

---

# Cognitive Sociology, Social Cognition and Coping with Racial Discrimination in International Law

Moshe Hirsch\*

## Abstract

*Cognitive science is the interdisciplinary study of mental processes involved in the acquisition, classification, organization and interpretation of knowledge in the human environment as well as the decision taken on the appropriate action based upon it. The point of departure is that people do not directly sense information; cognitive processes mediate between sensory input from the environment and behaviour. These cognitive processes are influenced by neurological, psychological, socio-cultural and other factors. In recent years, there has been growing scholarly interest in the study of cognitive sociology, focusing on the interactions between culture and cognition. This stream in sociological literature draws upon and complements cognitive psychological literature. The prohibition on discrimination constitutes one of the fundamental rules in international human rights law, but studies reveal that racial discrimination is pervasive and persistent in many states. Non-compliance with this international legal rule is significantly related to cognitive processes through which people acquire and interpret incoming information about other people. Racial groups are socially constructed and deeply ingrained socio-cognitive biases feed and reproduce racially discriminatory behaviour. These biased mental processes, however, are not inevitable and may change over time. Effective struggle against racial discrimination requires that international legal mechanisms also address the socio-cognitive infrastructure that facilitates and sustains racial*

\* Maria Von Hofmannsthal Chair in International Law, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem, Israel. Email: moshe.hirsch@huji.ac.il. Earlier versions of this article were presented at the Workshop on Cognitive Sociology, Culture and International law (iCourts, University of Copenhagen, April 2017) and the Symposium on the Psychology of International Law, held at the Hebrew University in January 2018, and I am grateful to the participants in those forums for their valuable comments. I would also like to thank Tal Sticker and Ohad Abrahami (Hebrew University Law Faculty) for excellent research assistance.

*discrimination. Consequently, this study also discusses some international legal strategies aimed at mitigating cognitive biases and enhancing compliance with treaties prohibiting racial discrimination.*

Recent evidence suggests that culture can operate as a lens, bringing distinct aspects of one's environment into focus, based on cultural priorities, values, and experiences. These cultural differences emerge not only in social domains, ... but also in cognitive domains, such as processing specific aspects of information

– Angela H. Gutchess and Allie Indeck, 'Cultural Influences on Memory'<sup>1</sup>

## 1 Introduction

The prohibition on discrimination constitutes one of the fundamental rules in international human rights law with diverse treaties prohibiting discrimination on various grounds, such as racial and gender discrimination. Notwithstanding this well-established prohibition, studies reveal that discrimination based on race or gender is pervasive and persistent in many states. Non-compliance with these central international legal rules is significantly related to cognitive processes through which people acquire and interpret incoming information about other people. This study addresses the interaction between socio-cultural factors and biased cognitive processes and their effect on compliance with the prohibition on racial discrimination.

Cognitive science is the interdisciplinary study of mental processes involved in the acquisition, classification and interpretation of knowledge in human environment as well as the decision on the appropriate action based upon it. The point of departure is that people do not directly sense information; cognitive processes mediate between sensory input from the environment and behaviour.<sup>2</sup> Thus, mental processes (such as perception) filter in/out and colour incoming information. These cognitive processes are influenced by neurological, psychological, socio-cultural and other factors. In recent years, there has been a growing scholarly interest in the study of cognitive sociology, focusing on the interactions between culture and cognition. This stream in sociological literature draws upon and complements social cognition literature, which is a branch of social psychology.

Scholars in the fields of cognitive sociology and social cognition explore how humans process information regarding the social world. However, they differ somewhat on several issues, notably concerning the basic unit of analysis and the role of culture. Like other branches of psychology, social cognition literature examines how individuals<sup>3</sup> make sense of the social world. While social cognition studies generally

<sup>1</sup> Gutchess and Indeck, 'Cultural Influences on Memory', in J. Chiao (ed.), *Progress in Brain Research* (2009), vol. 178, 137, at 137.

<sup>2</sup> S.T. Fiske and S.E. Taylor, *Social Cognition: From Brain to Culture* (3rd edn, 2017), at 13; M. Augoustinos, I. Walker and N. Donaghue, *Social Cognition* (3rd edn, 2014), at 20.

<sup>3</sup> On current social cognition research and theory driven by an overwhelming individualistic orientation, see, e.g., Augoustinos, Walker and Donaghue, *supra* note 2, at 6.

acknowledge that individuals' mental processes are also influenced by cultures,<sup>4</sup> the interaction between socio-cultural factors and cognitive processes has not taken centre stage in this literature.<sup>5</sup> On the other hand, cognitive sociology scholarship focuses on social groups (and their interactions *vis-à-vis* individuals) and underscores that socio-cultural factors affect how humans and social groups process information. Thus, from this sociological perspective, it is clear that people from different cultural groups perceive and interpret reality differently.<sup>6</sup> As Eviatar Zerubavel explains, '[s]ociety, in short, plays a major role in organizing our "optical" predispositions. Indeed, many of the mental lenses through which we come to "see" the world are actually *sociomental* lenses grounded in particular social environments.'<sup>7</sup> Like the psychological approach to international law, the cognitive sociological perspective constitutes a departure from rational choice assumptions,<sup>8</sup> highlighting various cognitive biases (such as 'outcome bias').<sup>9</sup>

Racial groups are socially constructed, and deeply ingrained, socio-cognitive biases feed and reproduce racially discriminatory behaviour. These biased mental processes, however, are not inevitable and may change over time. The effective struggle against racial discrimination requires, it is submitted, that international legal mechanisms also address the socio-cognitive infrastructure that facilitates and sustains racial discrimination. Consequently, this study also discusses some international legal strategies aimed at mitigating cognitive biases and enhancing compliance with treaties prohibiting racial discrimination. The suggested strategies shed light on the potential role of judicial bodies, governmental organs, non-state actors (such as the mass media) and international institutions in reducing racial bias in society.

