack of financial support for the work undertaken by the Commission: members had to pay for their travel, which is not an issue if one lives in Paris but becomes one if the person lives in Marseilles or Lille.[[98]](#footnote-98) This was a violation of section R115-3 CHC that states that unpaid members should get their travel expenses reimbursed. It also led to decisions being agreed by post rather than in person.[[99]](#footnote-99) Finally, there is a structural problem in the organisation of the Commission: its large size. Section R115-2 CHC sets up four colleges with 40 members in total, some members belonging to several colleges. The quorum to meet was half of its membership (20 members), which was rarely met (Section R115-4(3) CHC).[[100]](#footnote-100) Even when the quorum was met to discuss potential de-accession requests, it was rare to reach the required approval of two third of all members (26) of the Commission, rather than those present at the meeting (Section R115-4(4) CHC). Despite these difficulties, the Commission decided on a handful of cases: two guns from the Army museum, a few artefacts that were decaying in the Museum of Air and Space and the request was made by the Secretary of State for Defence; artefacts from the Sèvres manufacture,that produces porcelain.[[101]](#footnote-101) It also submitted a report to Parliament, in 2015, in which it identified criteria to deaccess objects within two collections: Manufacture of Sevres and the Army Museum but not human remains.[[102]](#footnote-102)

The commission’s deadlock was worsened by the lack of engagement of museum directors who are strongly opposed to deaccession and attached to the principle of inalienability as most still believe that the role of museums is to preserve the past for future generations, and that the floodgate will be opening.[[103]](#footnote-103) Furthermore, there are no guidelines on what could be deaccessed: fakes, doubles, damaged artefacts or human remains. The lack of engagement with this issue means that no criteria have been defined to identify objects that could be de-accessed, except for the Manufacture de Sevres and the Museum of Air and Space. It was expected that the Commission would set those criteria in its deaccession practice but it never happened. The situation is becoming urgent following the Savoy Sarr report, and the potential requests for repatriation and restitution of African cultural objects. Finally, the lack of clarity of the deaccession procedure for human remains creates an inequality of treatment between Maoris and other Indigenous peoples wishing to request the repatriation of their ancestors’ remains. Indeed, MPs showed a lot of emotional reasons either to oppose the deaccession (protecting the integrity of public collections, fearing opening the repatriation floodgate) or to support it (redressing the wrongs of colonialism being the main one), but they neither discussed potential criteria to identify other remains that could be repatriated nor were they aware (but one) that deaccessioning only Mokamokai discriminated against other Indigenous peoples.

# Repatriation: possible criteria

Repatriation takes time and needs to be carefully thought through in order to not cause a new wrong. 18 years after the repatriation of Vamaica Peru and Saartje Baartman, criteria to decide which remains could be repatriated and which could not be repatriated have been discussed within the Department for Culture but are not yet publicly available as they have not been approved by the Secretary of State for Culture. It is hoped that the guidelines have not adopted the four inadequate criteria put forward by the Museum of Rouen to allow for the repatriation of the Mokomokai: (1) the request originates from a sovereign country where the original community (*peuple*) still lives in; (2) the remains have no scientific interest; (3) the remains will be buried and not exhibited or preserved in a museum; (4) the death of the person was caused by barbaric acts. These criteria were later considered reasonable by