



Universität Hamburg
DER FORSCHUNG | DER LEHRE | DER BILDUNG

FAKULTÄT
FÜR RECHTSWISSENSCHAFT

UHH · Fakultät Rechtswissenschaft · Rothenbaumchaussee 33 · 20148 Hamburg

Secretariat of the Human Rights Council Advisory Committee

OHCHR - United Nations Office at Geneva
CH-1211 Geneva 10
Switzerland
via eMail

02.07.2023

Dr. Jan Christoph Bublitz

Faculty of Law
Rothenbaumchaussee 33
20148 Hamburg
Germany

christoph.bublitz@uni-hamburg.de
www.jura.uni-hamburg.de

Personal academic website:
www.christophbublitz.de

Submission to the call for inputs on neurotechnology and human rights (Resolution 51/3 Human Rights Council)

Dear esteemed members of the Advisory Committee,

with utmost respect and admiration for the timely and critical work you are undertaking with respect to neurotechnologies and human rights, I am privileged to submit this document for your consideration.

I am a legal scholar and have worked on questions of neurotechnologies and the law for 15 years. I founded the Palgrave book series on Neuroscience, Law, and Human Behaviour, serve as an associated editor of the journal Neuroethics, and I am currently one of the Principal Investigators of the international research consortium Hybrid Minds that addresses ethical and legal challenges of neurotechnologies that operate with Artificial Intelligence components (www.hybridminds.org).

I wish to offer the following observations in the hope you may find them helpful. In particular, I would like to address the protection of the person against neurotechnological interferences and potential gaps (Questions 14/26 of your Questionnaire) and draw your attention to possible solutions (Question 11). I also attach an unpublished paper of mine, *Neurotechnologies and Human Rights: Restating and Reaffirming the Multi-Layered Protection of the Person*, for your perusal (as it is currently under review, I kindly ask to not circulate it at this time).

On the protection of the person against neurotechnological interferences

Given that only a few cases involving interferences with fundamental rights through neurotechnologies have been brought before higher courts, established jurisprudence in most countries remains largely absent. This, however, should not be seen as indicative of gaps in the law, but rather as a result of the limited deployment of these technologies thus far. It is worth noting

that analogous cases involving interventions into brains and minds, such as coercive medication in psychiatry or the utilization of lie detection systems by law enforcement agencies, have been adjudicated for many years and may offer precedents. Accordingly, legal systems are not entirely unprepared should novel neurotechnologies be employed for similar purposes. Nevertheless, the future use of neurotechnologies for various other benign or nefarious objectives may raise numerous human rights concerns, necessitating context-specific evaluations. In the absence of concrete cases, the pertinent question is whether established human rights provide the necessary resources to effectively address unspecified situations in the future.

I am inclined to submit an affirmative answer. Established human rights can be interpreted to encompass nearly all conceivable interferences facilitated by neurotechnologies, without straining the wording or distorting their intended meaning. These interferences encompass both interventions into the brain and measurements of brain activity, sometimes described imprecisely as "writing into" and "reading of" the brain. From the Universal Declaration of Human Rights onwards, core international rights lay several protective veils around the person which can encompass a great many, perhaps all of these interferences. This means that these interferences fall under the protective perimeter of established rights and can be assessed according to the general principles and procedures.

The supposedly main point worth noting is that neurotechnological *interventions* into the brain which alter brain activity to affect mental states, processes, or capacities ("mental properties") inherently interfere with the integrity of the person. More specifically, such interventions interfere with physical integrity by altering, disturbing, or disrupting electrochemical processes in the central nervous system, or with mental (psychological) integrity by affecting mental properties. An alarming neurotechnological intervention that does not impinge upon bodily or mental integrity is inconceivable.

Rights to physical and psychological integrity are guaranteed in numerous international instruments, including Article 3.1 of the European Charter of Fundamental Rights (ECFR), Article 13 of the American Convention on Human Rights (ACHR), Article 17 of the Convention on the Rights of Persons with Disabilities (CRPD), and are entailed by the right to security of the person, Article 9.1 International Covenant on Civil and Political Rights (IPPR) (see the Human Rights Committee, *General Comment No. 35*, para. 3, UN Doc. CCPR/C/GC/35, 2014). The European Court of Human Rights has derived a right to psychological integrity from the right to private life, as stipulated in Article 8 of the European Convention on Human Rights (ECHR). Although the right to mental integrity remains underdeveloped and, to the best of my knowledge, has not been explicitly applied to neurotechnologies, it appears well-suited for this purpose, particularly if the right to bodily integrity alone is deemed insufficient to cover modifications of brain activity. During the drafting of the ECHR, delegates deliberated on the meaning of "mental integrity," which was unfamiliar to some. In view of future biotechnological interventions, it was expressly incorporated into Article 3.1 of the ECHR. In other words, the very rationale behind the right is to safeguard against biotechnological interventions, which include neurotechnologies. There is no inherent impediment to a similar interpretation of the rights to mental integrity in other instruments.

Interferences that involve the measurement of brain activity ("brain reading" or "neuroimaging") fall under the purview of the right to privacy, just as other measurements of physiological properties or examinations of the body or person, such as search and seizure. Drawing further inferences about mental properties from these measurements may constitute an additional intrusion upon privacy ("mental privacy"). Furthermore, specific rights may be applicable to particular situations, such as the right against self-incrimination, which may be pertinent to involuntary brain reading of defendants in criminal proceedings.