Part 2 briefly discusses the clash between the prohibition on discrimination against certain disadvantaged groups (particularly racial ones) and pervasive local socio-cultural features involving discriminatory behaviour. Part 3 introduces the central tenets of cognitive sociology and briefly presents some core social cognition processes. Part 4 highlights the interaction between certain key cognitive processes and racial discrimination (such as classification, schemata and stereotyping). Part 5 offers some international legal strategies aimed at mitigating racial discriminatory processes

<sup>4</sup> E.g. Fiske and Taylor, *supra* note 2, at 27–28, 17; Augoustinos, Walker and Donaghue, *supra* note 2, at 6–7, 288–289; Z. Kunda, *Social Cognition: Making Sense of People* (2nd edn, 2000), at 515–560.

<sup>5</sup> The cognitive stream in cultural psychology emphasizes cross-cultural differences in social cognition. E.g., Morling and Masuda, 'Social Cognition in Real Worlds: Cultural Psychology and Social Cognition', in S.T. Fiske and C.N. Macrae (eds), *Sage Handbook of Social Cognition* (2012) 429, at 434.

<sup>6</sup> E. Zerubavel, *Social Mindscapes: An Invitation to Cognitive Sociology* (1997), at 8–9; Cerulo, 'Establishing A Sociology of Culture and Cognition', in K. Cerulo (ed.), *Culture in Mind: Toward A Sociology of Culture and Cognition* (2002) 1, at 3

<sup>7</sup> Zerubavel, *supra* note 6, at 31 (footnote omitted; emphasis in original).

<sup>8</sup> On this characteristic of the psychology of international law, see Van Aaken and Broude, 'The Psychology of International Law: An Introduction', 30 *EJIL* (2019) 1225; Van Aaken, 'Experimental Insights for International Legal Theory?', 30 *EJIL* (2019) 1237.

<sup>9</sup> On 'outcome bias' in psychological analysis of international law, see Broude and Levy, 'Outcome Bias and Expertise in Investigations under International Humanitarian Law', 30 *EJIL* (2019) 1303.

and enhancing compliance with treaties prohibiting racial discrimination. Part 6 concludes.

## 2 The Prohibition on Discrimination and Incompatible Socio-Cultural Features

Non-discrimination constitutes a basic and general principle of international human rights law,<sup>10</sup> with various human rights treaties prohibiting discrimination based on diverse grounds.<sup>11</sup> The right to non-discrimination on the grounds of race, sex and religion has become part of customary international law.<sup>12</sup> As the United Nations (UN) Committee on Elimination of Racial Discrimination (CERD) has clarified,<sup>13</sup> international law prohibits both direct and indirect discrimination. Direct discrimination occurs when a person is treated less favourably than another in a comparable situation based on one of the prohibited grounds (for example, race). Indirect discrimination takes place when a provision, criterion or practice that is ostensibly neutral would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons.<sup>14</sup> States' obligation to adopt positive measures, standards of responsibility and evidentiary issues in this sphere are discussed further below.

Notwithstanding these well-established rules of international law, studies and experts' reports<sup>15</sup> reveal that discrimination based on race, gender or social grounds is pervasive and persistent in many states.<sup>16</sup> Certain social and cultural harmful

<sup>10</sup> E.g., Human Rights Committee (HRC), CCPR General Comment no. 18: Non-Discrimination, 37th Session (1989).

<sup>11</sup> E.g., International Covenant on Civil and Political Rights 1966, 999 UNTS 171, Art. 26; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, 660 UNTS 195; International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, 1249 UNTS 13; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 221, Art. 14.

<sup>12</sup> Moeckli, 'Equality and Non-Discrimination', in D. Moeckli, S. Shah and S. Sivakumaran, (eds), *International Human Rights Law* (2nd edn, 2010) 157, at 161, 168; M. Shaw, *International Law* (7th edn, 2014) 201, 208–209.

<sup>13</sup> On the ICERD practice regarding indirect discrimination, see P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016), at 114–115; Van Boven, 'Racial and Religious Discrimination', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), para. 13; K. Henrard, Committee of Experts on Issues Relating to the Protection of National Minorities, *The Impact of International Non-Discrimination Norms*, 24 October 2006, at 6, available at <https://rm.coe.int/1680097f35>.

<sup>14</sup> Moeckli, Shah and Sivakumaran, *supra* note 12, at 164–165; O. De Schutter, *International Human Rights Law* (2010), at 625–640; D. Silverstone *et al.*, *Non Discrimination in International Law: A Handbook for Practitioners* (2011), at 64ff.

<sup>15</sup> E.g., United Nations (UN) Human Rights Office of the High Commissioner, *Developing National Action Plans against Racial Discrimination* (2014).

