Digital Heritage, Decolonization, and International Law: Restitution, Authority, and the Transformative Potential of Digital Surrogates

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Abstract

The growing reliance on digital technologies in cultural heritage governance has introduced new possibilities and new risks for post-colonial restitution debates. This article argues that digital engagements with heritage can meaningfully contribute to decolonization only when they are shaped by, and serve the interests of, communities from which cultural objects were taken. Absent such conditions, digitization risks reproducing colonial hierarchies by reinforcing external control over heritage, even while appearing progressive or inclusive. The article contends that international law has a critical role to play in embedding ethical commitments to reparative justice, provided it moves beyond ostensibly neutral legal categories such as authenticity and access, which often operate to legitimize continued colonial possession. The analysis centres on proposals for digitization advanced in the Sarr–Savoy Report on the restitution of objects held in French museums, where digital surrogates were, in some instances, framed as a prerequisite to physical return. Drawing on the report and the diverse responses it generated, the article critically examines whether digitization can function as a form of reparation and emancipation, or whether it instead risks entrenching asymmetrical power relations by shifting value creation and control away from source communities. The article explores how digital surrogates generate new forms of cultural, symbolic, and economic value, and questions who controls that value in contemporary restitution arrangements. It argues that without legal frameworks that prioritise community authority, consent, and benefit-sharing, digital heritage initiatives may undermine rather than advance decolonization. The article concludes by proposing a reorientation of international legal approaches to digital heritage, one that foregrounds restitution, community governance, and the transformative potential of digital tools as instruments of justice rather than substitutes for material return.

Keywords: digital heritage; restitution; decolonization; international cultural heritage law; digital surrogates; reparative justice

Introduction

Digital heritage has become very fashionable, with its promise to broaden access and blur, if not altogether eliminate, the elitist distinctions between high and low culture. It also holds tremendous promise for keeping heritage connected to the everyday lives of the communities living in, with, or around heritage. Social media in particular is heralded as a tool to engage with, create, and recreate connections, meanings, and interpretations of heritage. It can also itself be heritage.

Among the many new avenues that digital heritage brings to the table, of particular interest for existing heritage processes is the idea of the digitization of existing heritage: that is, existing heritage being rendered in a digital format, for preservation, replacement, or even reconstruction purposes. Digitization can help preserve physical heritage by showing details not perceptible to the human eye; digital copies can replace fragile artefacts that, in their habitual context, would be too exposed to the elements and deteriorate quickly; and heritage affected in conflict can be reconstructed on the basis of 3D scanning and modelling.

Despite this promise, the law has so far had relatively little to say about digital heritage. Questions of digital copyright abound, but even beyond that the law is a set of mechanisms that necessarily bounds and authorizes what heritage can be and what it can be used for. The literature on law and technology largely posits that law is a means of slowing down the pace of legal technology, or at least subjecting what is technologically possible to what is ethically or morally desirable. As such, the law has a role to play with respect to digital heritage, and in particular on the digitization of existing heritage, since in that area the digital realm intersects very directly with already existing and legally-protected forms of heritage.

This article focuses on the possible responses of the law to the digitization of existing heritage, while raising the moral stakes of the issue. Specifically, I emphasize the law's role with respect to making reparations for the past while emancipating subaltern communities in the present and for the future. Notoriously, (international) law in general, and international cultural heritage law in particular, has had relatively little to say about the colonial baggage of the legal system and the ways in which the law can be used to reverse the harms of colonialism. Therefore, in this article I bring together two blind spots of cultural heritage law: digitization and colonialism. By doing so, it is possible to shed light not only on the law's shortcomings and the urgency of proposing solutions at this intersection, but also on the enthusiasm for digital heritage's own blind spot in relation to its colonial baggage.

I use the Sarr-Savoy Report of 2018, a notorious example of the post-colonial restitution of cultural heritage in recent years. This report, commissioned after President Macron of France committed to the restitution of African heritage artefacts held by French cultural institutions, engages in detail with the history and effects of French colonialism, and the ways in which those physical artefacts can be returned. It also suggests that, as part of the restitution process, those objects being sent back to African countries should be digitized and made available to the world community, promoting a "radical practice of sharing". However, there is little in the report on the workability of this proposal, let alone its legal repercussions and constraints. Therefore, the Sarr-Savoy Report is an emblematic example of the disconnect among the law, colonialism, and digitization in the heritage realm.

I argue that digital and post-colonial engagements with heritage can be reconciled only if they happen on the terms set by the once-colonized community, and for their benefit, and that the law can play a significant role in embedding ethical commitments, provided it can curb the influence of certain legal categories such as authenticity and access; categories which, despite their neutral or even cosmopolitan aspirations, function as reinforcers of a status quo that privileges colonial possession. That said, the existing law (lege lata) has little to say on the matter, and my proposals are largely of a lege ferenda

nature. The law is a useful language to consolidate these commitments in the specific context of the Sarr-Savoy Report because of the importance given to the law in that very report, which echoes the importance given to the law in regulating ethical heritage practices more broadly.