Mrs Fourneyron MP,[[104]](#footnote-104) even though during parliamentary debates, they were amended as follows: 1) the request is made by a democratic state, 2) in the name of an indigenous group that still exists today, 3) the remains have no scientific interest and 4) the principle of dignity justifies the repatriation. This approach emphasis state sovereignty and could lead to the exclusion of families, minorities and Indigenous peoples. The criterion of scientific interest can be disproportionate as a ground of refusal when it is not qualified as exceptional for the interest of humanity at large and a balance must be found between those scientists for whom all human remains have an interest and should be kept in museums, and those who think that the pursuit of scientific knowledge is not a value above all other.[[105]](#footnote-105) By contrast, remains of recently deceased cannot be studied without the previous consent of the living unless two conditions are met: there is a scientific or pathological interest to study the corpse and the remains are decently buried afterwards. It should not be otherwise for older remains, where consent can be gained from the communities of origin and whose remains can then be buried. It is the case that not all communities want the repatriation of their Ancestors’ remains since their spirit might not be embodied in them. Furthermore, the value of scientific research should be demonstrated to all including the community of origin and the interest of research balanced with the interests of the community, particularly its religious interest which is of paramount importance for the surviving community and the peace of the deceased whose remains are kept in a foreign place. Death related practices are part of the cultural identity of a community and the right to repatriation outweighs the general interest of humanity to have access to and to preserve cultural heritage.[[106]](#footnote-106) A dialogue between scientists and communities is important and in practice, different communities might have different views as to the testing and the display of remains.[[107]](#footnote-107) For example, a request for repatriation has not been made for the remains of five Inuit even after members of their community visited the museum.[[108]](#footnote-108) There are alternative solutions to the dichotomy repatriation/no repatriation: the remains can stay in the museum but the requesting group or individuals can exert a level of control over them. This, however, might not be a cost-effective option for the museum that would have to carry the financial burden of preserving and caring for the remains while not being able to exhibit them.

# Conclusion

The repatriation of human remains is a sensitive issue for both museums and those making the request because it often is a reminder of past atrocities. There must be safeguards in place in order to preserve a balance between museums’ interests and communities’ interest. France has not yet found this balance. Repatriation by ad hoc statutes is political, opaque and uncertain and cannot be the way forward. French museums and the Commission should face the reality of deaccession in order to guarantee the protection of national collections and to facilitate repatriation of human remains in a transparent, equal and fair way. It is not acceptable that museum curators willingly decide to by-pass the law on deaccession on the ground that their claim is doomed to fail. The lack of official documents to guide museum professionals on the criteria to assess a request to repatriate human remains means that France does not have a fair, transparent and effective mechanism to deal with requests contrary to Article 12 of the UN Declaration on the Rights of Indigenous People. It took eight years to repatriate the remains of Saartjie Baartman even though a promise had been made by the President himself to do so, and it took five years to repatriate the Mokamokai held in Rouen. A fair balance should be struck between the interests of museums to preserve and learn about the past and those of communities to care for their Ancestors. Hence, deaccession criteria for human remains should take into consideration the interest of the claimant (whether the community or the genealogical descendants) as well as the religious and social impact of a refusal to repatriate.