<sup>16</sup> E.g., Pager and Shepherd, 'The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets', 34 *Annual Review Sociology* (2008) 181, at 192; M. Kamali, *Racial Discrimination: Institutional Patterns and Politics* (2009), at 53. M. Banaji and A. Greenwald, *Blind Spots: Hidden Biases of Good People* (2013), at 201–207.

practices often feed discriminatory practices against people belonging to disadvantaged groups. Thus, for example, local norms regarding gender inequality often lead to breaches of the prohibitions on discrimination against women;<sup>17</sup> and similar strains and non-compliance derive from inconsistent social norms prevalent in some states' societies regarding racial discrimination.<sup>18</sup> Certain provisions in anti-discrimination treaties indicate that some treaty drafters were well aware that socio-cultural features prevailing in some societies undermine compliance with the prohibition on discrimination,<sup>19</sup> including racial discrimination.<sup>20</sup> The CERD expressed, for example, in the Concluding Observations on a particular country 'its concern about the existence of certain negative traditional practices that ... discriminate against people on racial or ethnic grounds'.<sup>21</sup>

Inter-group relations literature reveals the significant effects of social identity on individuals' behaviour. Human beings strive to belong to social groups and have the tendency to differentiate themselves by group membership.<sup>22</sup> Empirical studies have persuasively demonstrated that once people identify with a particular social group, they are likely to provide in-group members with better treatment and discriminatory treatment compared with that granted to out-group members.<sup>23</sup> This discriminatory tendency is also discerned from the absence of any history of inter-group contact or conflict and where people have no self-interest gains from discriminatory practices.<sup>24</sup>

Inter-group discrimination is frequently motivated by positive favouritism towards in-group members rather than by direct hostility towards out-group members.<sup>25</sup> Generally, in-group members are believed to be trustworthy, cooperative, peaceful and honest; whereas out-group members are often perceived as untrustworthy, competitive, quarrelsome and dishonest.<sup>26</sup> Group affiliation also tends to affect the radius of one's 'moral circle',<sup>27</sup> suggesting that members of a particular group readily excuse

<sup>17</sup> E.g. HRC, CCPR General Comment no. 28: Article 3 (Equality of Rights between Men and Women), 68th Session (2000), para. 5.

<sup>18</sup> Thornberry, *supra* note 13, at 387; A.J. Wiesand *et al.*, *Culture and Human Rights: The Wrocław Commentaries* (2016), at 48–49.

<sup>19</sup> E.g., CEDAW, *supra* note 11, Art. 5(a).

<sup>20</sup> ICERD, *supra* note 11, Art. 7.

<sup>21</sup> UN Committee on Elimination of Racial Discrimination (CERD), Concluding Observations on Ghana, UN Doc. CERD/C/62/CO/4, 2 June 2003, para. 11; see also CERD, Concluding Observations on Nepal, UN Doc. A/55/18 (2000), para. 299; CERD, Concluding Observations on Nigeria, UN Doc. CERD/C/NGA/CO/18, 27 March 2007, para. 18.

<sup>22</sup> M.B. Brewer, *Intergroup Relations* (2nd edn, 2003, reprinted in 2009), at 20, 103; E. Aronson, *The Social Animal* (11th edn, 2012), at 27–28. On social identity and international law, see M. Hirsch, *Invitation to the Sociology of International Law* (2015), at 104ff.

<sup>23</sup> W.G. Stephan and C.W. Stephan, *Intergroup Relations* (1996), at 92–93; Brewer, *supra* note 22, at 43ff; R. Jenkins, *Social Identity* (4th edn, 2014), at 8.

<sup>24</sup> Brewer, *supra* note 22, at 45, see also at 26.

<sup>25</sup> *Ibid.*, at 65–68; see also at 21; Dovidio and Gaertner, 'Stereotypes and Evaluative Intergroup Bias', in D.M. Mackie and D.L. Hamilton (eds), *Affect, Cognition and Stereotyping: Interactive Processes in Group Perception* (1993) 167, at 175.

<sup>26</sup> Brewer, *supra* note 22, at 51; see also Fiske and Taylor, *supra* note 2, at 54.

<sup>27</sup> On 'moral circle' and social identity, see Passini, 'What Do I Think of Others in Relation to Myself?', 23 *Journal of Community and Applied Psychology* (2013) 261.

unfair acts if the transgressors belong to the subjects' group.<sup>28</sup> Though group identity tends to generate certain discriminatory biases, these tendencies are not uniform, and cultural variations across social groups influence the type and extent of discrimination along certain lines. Group affiliation does not necessarily result in negative attitudes *vis-à-vis* an out-group's members, and the content of such attitudes can be either positive (for example, admiration) or negative (for example, viewing them as untrustworthy).<sup>29</sup>

### 3 Cognitive Sociology, Socio-Cultural Factors and Mental Processes

Cognitive sociology investigates the interactions between socio-cultural factors and cognition, emphasizing the impact of socio-cultural aspects on cognitive processes as well as variations in the social constructions of reality.<sup>30</sup> While not ignoring universal cognitive processes (such as certain elements of neural processing) or the impacts of personal factors on mental processes, cognitive sociologists highlight the differences that define the thinking of people in various communities. Karen Cerulo explains:

[W]hile sociocultural factors may not determine how mental constructs are initially acquired, such factors may help us to understand why certain constructs become so widely shared among social actors while others do not. And while sociocultural factors may not elucidate the ways in which mental constructs interface with one another, such factors may help us to better understand the ways in which mental constructs interface with the external world, thus steering, shaping, and limiting shared definitions of reality and patterns of social action.<sup>31</sup>

Cognitive sociology literature underlies that socio-cognitive patterns vary not only across distinct cultures but also within cultures – for example, according to historical periods, subcultures and social networks and in accordance with social roles (like gender or professional roles).<sup>32</sup> Such socio-cognitive characteristics are transmitted to new members of society via social mechanisms, such as socialization or language, and are enforced via social control mechanisms.<sup>33</sup>

<sup>28</sup> Valdesolo and DeSteno, 'Moral Hypocrisy: Social Groups and the Flexibility of Virtue', 18(8) *Psychological Science* (2007) 869, at 870.