What follows in the next (second) section supports this thesis by discussing the possibilities and risks of digital heritage in a post-colonial context, followed by a closer examination of the Sarr-Savoy Report and reactions to it in the third section. On the basis of that background, the fourth section discusses the related yet separate questions of whether to make digitization a precondition to post-colonial restitution, and, if so, how to go about doing it (discussed in the fifth section). The concluding remarks in the sixth section point out avenues for future legal development and research.

Digital Heritage's Promises and Pitfalls in Post-Colonial Contexts

Digital heritage can be of two types: digital-born heritage, which is culture produced with the intention of its existence in a digital format or environment; and digital surrogates, which are copies of physical or analogue heritage, created for the purposes of reproduction or safeguarding. I focus on the latter in this article.

Digital heritage in general brings to the table the re-examination of a number of key issues in cultural heritage safeguarding, and consequently the law surrounding it. Chief among them are changes to the way one considers authenticity and assigns value to culture and cultural heritage, and, most importantly for our purposes, the broadening of audiences.

In relation to authenticity, it is a key concept for the evaluation of heritage's value, and it even acts as a threshold issue to determine whether something can even be considered heritage in the first place. It is a concept fundamentally about control, which occupies a central place in how heritage is authorized by the law and other social forces. With respect to digital heritage, authenticity has been a significant preoccupation of scholars in the field, who speculate on whether digital heritage (and particularly digital surrogates, which are central for our present purposes) can still have value or be considered authentic. Citing Walter Benjamin, authors speculate whether the aura of authenticity is lost in the digital translation, even if research supports the idea that authenticity is not as indispensable as heritage professionals assume, and the emotions evoked by the heritage are as important as the actual material fabric, with authenticity being secondary to the experiential component. That said, research also shows that digital surrogates can acquire value and authenticity in their own right, and that what is at stake is not the object itself, but instead the relationships created in relation to the object.

However, as Jones et al. have argued, this "preoccupation with the binary question of whether 3D digital models are authentic or not obscures the wider work that such objects do in respect to the cultural politics of ownership, attachment, place-making and regeneration". The question of authenticity is endemic to the production of value in heritage, but it is entirely object-centric, and disregards or obscures the fact that value is created by a range of other factors that are not intrinsic to the heritage object itself. In fact, the focus on authenticity seems to assume that heritage's value is intrinsic, whereas it is in fact extrinsic, based on the uses made of it by different actors. Further, the value placed on authenticity, and the rejection of copies, is far more culturally-specific than the

literature assumes, because of its concern with Benjamin (a western thinker) as a central figure in the debate, to the exclusion of other perspectives.

With respect to increasing the number of people who can enjoy heritage, in legal circles much of that discussion refers to Merryman's typology of the three imperatives of cultural heritage disputes: preservation, truth, and access. Digital heritage has the effect of amplifying the number of actors who can seek access, the ways in which heritage is preserved, and the stories it can tell as "truth". This shift is particularly true today, when museums are closed worldwide because of the COVID-19 health emergency in place at the time of this writing, causing access measures to be of central importance.

Digital heritage brings to the fore a much wider network of users, which Silberman argues changes the way in which context operates. Context is relevant in cultural heritage disputes such as restitution because it helps determine the place where the artefact best "belongs". Source countries have long argued that artefacts taken from their territories in fact belong back there, because that is their original context and the place where they can be best appreciated. As regards digital-born heritage, that argument no longer holds and other forces are at play, such as the broadened user base that forms "a far more extensive network of contexts to users, consumers, funders, and of course to all other classes of cultural property known and documented all over the world".

In relation to digital surrogates, the data generated by the digitization process can also have significant implications related to their potential economic and marketing uses. The online data of digital surrogates can be used to target efforts to attract audiences, and inform what types of artefacts can form museum shows and attract the visitors crucial to a museum's financial viability and success, in spite of assumptions that a museum's mission sets it apart from economics. As Silberman has soberly put it, "the data tail now wags the cultural property dog. [...] digital data now helps preserve cultural property, shape its public interpretation, suppress the cultural dissent of the digitally unconnected, and pave the cultural information highway connecting suppliers with consumers [...]". Thus digital heritage plays a crucial role in the ways we understand heritage practice, and the law should keep up with it.

In terms of international standard-setting for digital heritage, there are two existing global instruments: the UNESCO Charter on the Preservation of Digital Heritage (the Charter); and the UNESCO Recommendation Concerning the Preservation of, and Access to, Documentary Heritage Including in Digital Form (the Recommendation). The Charter includes in its scope both digital-born and digital surrogate heritage, and makes access a central issue, emphasizing in fact "maximum public access". The Charter specifies that digital-born heritage should be given precedence in selecting what to keep in digital format, and in addition makes the authenticity of digital heritage an important question (except that this is in the sense of files not being tampered with, as opposed to the relational authenticity of the scholarly debates outlined above). Digital heritage is important because it "is inherently unlimited by time, geography, culture or format. It is culture-specific, but potentially accessible to every person in the world. Minorities may speak to majorities, the individual to a global audience".