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53. Administrative Tribunal Rouen, 27 December 2007: *Dalloz* (2008) panorama 1444 ; for a translation see R. Paterson, *Administrative Tribunal of Rouen, Decision n° 702737, December 27, 2007 (Maori Head Case)* "International Journal of Cultural Property " 2008, Vol. 15, 223. [↑](#footnote-ref-53)
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    Generally, on the case of the Mokomokai, see: A. Breske, *Politics of Repatriation: Formalizing Indigenous Repatriation Policy* "International Journal of Cultural Property " 2018, Vol. 25, 347; F. Lenzerini, pp157-177; F. Lenzerini, *Cultural Identity, Human Rights, and Repatriation of Cultural Heritage of Indigenous Peoples.* "The Brown Journal of World Affairs " 2016, Vol. 23, 127 [↑](#footnote-ref-54)
55. The expression ‘accredited museum’ is used to describe museums that have been labelled *Musée de France.* Those museums can be public, private (but not for profit), national or local but fulfil the same criteria of quality regarding the display of the collection and its management. The management of the collection falls within the ambit of the Cultural Heritage Code, however, rules for private not for profit museums are less stringent than for public museums. M. Cornu and Nathalie Mallet-Poujol, *Droit, œuvres d'art et musées, protection et valorisation des collections* 2nd edn, CNRS éditions, Paris 2006279. [↑](#footnote-ref-55)
56. Loi 2010-501 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections. *Journal Officiel de la République Française* 19 May 2010, 9210. [↑](#footnote-ref-56)
57. 'Museum of New Zealand, Te Papa Tongarewa, International repatriation ' <<https://www.tepapa.govt.nz/international-repatriation>> accessed 08/04/2019 [↑](#footnote-ref-57)
58. *Débat, session ordinaire de 2009-2010, Première séance du mardi 4 mail 2010* Assemblée Nationale, 2010) <<http://www.assemblee-nationale.fr/13/pdf/cri/2009-2010/20100176.pdf>>, 2712. [↑](#footnote-ref-58)
59. Restitution des têtes Maories Deb., vol JO AN déb.30 avril 2010, col p 2586 <<http://www.assemblee-nationale.fr/13/pdf/cri/2009-2010/20100172.pdf>> accessed 11/07/2019, Mrs Tabarot, at 2590 [↑](#footnote-ref-59)
60. Ibidem, Mr Folliot at 2591 [↑](#footnote-ref-60)
61. Restitution par la France des têtes maories Deb., vol JO Senat 30 June, col 6414 <<http://www.senat.fr/seances/s200906/s20090629/s20090629.pdf>> accessed 11/07/2019, M. Duvernois at 6427 [↑](#footnote-ref-61)
62. col p 2586, Mrs Bello at 2594.*Journal Officiel Assemblée Nationale débat* 30 April 2010, 2595. [↑](#footnote-ref-62)
63. P. Richert, *La gestion des collections des musées* Commission des affaires culturelles 03/07, 2003379) <<https://www.senat.fr/rap/r02-379/r02-3794.html>>[accessed: 09/05/2019], at ‘3 Vers une typologie ? a) Une nouvelle génération de réserves’. [↑](#footnote-ref-63)
64. *Mme Catherine Morin-Desailly, présidente - Restitution des oeuvres d'art - Audition de M. Stéphane Martin, ancien président de l'établissement public du musée du Quai Branly - Jacques Chirac Audition de M. Stéphane Martin*19 February, 2020) <<http://www.senat.fr/compte-rendu-commissions/20200217/cult.html>>[accessed: 02/03/2020] [↑](#footnote-ref-64)
65. Restes humains dans collections publiques p 11 [↑](#footnote-ref-65)
66. Section 16-1 Civil code : ‘Le corps humain (…) ne (peut) faire l’objet d’un droit patrimonial’. ‘The human body can not be subjected to ownership rights’. Author’s translation [↑](#footnote-ref-66)
67. Cour Cassation (First civil chamber) 23 February 1972 (70-12490)**:**Bulletin civ. 1 n. 61 p. 54 [↑](#footnote-ref-67)
68. Section 16-1-1 of the Civil code reads ‘The respect due to the human body does not stop with death. Human remains, including ashes when the corpse was cremated, must be dealt with respect, dignity and decency’. [↑](#footnote-ref-68)