<sup>29</sup> E.g., on the 'stereotype content model' and cross-cultural variances, Fiske, 'Intergroup Biases: A Focus on Stereotype Content', 3 *Current Opinion in Behavioural Sciences* (2015) 45; A.J. Cudy *et al.*, 'Stereotype Content Model across Cultures: Towards Universal Similarities and Some Differences', 48 *British Journal of Social Psychology* (2009) 1, at 3, 22–23.

<sup>30</sup> W.H. Brekhus, *Culture and Cognition: Patterns in the Social Construction of Reality* (2015), at 1; Zerubavel, *supra* note 6, at 22, 31. On the influence of group values and group ties on interpretation of scientific evidence, see Kahan, 'Fixing the Communications Failure', 463 *Nature* (2010) 296, at 296–297.

<sup>31</sup> Cerulo, 'Representation and Integration', in Cerulo, *Culture in Mind*, *supra* note 6, 113, at 118.

<sup>32</sup> E.g., Zerubavel, *supra* note 6, at 33; Friedman, 'Toward a Sociology of Perception: Sight, Sex, and Gender', 5 *Cultural Sociology* (2011) 187.

<sup>33</sup> E.g., E. Zerubavel, *Hidden in Plain Sight* (2015), at 62–66; Zerubavel, *supra* note 6, at 14–15; Rydgren, 'The Power of the Past: A Contribution to a Cognitive Sociology of Ethnic Conflict', 25(3) *Sociological Theory* (2007) 225, at 228.

As noted above, though social cognition (a branch of social psychology) and cognitive sociological studies differ on several issues,<sup>34</sup> they also complement one another. Cognitive sociology scholarship often draws on social cognition experimental studies, and social cognition experts occasionally acknowledge that culture influences mental processes. Social cognition examines how individuals make sense of the social world (other people and themselves), drawing heavily upon cognitive theories and experimental studies. As for culture's impact, Susan Fiske and Shelley Taylor explain in their influential book on social cognition that '[m]any of the central assumptions about how people think about other people turn out to be culturally bound'.<sup>35</sup> Social cognition and cognitive sociology studies discuss numerous cognitive concepts and processes; this part, however, briefly introduces four key cognitive processes (perception, classification, interpretation and memory) – as well as the central notions of 'schemata' and 'automatic cognition' – that are significantly involved in racial discrimination. The cognitive processes discussed below are often not separate, being rather frequently intertwined. The following brief discussion of core cognitive processes lays the groundwork for the analysis of racial discrimination undertaken in Parts 4 and 5.

### *A Perception and Attention*

People are unable to attend to all stimuli in their environment, with some aspects of reality remaining outside their attention.<sup>36</sup> For thinking to ensue, the brain must detect data and focus on it in conscious awareness.<sup>37</sup> People observe the world in an uneven fashion. One of the significant sets of factors influencing the process of perception being people's 'cognitive culture of attention', shaped by groups and social networks.<sup>38</sup> Thus, norms of focusing and socialization affect patterns of attention to reality.<sup>39</sup> Empirical studies show that people from different cultural systems have certain different perception and attention patterns.<sup>40</sup>

### *B Classification (or 'Categorization')*

In order to organize reality, humans think categorically rather than continuously, creating distinct categories of meaning out of continua and graduations.<sup>41</sup> To execute

<sup>34</sup> See Part 2 above.

<sup>35</sup> Fiske and Taylor, *supra* note 2, at 27; see also K.M. Galotti, *Cognitive Psychology: In and Out of the Laboratory* (6th edn, 2018), at 396ff.

<sup>36</sup> Though perception and attention may be analysed as separate (but related) processes, they are often discussed together in literature. See, e.g., E. Zerubavel, *The Elephant in the Room: Silence and Denial in Everyday Life* (2006), at 23; R. Passingham, *Cognitive Neuroscience: A Very Short Introduction* (2016), at 11–26, 27–41.

<sup>37</sup> Cerulo, 'Sensation and Attention', in Cerulo, *Culture in Mind*, *supra* note 6, 28, at 35.

<sup>38</sup> Brekhus, *supra* note 30, at 25, 33; Zerubavel, *supra* note 6, at 42.

<sup>39</sup> Zerubavel, *supra* note 36, at 22–25; Brekhus, *supra* note 30, at 22, 33.

<sup>40</sup> Nisbett and Masuda, 'Culture and Point of View', 100 *Proceedings of the National Academy of Sciences* (2003) 1163; Kitayama and Uskul, 'Culture, Mind, and the Brain', 64 *Annual Review of Psychology* (2011) 419, at 435–436.

<sup>41</sup> Brekhus, *supra* note 30, at 59–60.



this task, the brain must establish similarities and differences and cluster information into meaningful categories.<sup>42</sup> The databanks allowing human beings to draw similarities and categorize information emerge not only from the brain's physiological capacities but also from the social circumstances and cultural contexts in which those capacities are exercised.<sup>43</sup>

### *C Interpretation*

The classification process is inevitably tied to interpretation by way of resorting to the brain's warehouse of representational constructs (including concepts, metaphors and schemata) and its capacity to integrate new information with such constructs.<sup>44</sup> Concepts are mental representations of categories dividing and clustering information in the brain, thus enabling the interpretation of new information.<sup>45</sup> Meaning is occasionally constructed via the employment of metaphors implicitly drawing upon connections between different events and phenomena. While socio-cultural factors may not pinpoint the structure of the concepts and metaphors, such factors may assist in accounting for why certain mental constructs become widely shared in society and when certain constructs are invoked and applied over others.<sup>46</sup>

### *D Memory*

During the presentation of stimuli, the brain operates the encoding process and information is stored within the memory system.<sup>47</sup> The impact of social processes on individual memory has long been investigated by sociologists exploring 'collective memory', showing that a significant part of peoples' memories is acquired through social groups.<sup>48</sup> Individuals remember by accessing memory schemata, and schematically linked information is more easily retrieved.<sup>49</sup> The schemata activated (or deactivated) in the process of storage and retrieval are also influenced by the cultural context and communities.<sup>50</sup>

<sup>42</sup> Cerulo, 'Discrimination and Classification', in Cerulo, *Culture in Mind*, *supra* note 6, 57 at 57.