The Recommendation updates many of the views of the Charter and broadens its scope. For the purposes of the Recommendation, the term 'document' includes any image, text, or media file, including information, which means all digital heritage or its surrogates are considered documentary heritage. This Recommendation, like much of the literature on

digital heritage discussed above, is keenly concerned with the authenticity of heritage (what it calls "analogue carriers"). It also makes significant concessions to the idea of the sharing of digital heritage and digitization, and the provision of equitable access through best practice standards, ensuring the interoperability of systems. Public domain access is encouraged, as is a limitation on restrictions to access to documentary heritage. Of key concern for our present purposes, the Recommendation encourages participatory approaches to the preservation of this heritage, and invites Member States to:

facilitate the exchange between countries of copies of documentary heritage that relate to their own culture, shared history or heritage, and of other identified documentary heritage, in particular due to their shared and entangled historical nature or in the framework of the reconstitution of dispersed original documents, as appropriate, which has been the object of preservation work in another country. The exchange of copies will have no implications on the ownership of originals.

This latter provision is crucial for our present purposes, because it acknowledges the possibility of colonial heritage and puts a prize on the reunification of collections. But it makes no judgments as regards ownership or restitution, instead only encouraging the "radical practice of sharing"; which, as will be discussed below, the Sarr-Savoy Report aligns with.

These instruments' recognition of cultural specificity in the treatment of heritage is crucial, because of their inclusivity. But they can also be interpreted as relativizing decisions about the appropriateness of digitization in favour of more digitization in all instances, which can be problematic in certain contexts. That said, the language is clear that digital heritage is only "potentially accessible to every person", and that "a participatory approach" should be adopted, therefore leaving room for digitization to happen in culture-specific ways. The question that remains is who gets to decide, using their own culture-specific norms, whether and how digitization takes place in the context of restitution of heritage taken during colonialism. This question was addressed in the Sarr-Savoy report.

The Sarr-Savoy Report and "Radical Sharing"

As indicated above, the Sarr-Savoy Report was commissioned to operationalize the promise made by the French President to return cultural artefacts taken during colonialism to the African countries where the artefacts originated and rightfully belong. Published in November 2018, the report was led by Felwine Sarr, a Senegalese and Senegal-based scholar; and Bénédicte Savoy, a French scholar mostly based in Germany, but also the International Chair at the Collège de France. While most of the report is focused on the physical return of artefacts, and how to work around the legal impediments thereto, it also makes important remarks that are aimed at setting the tone for the engagement of digital surrogates in post-colonial contexts. These remarks have sparked strong reactions.

The report sees the restitution of heritage as part of the much bigger story of redressing the harms of colonialism. But the return of heritage also functions as a pathway to have a broader conversation about the enduring legacies of colonialism which disadvantage former colonies and work in favour of former colonial powers. In the report's own words concerning the breadth of colonialism and the role of museums, "the questions around restitution also get at the crux of the problem: a system of appropriation and alienation -

the colonial system - for which certain European Museums, unwillingly have become the public archives". The restitution of heritage is a first step in looking at the past to serve as a bridge "for future equitable relations. Guided by dialogue, polyphony, and exchange, the act or gesture of restitution should not be considered as a dangerous action of identitarian assignation or as the territorial separation or isolationism of cultural property". The report and its authors, who represent two opposite ends of the colonial relationship, are therefore committed to a relationship of dialogue between equals. On this latter point, the report establishes itself as not only being written by a Senegalese person and a French person as its lead authors, but also stresses the wide consultation that went into its preparation: "The present report was written and edited in Dakar, Berlin, and Paris throughout the summer of 2018. It is the fruit of a vast consulting work of experts and political actors in France and throughout four Francophone African countries (Benin, Senegal, Mali, and Cameroon)". It therefore seeks to establish itself as legitimately representing African voices and the voices of the communities from where heritage was taken and is now to be returned.

As regards the goal of helping redress colonialism through heritage, the report indicates that "the acquisition of cultural objects and resources and their transfer to the capitals of Europe were in fact at the heart of and not at the margins of the colonial enterprise". In this connection, the return of heritage is a necessary step in undoing a key harm of colonialism, as well as to stop the repetition of colonial violence: "ethnographic museums, which some have taken to labeling [sic] as 'universal' where artifacts [sic] from Africa are collected [...] have been and continue to remain the sites of the production of discourses and representations of African societies. However, any power is first and foremost a power of controlling the narrative". And the return of heritage also has effects on African societies after they receive these materials back, "accomplishing a twofold task of the reconstruction of their memories and one of self-reinvention, through a resemanticization and a re-socialization of the objects of their cultural heritage, through reconnecting these objects with the current societies and the questions and problems that these contemporary societies pose". The report goes to state that, while these effects are possible, it is up to the African communities themselves to (re)define their relationship with the returned objects, acknowledging that those relationships will necessarily vary across different communities.