69. <http://www.ourbodytheuniversewithin.com>

    The bodies are preserved by ‘polymer impregnation’ or ‘plastination’ which is a process that replaces the body’s water and fat with reactive plastics. [↑](#footnote-ref-69)
70. C. Frerking and H. Gill-Frerking, *Human Remains as Heritage: Categorisation, Legislation and Protection* "AAL " 2017, Vol. 22, 49 [↑](#footnote-ref-70)
71. Grégoire Loiseau, 'Des cadavres mais des hommesnote sous CA Paris 30 avril 2009' (2009) (n° 25 15 juin 2009, 12) *JCP*. [↑](#footnote-ref-71)
72. X. Perrot, *Le refus de l'oubli ; patrimoine culturel et résistance mémorielle* in: V. Negri and I. Schulte-Tenckhoff (eds)*, Normer l'oubli*, IRJS Editions 2018, 153 [↑](#footnote-ref-72)
73. The merits of specific aspects of different theories of posthumous ‘rights’ have been widely discussed. To revisit this debate is beyond the scope of this paper. Daniel Sperling, *Posthumous Interests, Legal and Ethical Perspectives* (Law, Medicine and Ethics, Cambridge University Press, Cambridge 2008). [↑](#footnote-ref-73)
74. D. Huffer and D. Chappell, *The mainly nameless and faceless dead: an exploratory study of the illicit traffic in archaeological and ethnographic human remains* "Crime, law and social change " 2014, Vol. 62, 131; D. Huffer and S. Graham, *Fleshing Out the Bones: Studying the Human Remains Trade with Tensorflow and Inception* "Journal of Computer Applications in Archaeology " 2018, Vol. 1, 55; L. White, *The traffic in heads: bodies, borders and the articulation of regional histories* "Journal of Southern African Studies " 1997, Vol. 23, 325 [↑](#footnote-ref-74)
75. S. Vigneron, *The holy thorn reliquary and cultural heritage* "NILQ " 2017, Vol. 68, 329 [↑](#footnote-ref-75)
76. *Journal Officiel Assemblée Nationale débat* 30 April 2010, 2595. [↑](#footnote-ref-76)
77. , col p 2586, Mrs Bello at 2594.*Journal Officiel Assemblée Nationale débat* 30 April 2010, 2595. [↑](#footnote-ref-77)
78. 'Le premier ministre s'engage à restituer au peuple kanak le crâne d'un chef de la rébellion de 1878' Le Monde (31 July 2013). [↑](#footnote-ref-78)
79. Groupe de travail sur la problématique des restes humains dans les collections publiques, *Les restes humains dans les collections publiques*OCIM, Dijon 2019p 7 ; ;Pascal Blanchard and Didier Daeninckx. 'Un chef revient parmi les siens' *Le Monde* (10 August 2013) [↑](#footnote-ref-79)
80. For public ownership laws, see the Code Générale de la Propriété des Personnes Publique and section L2112-1 for movables. [↑](#footnote-ref-80)
81. *Journal Officiel Assemblée Nationale débat* 21 February 2002, 1719. Section 16-1-1 of the Civil Code had not yet been enacted. [↑](#footnote-ref-81)
82. Tribunal and CA decision [↑](#footnote-ref-82)
83. Section 3111-1 Public Bodies’ Property Code states : ‘Les biens des personnes publiques mentionnées à l'article L. 1, qui relèvent du domaine public, sont inaliénables et imprescriptibles’. See also, J. Rigaud, *Réflexion sur la possibilité pour les opérateurs publics d'aliéner des oeuvres de leurs collections Réflexion*Ministère de la Culture, 2008) 51 <<http://lesrapports.ladocumentationfrancaise.fr/BRP/084000071/0000.pdf>>[accessed: 17/05/2019]. [↑](#footnote-ref-83)
84. Section 2141-1 Public Bodies’ Property Code. The French expression is ‘*règle du parallélisme des formes’.* [↑](#footnote-ref-84)
85. M. Van Praët, pp367-385 [↑](#footnote-ref-85)
86. J. Rigaud, 51 [↑](#footnote-ref-86)
87. There are different commissions depending on the type and size of the museum and price of the object. For example, if the value of the object is less than a fixed threshold, the Louvre’s director needs the approval of an in-house commission: section 4-1 decree 92-1338, 22 december 1992 creating the Louvre museum. For more details, see M. Cornu and Nathalie Mallet-Poujol, 164. [↑](#footnote-ref-87)