<sup>43</sup> *Ibid.*, at 60.

<sup>44</sup> Cerulo, 'Representation and Integration', in Cerulo, *Culture in Mind*, *supra* note 6, 113, at 113; Brekhus, *supra* note 30, at 89–90.

<sup>45</sup> Cerulo, 'Representation and Integration', *supra* note 44, at 113–115; Kunda, *supra* note 4, at 16–19, 51.

<sup>46</sup> Cerulo, 'Representation and Integration', *supra* note 44, at 118. On the impact of socio-cultural factors (such as norms) on interpretation of new scientific information, see Kahan, *supra* note 30.

<sup>47</sup> M.W. Eysenck and M.T. Keane, *Cognitive Psychology* (7th edn, 2015), at 209.

<sup>48</sup> E.g., Olick and Robbins, 'Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices', 24 *Annual Review of Sociology* (1998) 105. On collective memory and international law, see Hirsch, 'The Role of International Tribunals in the Development of Historical Narratives', 20 *Journal of History of International Law* (2018) 391.

<sup>49</sup> Brekhus, *supra* note 30, at 149.

<sup>50</sup> Cerulo, 'Storage and Retrieval', in Cerulo, *Culture in Mind*, *supra* note 6, 201, at 204; Zerubavel, *supra* note 6, at 88–89.



## E Schemata

Schemata constitute highly generalized knowledge structures and abstract guidelines and assist people in understanding the world and forming expectations.<sup>51</sup> Schemata are both representations of existing knowledge and information-processing mechanisms.<sup>52</sup> Schemata may be conceived as abstract generalizations derived from a collection of specific experiences or complex phenomena (such as group stereotypes or social roles). Event schemata constitute a significant class of schemata; for example, after participating in several classrooms, one develops a general notion of classrooms – a schema constructed from the various attributes of the different classrooms one has experienced.<sup>53</sup> Schemata influence the processing of information, allowing people to ‘fill in the blanks’ and make sense of new experiences. Schemata and culture are often closely interrelated and Paul DiMaggio explains that ‘[h]ighly schematic cognition is the realm of institutionalized culture’.<sup>54</sup> Culturally infused schemata affect our perception, interpretation and memory.<sup>55</sup>

## F Automatic and Deliberate Processes

One of the characteristic features of cognitive studies is the distinction between automatic and deliberate processes.<sup>56</sup> Automatic cognitive processes can occur outside of consciousness, while deliberate thought demands consciousness. Automatic cognition involves the rapid, effortless and unintentional processing of information,<sup>57</sup> essentially activating some well-learned sets of associations or responses.<sup>58</sup> Deliberate cognition involves slow, well-thought and measured cognitive processing. When engaged in deliberate thought, individuals may reject or override their schemata, thus leading them to actively search for characteristics and connections rather than assume them.<sup>59</sup> People are more likely to shift to deliberate cognition where, *inter alia*, they are not under stress, when their attention is attracted to a problem or strongly motivated to do so, where well-established routines are disrupted or when existing schemata fail to account for a new stimulus.<sup>60</sup> Socio-cultural features permeate into automatic and deliberate cognitive processes.<sup>61</sup>

<sup>51</sup> Cerulo, ‘Mining the Intersections of Cognitive Sociology and Neuroscience’, 38 *Poetics* (2010) 115, at 125; Eysenck and Keane, *supra* note 47, at 436ff.

<sup>52</sup> DiMaggio, ‘Culture and Cognition’, 23 *Annual Review of Sociology* (1997) 263, at 269.

<sup>53</sup> Cerulo, ‘Mining the Intersections’, *supra* note 51, at 125.

<sup>54</sup> E.g., DiMaggio, *supra* note 52, at 269. DiMaggio adds that ‘[i]n schematic cognition we find the mechanisms by which culture shapes and biases thought’ (at 269).

<sup>55</sup> Cerulo, ‘Mining the Intersections’, *supra* note 51, at 125–126; see also DiMaggio, ‘Why Cognitive (and Cultural) Sociology Needs Cognitive Psychology’, in Cerulo, *Culture in Mind*, *supra* note 6, 274, at 276–277.

<sup>56</sup> See, e.g. D. Kahneman, *Thinking Fast and Slow* (2011), at 19ff.

<sup>57</sup> Cerulo, ‘Mining the Intersections’, *supra* note 51, at 117; Fiske and Taylor, *supra* note 2, at 34, 40.

<sup>58</sup> Devine, ‘Stereotypes and Prejudice: Their Automatic and Controlled Components’, 56 *Journal of Personality and Social Psychology* (1989) 5, at 6.

<sup>59</sup> Cerulo, ‘Mining the Intersections’, *supra* note 51, at 117.

<sup>60</sup> *Ibid.*, at 117; Fiske and Taylor, *supra* note 2, at 51; Brekhus, *supra* note 30, at 29–30.

<sup>61</sup> Mason and Morris, ‘Culture, Attribution and Automaticity: A Social Cognitive Neuroscience View’, 5 *Social Cognitive and Affective Neuroscience* (2010) 292, at 293, 300–302.