The report acknowledges that, in terms of operationalizing the return of artefacts, "the French State must be carefully attentive to respecting the sovereignty of the various nation-states; With this in mind, the procedures of restitution will be undertaken on a state by state basis". This pluralism may in practical terms mean direct collaboration among the relevant state (cultural) institutions, which may bypass the necessity to go through foreign ministries. That said, the report also proposes a rather formalistic solution by stating that the "property of the French State will thereby be granted to the requesting state, it is then this (requesting) state's responsibility, after the negotiations, to give this property back to its community or initial owner". Therefore, while heritage may legitimately belong outside of state structures, the report suggests a legal formula that, in accordance with traditional international law, makes the State the mediator of the agency and rights of those within its jurisdiction, and leaves it to the receiving State to determine internally how to resolve the distributive issues. This formula is traditional

and respectful of state sovereignty, but can also be problematic in that it does not allow for communities to be directly involved in the restitution processes.

Despite its aspiration to redress French colonialism, it is noteworthy that the report focuses only on Sub-Saharan Africa, and excludes North Africa, where French colonialism was arguably far more brutal: "Whereas many other regions of the world represented in Western Museum collections are still able to hold on to a significant portion of their own cultural and artistic heritage, this is not the case in sub-Saharan Africa which has been able to retain almost nothing". The report explains this exclusion on the basis of the volume of cultural artefacts still in the different countries of origin, but it also partly betrays its commitment to use heritage only as a door to engage in a broader dialogue about the harms of colonialism, since it effectively excludes countries where the colonial harm was much greater, even if not done via heritage. Understandably, the report's and its authors' mandate is restricted to heritage, but it could have acknowledged that colonial violence happened in other forms in North African countries. Furthermore, even if those countries still have heritage objects left in their territories, they should still have a say on whether the objects contained in French cultural institutions should be returned to them. For the purposes of the report 'heritage objects' are not only about more conventional objects like paintings, sculptures, and furniture. The term also includes archives, manuscripts, and even films taken by French researchers and colonial or military officers during colonization. Many of these artefacts were removed not as the direct result of military incursions, but in the name of science or as diplomatic gifts. The report acknowledges the different categories, but only in order to deal with potential objections to its mandate to return all of these artefacts, regardless of their origin. For example, with respect to scientific expeditions the report offers a scathing portrait of the nature of colonial science: "Far from being a mere fortuitous addition of cultural items gathered from repeated missions, this large sum of items reveals the existence of a veritable rationalized system of exploitation, in some ways comparable to the exploitation of natural resources". Therefore, since all of these systems belonged to the same colonial machinery, the artefacts that ended up in French cultural institutions as a result of the colonial machinery must be sent back.

The report organizes restitution around three phases. The first phase is the immediate return of a large number of high-profile items already identified in the report itself. The second phase, currently ongoing as per the timeline in the report "(Spring [presumably in the northern hemisphere, where France is located] 2019-November 2022) [...] involves the process of inventorying, the sharing of digital files, and an intensive transcontinental dialogue". The third phase is the continuing work of dialogue between France and the former colonies, as well as the return of items that may be discovered in French territory after the second phase is deemed completed, and this latter phase is to be an ongoing process.

The second phase is therefore the one of interest for present purposes, since it is where digitization is set to occur. There are four stages in this second phase. One of them is digitization (b), alongside inventorying (a), workshops to share know-how (c), and joint commissions to moderate diplomatic dialogue (d). There is relatively little said in the report with respect to digitization specifically, but it is worth quoting that language in full:

b. Sharing of Digital Content

A large number of photographic, cinematographic, or sound documents concerning African societies once held by former colonial administrations have recently been part of intensive campaigns for digitization projects (such as the "iconothèque" in the Musée du quai Branly-Jacques Chirac). Within the framework of the project of restitutions, these digitized objects must be made part of a radical practice of sharing, including how one rethinks the politics of image rights use. Given the large number of French institutions concerned and the difficulty that a foreign public has for navigating through these museums, we recommend the creation of a single portal providing access to this precious documentation in the form of a platform that would be open access. After a dialogue with the other institutions and parties involved, a plan for the systematic digitization of documents that have yet to be digitized concerning Africa should be established, including the collections of (Ethiopian, Omarian, etc) manuscripts from the Bibliothèque nationale de France. It goes without saying that questions around the rights for the reproduction of images needs to be the object of a complete revision regarding requests coming from African countries from which these works originated, including any photographs, films, and recording of these societies. Free access to these materials as well as the free use of the images and documents should be the end goal.

