**DRAFT REMARKS TO ADVISORY COMMITTEE**

**OF THE UN HUMAN RIGHTS COUNCIL**

In our work on the potential misuse and abuse of neurotechnology, we have focused on five neurorights, which can be derived from further interpreting existing treaty rights. They include a right of mental privacy, to personal identity, to free will, to fair access to mental augmentation, and to protection from bias. These risks came from the collective work of a group of 25 global experts called the Morningside Group, which we convened in 2017. Together, we published our analysis in the scientific journal *Nature*.

While the Advisory Committee’s draft report covers these and a wide array of other concerns, I believe it could and should be improved in three important ways.

First, the draft report should, in terms of its analysis and recommendations about the risks of misuse and abuse of neurotechnology separate the urgent problem that the world has today and everything else, as a matter of simple prioritization. Specifically, **there is an urgent need, immediately, to codify a right to mental privacy both at the international and national levels**. In short, while brain activity and neural data gathered for medical purposes are fully protected by health privacy laws and implantable brain-computer interfaces are regulated as medical devices, there is generally no regulation of any kind around consumer neurotech products.  This is not a future problem, but already a serious problem *right now*. Today, there are at least 18 consumer neurotech products on the market for purchase that do such things as monitor if a person is in a meditative state, help improve sleep, or enable a person to fly a toy helicopter with their mind.  Our Foundation is publishing a report in September 2023 that will provide a detailed analysis of the user agreements for these 18 products across nine dimensions of potential human rights concerns. It is already clear, however, that these agreements are predatory. For example, across all 18 products, when a person clicks “I agree,” to the typical long agreement few ever read, the company functionally owns all their neural data coming from their BCIs and in 16 of these products, they can immediately sell or transfer the scans to a third party. Today we can only decode some one percent of what is in a brain scan. But that will rise to three or even five percent in just the next few years. Beyond what is already happening, the urgency for mental privacy protection is heightened because I expect that with rapid advances in generative AI and its ability to rapidly analyze large quantities of data and extract hidden patterns, that within some two years or so, there will be wearable BCIs that will be able to accurately read thoughts in a person’s mind in different ways. Such technology has *already* enabled a person who is paralyzed with an implantable BCI to communicate at 18 words a minute with 94% accuracy.

Second, while the Advisory Committee’s draft report rightly discusses the fullest range of existing and potential hard and soft-law mechanisms that could address these issues, as it relates to the urgent need to codify a right to mental privacy, **the report should specifically and clearly recommend an urgent focus on hard law mechanisms and their applications to codify a right to mental privacy**. For example, the Advisory Committee could request the Human Rights Committee review the application of its treaty rights in the ICCPR to neurotechnology and, through mechanisms like amending general comments, consider further interpreting their meaning to explicitly provide for a right of mental privacy. As one illustration, Article 17(1) says “no one shall be subjected to arbitrary or unlawful interference with his privacy . . . .” The relevant General Comment No. 16 focuses on privacy as a generic concern, raises special concerns about the need to prohibit electronic or other surveillance, and it says that “so far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person being searched.” Yet the ICCPR was adopted in 1966, it came into force in 1976, and this General Comment was adopted in 1988. It is therefore unsurprising, the HRC has not considered the need for a right to mental privacy. In this regard, the Advisory Committee might recommend the HRC review this General Comment in light of its report and consider amending it to further interpret the right to privacy as having had embedded within, from the treaty’s adoption, a right to mental privacy, which must be accorded the highest levels of protection. Such a statement could clarify that when it comes to personal and body search, breaching a person’s mental privacy is strictly prohibited because there is no way it can be conducted in a way that retains the person’s dignity, given the extreme sensitivity of a person’s innermost thoughts and emotions. As the ICCPR’s preamble says, all rights in the treaty “derive from the inherent dignity of the human person.” Taking such a hard-law approach is the fastest way to address ongoing and expanding violations of mental privacy being committed by through neurotechnology around the world. The ICCPR is binding on its some 170 States Parties. And Article 2(2) requires them to immediately bring their domestic law into compliance with the treaty. The adoption of an amended General Comment further interpreting Article 17(1) to include a right to mental privacy, because it is simply a further application of the plain language of the treaty, should also be considered legally binding. For the HRC to take such a decision would send a clear signal to States they need take action to protect mental privacy, enable the HRC to ask States about their legislative efforts to protect mental privacy in State Party reporting, and even allow for individual cases to be adjudicated under the first Optional Protocol.

Finally, third, in the Advisory Committee’s draft report should be strengthened by recommending the Human Rights Council itself also focus on the need to codify a right to mental privacy. The Council could undertake a number of specific actions that could help enormously. For example, in its follow-on resolution to this report, if the Advisory Committee so advised, it could as a matter of soft law simply state as an affirmative interpretation of law that the right to privacy enshrined under international law has always had embedded within it a right to mental privacy. And it could explain that with the rapid development of neuro-technologies, it is now important for all relevant stakeholders in the international human rights system to recognize and further develop this important further interpretation of the right to privacy. It could also add to the mandate of the UN Special Rapporteur on the Right to Privacy, which was last renewed in 2021, a request that the Special Rapporteur develop and publish a detailed report, based on wide consultations, about how to advance the development of the right to mental privacy under both international law and by States.

I fully understand why the Advisory Committee’s draft report intentionally drew from and presented information from numerous global stakeholders to present a wide look at issues relating to neurotechnology and human rights. That said, I hope this approach won’t preclude it from identifying immediate priorities coming from this information and making specific and tactical recommendations for addressing urgent concerns. As a scientist and technologist who has worked in this field over my entire career, there is simply no question that codifying and advancing a right to mental privacy must be the top priority.