## 4 Racial Discrimination and Socio-Cognitive Biases

Socio-cultural factors are involved in three primary dimensions of racial discrimination: behaviour, knowledge and cognition. First, cultural features of a particular group influence behaviour towards in-group and out-group members. For example, societal norms often guide people to grant preferential treatment to the members of one's own racial group, and such discriminatory norms are likely to be supported by social control mechanisms pressuring people to conform.<sup>62</sup> Second, social groups are involved in the construction of collective knowledge regarding other groups – for example, information relating to past interactions between the groups. For example, collective memories may influence individuals belonging to a racial group to remember previous friendly or hostile interactions between the two groups. Third, socio-cultural factors are involved in individuals' deeply ingrained cognitive processes and may affect the perception, classification, interpretation and memory of new information regarding people belonging to their group as well as other racial groups. This study emphasizes the third – socio-cognitive – dimension of racial discrimination and its interactions with the two other dimensions of discrimination (behaviour and knowledge). The following discussion explores interactions between core cognitive processes and racial discrimination.

### *A Category Activation and Cognitive Load*

Mental classification is essential for discrimination, and it is clear that dividing people into certain categories (for example, by the colour of their skin) is undertaken in a social process.<sup>63</sup> Discriminatory behaviour towards people belonging to a certain group is preceded by mental classification of people as belonging to either an in-group or an out-group. Some social categories, such as race, have come to be seen as 'naturalized', as sharing an essence as do natural categories.<sup>64</sup> Sociologists widely assume that such categorizations are socially constructed and that they vary across cultures and over time.<sup>65</sup>

Category activation is affected, *inter alia*, by cognitive load. The cognitive resources available to people in a state of arousal are more limited, and such situations are more likely to increase reliance on stereotypes.<sup>66</sup> Using stereotypes frees mental capacity, and people with a high need for 'cognitive economy' are especially prone to engage in inter-group categorization,<sup>67</sup> including racial categorization.

<sup>62</sup> On social pressure to conform to racial stereotypes, see, e.g., J.R. Feagin, *Racial and Ethnic Relations* (5th edn, 1996), at 15–16.

<sup>63</sup> E.g., Brekhus *et al.*, 'On the Contributions of Cognitive Sociology to the Sociological Study of Race', 4 *Sociology Compass* (2010) 61, at 63–66.

<sup>64</sup> E.g., Brewer, *supra* note 22, at 5.

<sup>65</sup> E.g. Brekhus, *supra* note 30, at 59–61; Zerubavel, *supra* note 6, at 63–65.

<sup>66</sup> Kunda, *supra* note 4, at 393; see also Fiske and Taylor, *supra* note 2, at 319; Brewer, *supra* note 22, at 69–71.

<sup>67</sup> Fiske and Taylor, *supra* note 2, at 319.

## B Schemata and Stereotyping

Sociological and psychological cognitive literature on discrimination highlights the concept of stereotyping – that is, shared beliefs regarding the generalization of personal characteristics, motives or behaviour to a group of people.<sup>68</sup> Those who do not belong to their society's 'default categories' are likely to be stereotyped.<sup>69</sup> Stereotypes constitute one type of schemata, a schema about a group of people.<sup>70</sup> Stereotyping is not necessarily an intentionally hostile feature, nor is it always negative.<sup>71</sup> The cognitive system is limited, and humans are assumed to often simplify the complexity of their social world. In that sense, stereotypes can thus be considered an 'energy saving device'.<sup>72</sup> On the other hand, when stereotypes blind people to individual differences within a social group, they can be dangerous.<sup>73</sup> Stereotypes are likely to be used as the default in the absence of other relevant information, when attention is diverted from the careful observation of another's behaviour<sup>74</sup> or where cognitive resources are strained.<sup>75</sup> Culturally embedded stereotypes about racial differences are reflected in both conscious and unconscious evaluations. They often colour perception, interpretation and additional key cognitive processes and may set the stage for various forms of racially discriminatory treatment.<sup>76</sup>

## C Perception and Category Accentuation

As discussed above, the perception of the same sensory information may vary cross-culturally.<sup>77</sup> People tend to make racial attributions based on visual cues, and these often depend on the communities to which they belong. For example, Wayne Brekhus and colleagues note that '[i]n the United States, skin color is marked and given great weight as the primary racial indicator, while the rest of the body is ignored as racially neutral'.<sup>78</sup> Once social categories are established, people identified with a particular racial (or other social) group tend to sharpen the differences between group members and out-group members and be less attentive to information about similarities

<sup>68</sup> Kunda, *supra* note 4, at 314–315; Pager and Shepherd, *supra* note 16, at 193.

<sup>69</sup> Banaji and Greenwald, *supra* note 16, at 92.

<sup>70</sup> E.g., G.B. Moskowitz, *Social Cognition: Understanding Self and Others* (2005), at 440.

<sup>71</sup> As noted in Part 2 above, such generalizations can be either positive or negative. See, e.g., Cudy *et al.*, *supra* note 29, at 3, 22–23.

<sup>72</sup> McGarty, Yzerbyt and Spears, 'Social, Cultural and Cognitive Factors in Stereotype Formation', in C. McGarty, V.Y. Yzerbyt and R. Spears (eds), *Stereotypes as Explanations: The Formation of Meaningful Beliefs about Social Groups* (2002) 1, at 3–5.

<sup>73</sup> Aronson, *supra* note 22, at 310.

<sup>74</sup> Wilder, 'The Role of Anxiety in Facilitating Stereotypic Judgments of Outgroup Behaviour', in D.M. Mackie and D.L. Hamilton (eds), *Affect, Cognition and Stereotyping* (1993) 87, at 88–89.