In addition to the sharing of pre-existing digitized collections, the report also suggests that prior to their return other documents must be digitized and shared widely. While this language is mindful of questions of rights and ethics regarding digitization, it does not see them as an obstacle to the much larger imperative of establishing a "radical practice of sharing". Further, the report also does not offer many answers on how to circumvent these obstacles, whether ethically or legally.

The following and third part of the report, on the legal mechanisms to enable restitution, does not refer to the digitization issue, focusing instead on the physical restitution. In doing so, it gives the impression that these digital issues are of little legal import, or at least easily surmountable. A response to this report was mounted by Dr Mathilde Pavis and Dr Andrea Wallace in February 2019 and co-signed by a number of (mostly) scholars in the area, including the present author. This response seeks to counter this problematic assumption and to shed light on the problems surrounding the law and ethics of digitization of heritage in a post-colonial context.

The Pavis and Wallace response ("the response") sets out its intention to "acknowledge the complex issues regarding intellectual property rights and open access policies around these materials, and [...] call on the French Government to dedicate further resources to researching and co-developing digitization solutions with African communities of origin". Specifically, it calls for a rejection of the digitization recommendation on four key grounds: (1) that the French government, albeit returning physical heritage, would effectively control the "generation, presentation, and stewardship" of African digitized heritage; (2) that the sharing requirements imposed on African collections are not in line with those imposed on French collections in France, thus creating a double standard; (3) that making restitution conditional upon digitization is inconsistent with true restitution, and the decisions on digitization should be made by the African communities themselves, on their own terms; and (4) that digitization should not be an afterthought, since digital heritage is as important as built heritage, and therefore African digital heritage deserves as much care as the restitution of physical heritage.

The first and third arguments are closely related, and thus will be discussed together. They are fairly straight-forward, as any attempt at restitution whereby the returning party retains a level of control over the returning thing is not real restitution. The response declares that: "It simply is not enough to return the material cultural heritage while retaining any potential right to digitize, commercialize, and control access (even by mandating "open access") to another community's digital cultural heritage". It further points out that the "management of intellectual property is a cultural and curatorial prerogative, as is the initial decision about whether and what materials to digitize. These prerogatives should belong to the communities of origin".

In a related manner the response calls for much greater involvement of African voices in developing the standards of digitization and control over digitized heritage, stating that "this 'radical practice of sharing' must be defined according to a co-developed understanding and encompass only the works deemed appropriate for digitization, unfettered open access, and public reuse, and only after the key stakeholders and communities of origin are consulted as to how this should proceed". In fairness, it should be noted that the report's authors did consult with African communities and institutions more than seemingly acknowledged in the response, but the response seems to take issue with how the digitization issue is presented as unilateral or consensual, without any acknowledgement in the report of how fraught the proposal can be in practice.

The second argument assumes that digitization is in the interest of African cultural institutions and communities, which is also a problematic assumption laden with the baggage of colonialism and paternalism. The response goes on to discuss the law applicable to digital surrogates and the digitization of heritage, suggesting that "claiming copyright in digital surrogates of public domain works essentially diminishes the public domain and privatizes its contents". Moreover, the law applicable to digital surrogates, if seen as the law of the place where the digitization occurs, would impose the continuing operation of French law on that heritage even though it is really the heritage of the African countries, thus renewing the legal violence of the colonial encounter.

The response engages in detail with the step contained in the report, quoted extensively above, about the "sharing of digital content". Unpacking the language of that discussion, the response posits that "the public domain and 'open access' are components of this colonial thinking. We should therefore resist casually exporting our associated understandings of 'sharing' to non-Western heritage". Furthermore, it is important not to "legitimize French systems of intellectual property to Africa's Digital Cultural Heritage, which appropriate for communities of possession certain rights connected to the very heritage designated for restitution", as well as to "ensure [that] any intellectual property rights arising during digitization are not subjected to the same historical annexation and appropriation of cultural heritage that [the Sarr-Savoy report] seeks to dismantle".

The response acknowledges the value of sharing digitized heritage and approves of the language on openness in the report, identifying three rationales for the latter: (1) improving education on colonialism, the importance of restitution of heritage, and the power dynamics underlying much of the Western treatment of African heritage; (2) ensuring continued access to African heritage to the same communities that had access prior to restitution; and (3) preventing French institutions from claiming intellectual property rights over African digitized heritage. Nonetheless, the response insists that the decision on whether and how to digitize should rest with African communities themselves.