Furthermore, I would like to draw your attention to another crucial right – freedom of thought, which is ill-defined at the moment. However, 75 years ago, during the deliberations on the Universal Declaration, drafters and the Third Committee were concerned about the freedom of unmanifested inner thought and the freedom of the “inner man”. Although they did not envision many practical ways in which this freedom could be violated, its significance was deemed so paramount that it was accorded the strongest protection possible and become one of the few absolute rights, Article 18 UDHR. Notably, freedom of thought was intentionally placed first in the article, preceding the freedoms of conscience and religion, as they were seen as deriving from it (for a more in-depth analysis of the travaux préparatoires, I have addressed this topic in a chapter for an upcoming book, and it would be an honour to share it with you). Article 18 UDHR draws upon a centuries-long line of reasoning about the invincibility of an inner realm, the forum internum, or perhaps the soul, with respect to conscience and religion. Article 18 UDHR expands it to the broader realm of “thought”. It has inspired Article 18 ICCPR and its equivalents in regional instruments. Among the concerns that motivated drafters to this unprecedented expansion of absolute protection were worries about overwhelming pressures on the thoughts, beliefs, and decisions of persons. This may be demonstrated by the following remarks by Charles Malik at the 14th meeting of the Commission on Human Rights (February 4th, 1947):

The state “is becoming increasingly determinant of the very being of the person, and it does it by its laws, by psychological pressure, by economic pressure, by every possible means of propaganda and social pressure. In my opinion, there is here involved the deepest danger of the age, namely, the extinction of the human person as such in his own individuality and ultimate inviolability, and therefore, the disappearance of real freedom of choice” (quoted from Allida Black, ed., *The Eleanor Roosevelt Papers*. Volume I, 1945-1948, p. 506).

As an antidote, Malik put forth four propositions for recognition in the Declaration, one of which stated that “the human person's most sacred and inviolable possessions are his mind and his conscience” (UN Doc E/CN.4/SR.14). This proposition laid the foundation for the formulation of freedom of thought in Article 18 UDHR. The psychological and social pressures, the influence through propaganda, and the loss of individuality and freedom of choice that worried Malik easily extend to neurotechnological interferences, they are different and arguably more powerful stimuli that affect the human mind. In other words, neurotechnologies are a concrete contemporary manifestation of the dangers that drafters were abstractly apprehensive about. Therefore, I wish to submit that the Universal Declaration and subsequent instruments stipu-

late that some parts of the human mind are, in principle, out of governmental reach. The challenge is to render this realm of thought more precise. To this end, I propose a robust understanding of the right, encompassing all forms of thought and the mental activity of thinking (see *Freedom of Thought as an International Human Right: Elements of a Theory of a Living Right*. In: Blitz/Bublitz, eds., *Law and Ethics of Freedom of Thought*, 2022).

After all, established rights provide for broad and deep protection, encompassing all interferences and prohibiting some of them in principle (please see the attached manuscript for a further elaboration). This configuration strikes me as both prudent and perspicacious. Therefore, contrary to certain recent writings, established human rights should not be regarded as impotent or inadequate in addressing the challenges posed by neurotechnologies. It would be unfortunate if UN bodies were to create and sustain such a misleading impression. Rather, it is advisable to confer visibility on existing but underdeveloped rights, and encourage and guide interpretations that realize their full potential.

Nevertheless, current law appears to have two notable gaps. The first gap pertains to the liberty to use neurotechnologies. International human rights law does not explicitly address whether individuals possess a right to voluntarily utilize such technologies, particularly for non-medical purposes. While domestic legal systems may have addressed similar issues in the context of rights to use drugs, it is important to recognize that neurotechnologies may differ from drugs in various ways, such as their addictive potential and social effects. Thus, drug-related cases may not provide good precedents. However, general principles of law such as the autonomy of the person in the absence of harm to oneself or others, support the existence of a pro tanto right to use neurotechnologies. Nevertheless, the challenge lies in rendering this right more precise, an aspect that requires attention.

The second gap arises from the broader issue of the limited applicability of human rights to private actors, who pose numerous threats to privacy and integrity. Insofar as domestic laws inadequately protect against unwanted measurements of brain activity or interventions into the brain, these gaps must be addressed and resolved. Allow me to draw your attention to two proposals I have put forth in this regard, which involve the adoption of novel criminal offenses or crimes against minds. The first proposal concerns non-consensual direct interventions into the brain (see Bublitz/Merkel, *Crimes against mind*, *Criminal Law and Philosophy*, 2014, pp. 51-77). The second proposal addresses acts of mind-probing, the non-consensual inference of mental properties from biometric data (should you be interested, I have an unpublished manuscript on this that I would be pleased to share with you).

In closing, I would again like to express my appreciation for your work and your unwavering commitment to upholding human rights in light of emerging challenges. Should you have any questions, please do not hesitate to contact me. I would be honoured to provide additional materials if it would assist in your deliberations.

Sincerely,

[Christoph Bublitz]

A handwritten signature in black ink, appearing to read "J. C. Jull". The signature is fluid and cursive, written over a white background.