<sup>75</sup> See Part 4.E below.

<sup>76</sup> Pager and Shepherd, *supra* note 16, at 193; Pronin, 'Perception and Misperception of Bias in Human Judgment', 11 *Trends in Cognitive Sciences* (2007) 37, at 38.

<sup>77</sup> See Part 3 above.

<sup>78</sup> Brekhus *et al.*, *supra* note 63, at 70.

between the categories; out-group members are thus more likely to be perceived as undifferentiated.<sup>79</sup>

### *D Interpretation, Memory and Stereotyped Schemata*

We may understand identical behaviour quite differently when it is performed by members of different racial groups. Group stereotypes colour peoples' interpretations of behaviour, personal traits and situations.<sup>80</sup> Stereotypes are particularly influential in ambiguous situations.<sup>81</sup> Once people possess more information about a particular person (in addition to group membership), their tendency to apply group stereotypes diminishes.<sup>82</sup>

As to memory, cognitive studies reveal that the likelihood of retrieval of stored information is affected by previously stored schemata. The activation of schemata and the retrieval process is influenced by the socio-cultural context and group membership.<sup>83</sup> For example, certain collective memories tend to foster stereotypical views, for instance, regarding the character of people belonging to a racial group. Generally, expectancy-confirming information is better remembered than expectancy-disconfirming information.<sup>84</sup> And even when disconfirming information is being encoded, people tend to remember information in ways that support pre-existing stereotypes.<sup>85</sup>

### *E Automatic Activation of Stereotypes*

Automatic cognitive processes heavily rely upon culturally available schemata, such as racial stereotypes.<sup>86</sup> Empirical studies reveal that in cases where people encounter a member of a stereotyped group or information associated with that group, they may automatically activate the group's stereotypes.<sup>87</sup> While literature has shown that cultural racial stereotypes provide the default, automatic response, empirical studies also indicate that motivated people may modify this mental tendency. Motivated 'low-prejudice individuals' (regarding racial stereotypes)<sup>88</sup> can replace automatically activated

<sup>79</sup> Stephan and Stephan, *supra* note 23, at 94–95; Fiske and Taylor, *supra* note 2, at 308.

<sup>80</sup> Kunda, *supra* note 4, at 316, 334; see also Brekhuis *et al.*, *supra* note 63, at 66.

<sup>81</sup> Kunda, *supra* note 4, at 349, 362, 353–355; see also Fiske and Taylor, *supra* note 2, at 320–321.

<sup>82</sup> Kunda, *supra* note 4, at 353–355, 393.

<sup>83</sup> Cerulo, 'Storage and Retrieval', in Cerulo, *Culture in Mind*, *supra* note 6, 201, at 204; Zerubavel, *supra* note 6, at 88–89.

<sup>84</sup> Fyock and Stangor, 'The Role of Memory Biases in Stereotype Maintenance', 3 *British Journal of Social Psychology* (1994) 331.

<sup>85</sup> Stephan and Stephan, *supra* note 23, at 25; see also Baumeister and Hastings, 'Distortions of Collective Memory', in J.W. Pennebaker, D. Paez, and B. Rim (eds), *Collective Memory of Political Events* (1997) 277, at 278–279.

<sup>86</sup> DiMaggio, *supra* note 52, at 269; Cerulo, 'Mining the Intersections', *supra* note 51, at 117; see also Monteith, Woodcock and Gulker, 'Automaticity and Control in Stereotyping and Prejudice', in D.E. Carlston (ed.), *The Oxford Handbook of Social Cognition* (2013) 74, at 76–79. On unconscious bias against members of disadvantaged groups in legal literature, see, e.g., Jolls and Sunstein, 'The Law of Implicit Bias', 94 *California Law Review* (2006) 969; Kang, 'Trojan Horses of Race', 118 *Harvard Law Review* (2005) 1489; Nance, 'Student Surveillance, Racial Inequalities, and Implicit Racial Bias', 66 *Emory Law Journal* (2017) 765; Kang *et al.*, 'Implicit Bias in the Courtroom', 59 *UCLA Law Review* (2012) 1124.

<sup>87</sup> On the automatic activation of group stereotypes, see Kunda, *supra* note 4, at 318–323, 392; Brewer, *supra* note 22, at 74–75.

<sup>88</sup> The term 'low-prejudice individuals' refers to people who are familiar with the negative racial stereotype but believe it is inappropriate and mistaken.

bias with more egalitarian responses through deliberate processing, particularly if they possess the cognitive resources to engage in more deliberate thought.<sup>89</sup> Research work also suggests that shifting to deliberate processes may follow the encountering of information disconfirming stereotypes.<sup>90</sup>

### *F Biased Socio-Mental Lenses and Racial Discrimination*

The above-discussed literature illustrates well the influence of socio-cultural features on discriminatory cognitive processes. Social groups influence their members to be perceptive to certain aspects of reality, highlighting the difference *vis-à-vis* disadvantaged racial groups and overestimating data regarding similarity among people belonging to another racial group. Categorization norms guide people to classify others as belonging to certain categories according to some social distinctions, prominently along racial lines. Communities steer people to interpret new information according to certain social patterns, such as attributing some personal features ('stereotyping'). Socio-cultural features prevailing in society also influence patterns of memory, and people tend, for example, to better recall data confirming racially stereotyped beliefs. These socio-mental lenses do not only reflect socio-cultural characteristics of a particular social group, but they also sustain, reproduce and constitute fertile ground for further racially discriminatory practices.