88. C. Le Moal, *Rapport 2447 sur la proposition de loi adoptée par le Sénat visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections Rapport 2447*Assemblée Nationale, Commission des affaires culturelles, 2010)31; P. Richert, 39 [↑](#footnote-ref-88)
89. *Audition de M. Stéphane Martin* (19 February 2020) <http://www.senat.fr/compte-rendu-commissions/20200217/cult.html>[accessed: 02/03/2020] [↑](#footnote-ref-89)
90. *Rapport au Parlement de la Commission scientifique nationale des collections (CSNC); Annexes 1re partie du rapport au Parlement de la Commission scientifique nationale des collections* 11/02/2015, 2015), 20 [↑](#footnote-ref-90)
91. Ibidem; Groupe de travail sur la problématique des restes humains dans les collections publiques, [↑](#footnote-ref-91)
92. *Commission de la Culture, de l'Education et de la Communication, Mme Catherine Morin-Desailly, présidente - Restitution des biens culturels - Audition de M. Jacques Sallois, ancien president de la Commission scientifique nationale des collections* (15 janvier 2020) <http://www.senat.fr/compte-rendu-commissions/20200113/cult.html>[accessed: 20/02/2020 ; *Audition de M. Stéphane Martin,* (19 February 2020) [↑](#footnote-ref-92)
93. *Comptes rendus de la Commission de la Culture, de l'Education et de la Communication, Mme Catherine Morin-Desailly, présidente - Audition de M. Jacques Sallois, president de la Commission scientifique nationale des collections sur le rapport de cette commission au Parlement Audition de M. Jacques Sallois, president de la CSNC*18 mars, 2015) <<http://www.senat.fr/compte-rendu-commissions/20150316/cult.html#toc3>>[accessed: 13/03/2020] [↑](#footnote-ref-93)
94. *Comptes rendus de la Commission de la Culture, de l'Education et de la Communication, Mme Catherine Morin-Desailly, présidente - Organismes extra-parlementaires - Communications* 4 December, 2019) <<http://www.senat.fr/compte-rendu-commissions/20191202/cult.html>>[accessed: 20/02/2020] [↑](#footnote-ref-94)
95. Projet de loi d'accélération et de simplification de l'action publique (article 10), <http://www.senat.fr/rap/l19-358/l19-3581.pdf> [↑](#footnote-ref-95)
96. Rapport n° 358 (2019-2020) de Mme Patricia MORHET-RICHAUD, fait au nom de la commission spéciale, déposé le 26 février 2020, 49-52, <http://www.senat.fr/rap/l19-358/l19-3581.pdf> [↑](#footnote-ref-96)
97. *Ibidem* [↑](#footnote-ref-97)
98. *Ibidem* [↑](#footnote-ref-98)
99. *Audition de M. Jacques Sallois* (15 janvier 2020) [↑](#footnote-ref-99)
100. *Comptes rendus de la Commission de la Culture, de l'Education et de la Communication, Mme Catherine Morin-Desailly, présidente - Restitution des biens culturels - Audition de M. Jacques Sallois, ancien president de la Commission scientifique nationale des collections Audition de M. Jacques Sallois*15 janvier, 2020) <<http://www.senat.fr/compte-rendu-commissions/20200113/cult.html>>[accessed: 20/02/2020] [↑](#footnote-ref-100)
101. Assemblée Nationale, vol Question N° 83570, col Réponse publiée au JO le : 24/05/2016 page : 4476 <<http://questions.assemblee-nationale.fr/q14/14-83570QE.htm>> accessed 09/03/2020 [↑](#footnote-ref-101)
102. *Rapport au Parlement de la CSNC* (2015), 22 [↑](#footnote-ref-102)
103. J. Rigaud, 30 [↑](#footnote-ref-103)
104. *Journal Officiel Assemblée Nationale débat* 30 April 2010, 2594 [↑](#footnote-ref-104)
105. R. M. Seidemann, *Altered Meanings: The Department of the Interior's Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains* "Temple Journal of Science, Technology & Environmental Law " 2009, Vol. 28, 1; R. Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values* "Arizona State Law Journal " 1999, Vol. 31, 583 [↑](#footnote-ref-105)
106. F. Lenzerini, pp157-177 [↑](#footnote-ref-106)
107. L. Overholtzer and J. R. Argueta, *Letting skeletons out of the closet: the ethics of displaying ancient Mexican human remains* "International Journal of Heritage Studies " 2018, Vol. 24, 508; S. Pfeiffer and L. Lesage, *The Repatriation of Wendat Ancestors, 2013* "Canadian Journal of Archaeology " 2014, Vol. 38, 5; R. M. Seidemann, 1, 45 [↑](#footnote-ref-107)
108. *Audition de M. Michel Van Praët* (15 janvier, 2020) [↑](#footnote-ref-108)