The fourth argument in the response, that digitization should not be an afterthought, is in many respects the summation of all the other arguments: by showing the many gaps and their possible unintended consequences, the response argues that the report's underdeveloped proposal for a "radical practice of sharing" is, while meritorious in the abstract, very problematic in actuality. The response frames the issue by referring back to the same colonial practices the report ostensibly sets out to reject:

The Report criticizes the situation in 1960s Europe for defaulting on its obligation to address colonial structures deeply embedded in the ownership and management of African Cultural Heritage. Yet the Report lacks the same "structured reflection devoted to the role [digital heritage collections] could play in the emancipation of formerly colonized African countries". Our concern is that an equally important part of this process is being neglected, and that genuine efforts to restitute African Cultural Heritage may therefore succumb to the same mistakes made during (and prior to) the 1960s. This is because just as there are "different interpretations or conceptions of cultural heritage", there are different interpretations or conceptions of digital cultural heritage. Digital cannot be treated as an afterthought. Any rebalancing of global cultural heritage must anticipate these different interpretations or conceptions and, most importantly, be motivated by the interests of the relevant communities in documenting and sharing their own material heritage. This rebalancing must account for alternative conceptions of objecthood, authorship or personhood, representation and presentation, and digital heritage, thereby "releasing oneself from the lone framework of European thought".

Therefore, French institutions should not be free to claim intellectual property rights over digitized material while requiring African institutions to have their digitized content available to all. According to the response, this principled position is not thought through, and needs to be reconsidered if the report is to fulfil its ambition of serving as a reparatory measure for colonialism. To that effect, the response makes what it calls "alternative recommendations", as follows: (1) there should be no obligation on digitization as a precondition to restitution; (2) consultation and dialogue on digitization is as important as consultation and dialogue on the return of physical objects; and (3) that structured reflection be done on whether digitization is an avenue for the emancipation of formerly colonized African countries, replicating the report's promise in relation to physical heritage for the digitized domain.

Therefore, while the report holds promise for decolonization through heritage restitution, the response to it points to the incongruity of sharing if done as a matter of principle and imposed unilaterally by the party that, by holding the heritage, holds the power in the restitution context. Digital decolonization, as discussed in the previous section, is not a given, and is in fact problematic. The questions that remain are whether digital surrogates should legitimately be a part of conversations on restitution and, if so, on what terms? The remainder of this article is devoted to these two issues.

Whether to Make Digital Surrogates a Precondition of Restitution

The question of whether to digitize is - as the discussion above indicated - a fraught with concerns. For one, considering UNESCO standard-setting instruments, the Charter indicates that, while desirable, the preservation of digital surrogates is not as high a priority as the preservation of digital-born heritage, and the Recommendation places a high value on the exchange of copies of digital heritage. The Sarr-Savoy report, building

on the fact that several French museums had already digitized significant parts of their African collections, pushed for digitization as a precondition for return. The Pavis-Wallace response suggests that it should, instead, be up to African cultural institutions and communities themselves to decide, after receiving the returned heritage, whether to digitize.

Two questions are at stake: the propriety of the imposition of digitization, and the willingness and ability of resource-constrained cultural institutions in poorer countries to undertake extensive digitization efforts. As regards the propriety of the requirement, I agree with the response's principle: digitization should happen only with the full consent of African communities and institutions, on terms determined by them, and the digital surrogates should be deposited with and controlled by them. Without that measure of control, it will still be for institutions in the previous colonial power, e.g. France, to determine the fate of that heritage, which affects not only how that heritage is used but the value attributed to it, as discussed above. Therefore, digitization should happen only if it is controlled entirely by the countries to which the physical artefacts are returned.

That said, it is unclear from the report whether some of that is already happening. Specifically, the report goes a long way in terms of speaking to the wide consultation that has happened across Africa, with one of the lead authors being from and based in an affected country. However, while these two factors speak in favour of giving the authors of the report the benefit of the doubt, they do not guarantee that digitization would be appropriately conducted under the control of African countries. In my view, only if those guarantees are in place should digitization go forward.

As to the willingness and ability of those African countries to undertake digitization as a precondition for implementing the Sarr-Savoy report, one should bear in mind the relationship between digitization and making heritage more popular and accessible, thus breaking through the problematic "high versus low" culture distinction. Moving past this duality speaks in favour of the willingness to digitize from an abstract cultural standpoint. There are two problems related to this assumption, however. First, to breach the distinction may render African heritage on the same level as low culture as the result of identifying the lowest common denominator. In other words, digitization may backfire, and instead of bridging the divide, render all cultural heritage that has a digital surrogate a lesser form of heritage. Value can be diminished, since it is largely construed on the basis of an elusive (elite) access or rarity, with the value of cultural objects being associated with rarefied access by connoisseurs, and not widespread global access. The diminution of the value of African heritage could thus have the unintended consequence of dealing a blow to its importance to the communities of origin. Herein lies one of the paradoxes of the construction of heritage value: while heritage should be known and have value, it should also be known as rare and authentic. In other words, to be otherwise means it is a lower because it is more accessible - form of human achievement. Therefore, heritage should be known and accessible, just not by and to everyone if it is to retain its status as high culture. Access is more important to African communities now because the artefacts are located beyond their territorial reach; once they are returned it may be in their interest to control access and rarefy it to help build and maintain the "aura" of authentic heritage value. Digital surrogates may dull that aura, and therefore African communities may be unwilling to produce digital surrogates in large quantities.

Second, it is very problematic that digitization, and the risk of aura diminution, is only to be expected of heritage that is already charged - based on colonial and racist assumptions that invisibly still form part of the fabric of how heritage and its value are produced - with being somehow "less" valuable than western heritage. Of course nothing could be further from the truth, as African artistic and cultural achievement is both remarkable and extensive, but that verifiable truth does not stop western museums from playing down their African collections in favour of western artists, and thus attributing greater relevance, value, and "aura" to western heritage over African heritage. There is thus a risk that, because of the racist and colonial structures that underpin how culture is valued in the west, digitization for the benefit of western communities - which will no longer have immediate access to African artefacts - will lower the value of African heritage at the expense of those communities which can now politically and economically benefit from those same values. Therefore, it is perfectly logical and acceptable that African communities and cultural institutions might be unwilling to produce digital surrogates and engage in a "radical practice of sharing" for the benefit of their former colonizers, and in addition in a way that can reinforce the colonial violence of how heritage is valued and used.

Moreover, with respect to the ability of African communities and museums to undertake digitization, even if they are willing to do so an inevitable question arises; i.e. that of digital asymmetries, or the resources of those communities and institutions to undertake digitization. A digital divide, directly attributable to colonialism and "an expression of the unequal geography of global capitalism", still persists in Africa, meaning not only that those institutions may not have resources to undertake digitization, but also that relatively few local users will have access to those digitized collections. In other words, it may be that even if digitization happens, it will be for the benefit of the former colonizers rather than local communities themselves, which would speak against their willingness as well. If, however, the "radical practice of sharing" would be tied to a "radical practice of bridging the digital divide" as part of addressing the harms of colonialism (to which the return of heritage is also connected), then one can overcome the (dis) ability barrier, and such measures would also help encourage willingness.

Therefore, the production of digital surrogates can be read as meaning much more for the institutions located in places to where the African heritage is being returned than for those communities and institutions from where the heritage is being sent. Only with the full agreement of the former communities and institutions should digitization be undertaken, and it should not in any way be made a condition for return. To require digitization reinforces the same colonial violence which the Sarr-Savoy report is meant to remedy.

Nevertheless, even if the above objections are overcome, i.e. digitization happens under the control of African communities and institutions and they are willing and able to undertake the effort of producing digital surrogates, there are other arguments in favour of digitization as well. These arguments particularly regard access to and appreciation of African heritage by the world at large, which in and of itself can lead to a reconsideration of the racist and colonial structures that undermine the value of African heritage. But that is a choice to be made entirely by African communities and institutions, and in my view digitization should only happen on their terms.

If the above threshold questions concerning "whether to do digitization" can be cleared, the next set of questions which arise concern how to do it in a way that maximizes the value of African heritage and works in favour of those African communities and institutions. The following section considers some additional elements drawn from the literature on digital heritage and the law's possible involvement in resolving those issues.

Some Ideas on How to Use Digital Surrogates in Post-Colonial Contexts

Assuming that the control issues regarding the production of digital surrogates of African cultural heritage artefacts are resolved in favour of African communities and institutions, there are still a number of issues that arise in relation to how to undertake digitization. This section offers some elements for consideration.

Key among these issues and related to the idea of control by African communities and institutions is that digitization should be undertaken as part of a co-production exercise. To co-create digital surrogates means that new forms of value are created for the heritage and beyond (such as helping bridge the digital divide). Co-design and co-production shift the focus away from the product of heritage artefacts and towards the social and cultural practices that actually constitute heritage (namely, the intangible values). And the artefacts themselves can be enhanced, by gaining new relationships that attribute value to them, and value that is tied to the African communities of origin and not digitizers based in France.

It is a major problem that no UNESCO treaties in the 21st century (nor the United Nations Declaration on the Rights of Indigenous Peoples) address the idea of digital heritage front and centre. The specific digital heritage instruments discussed above are, after all, only soft law instruments and offer limited guidance. This gap reinforces the issue, pointed out in the introduction, of the lack of a clear legal engagement in the matter. This lack of legal engagement creates a significant blind spot, in that it ignores background norms on "multiple regulatory domains, such as telecommunications, information technology, standards, trade, intellectual property, and Internet governance. Each of which is marked by its own peculiar dynamics, power plays, and path dependencies".

That said, there are relevant experiences with the mass production of digital surrogates of the heritage of colonized peoples that can offer some guidance for future regulatory action. Australian museums, for instance, have engaged in significant efforts to produce digital surrogates of its Pacific collections, as discussed by Supriya Singh, Meredith Blake, and Jonathan O'Donnell. The context here is different of course, because the physical artefacts were not returned to Pacific nations (even though arguably they should be). But the co-design and consultation in the digitization process is noteworthy.

Most museums have in this area treated digitization as the creation of digital catalogues with some associated metadata, therefore being a light-touch approach to digitization that does little to guide interpretation and add value to heritage. The creation of digital surrogates was largely conceived of and treated as a social process. Access constituted a key issue behind the digitization efforts, for the benefit of both source and diasporic communities. Another key issue was that digital surrogates were likely to be used in very different ways by users accessing them, as opposed to the museum professionals creating them. In the experience with Australian institutions digitizing Pacific heritage, "[m]useum professionals were interested in getting better provenance. Melanesians were

more interested in cultural revival rather than documentation. They were interested in the museum objects to address contemporary issues".

Therefore, in order to do ethically appropriate digitization local communities (whether in the territory or diasporic) should be treated as the primary stakeholders; museums should move beyond minimal legal requirements; and extensive consultation should be undertaken in order to respect cultural uniqueness. Consultation is key, even if museums lack the time and resources to undertake them (which is another reason for it to be done in African countries, where consultation will be much easier). However costly and time-consuming it might be, it is key to understanding cultural restrictions governing access and the knowledge that underlies the artefacts, and should be undertaken in a free-flowing format rather than as a rushed box-ticking exercise.

There are always items that should never be digitized because of cultural privacy or other sensitivities (such as human remains). Consideration should also be given to ritual uses of objects that can restrict access. If those objects are digitized, access to the digital surrogates can still be restricted. Furthermore, there are issues with copyright, taking high-quality images of the object, and protecting these images from modification (i.e. maintaining digital authenticity in the terms of the Charter and Recommendation discussed above). Singh, Blake, and O'Donnell have created, on the basis of their experience, a checklist for digitization, which is worth quoting in full:

CHECKLIST FOR DIGITIZATION

Drawing on our study of the practices of museum professionals and cultural experts, we charted the following stages and guidelines for the digitization of Pacific cultural collections.

- Resource the project with sufficient staff and budget.
- For whom do you want to digitize parts of your collection? What does your target audience want?
- Consult with source and diasporic communities.
- Collaborate with other museums and develop capacity within the organization.
- It is preferable to go for selective digitization about objects and areas where your museum professionals already have detailed knowledge.
- Check museum ownership of the object and museum copyright of the image. Should you digitize certain cultural objects? If an object is secret/sacred or ritual or human remains, the most responsible and respectful response would be not to digitize. If the community particularly wants any of these objects digitized, work together with the community to devise appropriate checks to access.
- Digitization targets and costs will depend on the availability of good photographs, validating images (cross-checking with registration numbers), and the need to validate knowledge about the object, augmented with intangible knowledge.
- Protect images from modification and misappropriation.
- If you are allowing comments or tagging, then monitor and moderate those comments.

A series of questions remain for our present purposes: How can these practices be turned into law? What should be the forum for law-making? What should be the format of the standard-setting instrument? How likely is it to be successful? Would the current Charter and Recommendation be useful?

There is much to be said about using international law and an institution like UNESCO for this law-making exercise. Despite their shortcomings, the Charter and Recommendation are useful launching pads for future standard-setting actions, considering UNESCO's practice of building upon soft law instruments for treaty-making in the area of cultural heritage. Further, UNESCO's experience in both cultural heritage and intellectual property, even if not always seamlessly aligned within UNESCO, gives the organization the necessary expertise. Given the existence of the Charter and Recommendation, it seems another autonomous soft law instrument is unwarranted, and the Charter and Recommendation can be built on towards a treaty. But a treaty, however feasible, is in my opinion probably undesirable. A new treaty would operate separately from the existing legal regimes within UNESCO, whereas it would probably be best if, at least in addressing the specific questions surrounding digital surrogates of otherwise already-protected heritage, existing regimes be adapted to the digitization possibilities.

The best pathway for digital surrogates, therefore, is not a separate instrument that would require a separate ratification, but rather the reform of implementation guidance (in the form of Operational Guidelines or Operational Directives) to existing treaties. Changes to these instruments are far more agile, which benefits both the initial efforts toward including digital surrogates and subsequent reforms as technology evolves. Moreover, this solution does not require separate ratification, and relates closely to the existing frameworks, instead of requiring the creation of relationship clauses that would further fragment international heritage law and impose more obstacles for communities seeking to engage with it.

Concluding Remarks

The use of digital surrogates can help promote the value of cultural heritage in restitution contexts. However, it can also re-enact and reinforce much of the colonial violence for which restitution was meant to serve as a reparation. So far, international heritage law has been notably silent on providing answers to the management of digital heritage, or to reparations for the harms of colonialism vis-à-vis cultural heritage. The Sarr-Savoy report opens a door through which a legal response can be developed, mainly because of its good faith efforts to repair the harms of the past. It is up to us as scholars and practitioners to seize upon this opportunity and develop an adequate legal framework through which heritage can in fact serve as an emancipatory political force for subaltern voices and communities, in Africa and beyond.

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