## 5 Coping with Racial Discrimination in International Law

The formation, interpretation and implementation of international law interact with socio-cognitive processes.<sup>91</sup> Thus, for example, international legal rules are affected by and affect the classification of social groups (such as 'states' or 'indigenous groups') and certain types of behaviour (for example, a 'terrorist act'). Similarly, socio-cognitive processes often influence the interpretation of international legal instruments<sup>92</sup> and the attribution of responsibility to a particular state.<sup>93</sup>

<sup>89</sup> Devine, *supra* note 58, at 14–15. Monteith, Woodcock and Gulker, *supra* note 86, at 78, 81.

<sup>90</sup> DiMaggio, *supra* note 52, at 272; see also Fiske and Taylor, *supra* note 2, at 56–57.

<sup>91</sup> On the relevance of social cognition studies for various branches of law, see Spellman and Schauer, 'Law and Social Cognition', in D.E. Carlston (ed.), *Oxford Handbook of Social Cognition* (2013) 829.

<sup>92</sup> On the influence of cognitive socialization and language on the interpretation of international treaties, see Pirker and Smolka, 'The Future of International Law Is Cognitive: International Law, Cognitive Sociology and Cognitive Pragmatics', *20 German Law Journal* (2019) 430, at 437, 446–447. On some interactions between cognitive frames and the interpretation of international law, see Wählisch, 'Cognitive Frames of Interpretation in International Law', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (2015) 331.

<sup>93</sup> One of the significant questions arising in the context of state responsibility is whether a particular state should bear responsibility for a specific harmful event. Attribution theory in cognitive literature concerns how people infer causal explanations for social events and how cultural differences influence interpretations about causality. When seeking to explain reasons for behaviour, individuals may invoke either factors internal to the person or factors existing in the external environment. Research work on 'ultimate attribution error' reveals that people's judgments regarding such causal links are influenced by cultural differences and whether the perpetrator is perceived as an in-group or out-group. Fiske and Taylor, *supra* note 2, at 158, 185, 321; Brewer, *supra* note 22, at 9–11; Morling and Masuada, *supra* note 5, at 436; see also Moskowitz, *supra* note 70, at 233–234; Kunda, *supra* note 4, at 348.

International law commonly regulates behaviour and not mental processes. Though racially discriminatory behaviour is occasionally explicit and intended, it often emerges from the subtle and deeply ingrained socio-cognitive biases discussed above. An effective struggle against racial discriminatory behaviour requires addressing the cognitive infrastructure that feeds and sustains discriminatory behaviour. This study does not suggest adopting international legal prohibition on certain cognitive biases but, rather, some legal strategies that are likely to mitigate such biases in society, national policy-making processes and judicial proceedings. The suggested strategies include the reduction of the impact of racial biases in domestic decision-making processes (by involving people external to the particular ‘optical community’), encouraging people to shift from an automatic to a deliberate mode of thinking regarding other racial groups (by diverse ‘soft’ and ‘hard’ rules) and offsetting existing biases in society by the application of special rules of evidence. The employment of these international legal strategies must, however, first acknowledge the limits and potential of international law in this sphere.

### *A The Limits and Potential of International Law*

The above-discussed studies underscore the limits of international law (as well as many domestic legal systems) in supporting social change in this sphere. Sociologists of law have long emphasized that law is embedded in communities,<sup>94</sup> viewing law as one aspect of the whole social field.<sup>95</sup> The mutual interactions between law and society highlight the fact that meaningful changes in international law are often intertwined with socio-cultural changes.<sup>96</sup> Facing widespread discriminatory beliefs and practices in many societies, sustained by socio-cognitive processes, it would be naive to assume that the mere establishment of additional international legal prohibitions on discrimination is likely to significantly reduce racial discrimination in society.<sup>97</sup> These deeply entrenched biases against disadvantaged racial groups may explain (at least partially) why racial discrimination is relatively stable and resilient to significant changes in numerous societies.

These socio-cognitive studies, however, should not lead to the conclusion that international legal mechanisms cannot mitigate racial discrimination or be involved in a significant social change in the long run. The above literature on the social construction of race and the role of socio-cultural factors in biased cognition indicates that racial discrimination, though widespread, is not inevitable. Social change has been at the heart of sociology since its inception, and the general assumption is that changes occur in all domains of social life. Some social changes result from planned activities, and some are unintended; most often, they are the

<sup>94</sup> R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006), at 117, 161; L. Rosen, *Law as Culture: An Invitation* (2006), at xii; P.S. Berman, ‘The Enduring Connections between Law and Culture’, 57 *American Journal of Comparative Law* (2009) 101.

<sup>95</sup> R. Cotterrell, *The Sociology of Law* (2nd edn, 1992), at 65.

<sup>96</sup> On the limits and potential of domestic law in initiating social changes, see *ibid.*, at 51–58.

<sup>97</sup> On some failures to use legislation to change deeply rooted patterns of social behaviour, see *ibid.*, at 55–56.



outcome of a combination of intended and unintended acts.<sup>98</sup> Existing studies indicate that socio-cognitive changes are possible,<sup>99</sup> and experience shows that discrimination against some social groups (such as women and the lesbian, gay, bisexual, transgender and queer community) has been significantly reduced over the last decades in some societies (though to varying extents in different societies and spheres).<sup>100</sup> Thus, medium- and long-term concerted legal strategies – on the domestic and international levels – are required to cope with the daunting task of reducing racial discrimination.

### ***B International and Domestic Law***

Domestic and international legal rules address various forms of racial discrimination and often complement one another.<sup>101</sup> National anti-discrimination legal rules present certain manifest advantages; prominently, they are better tuned to the specific cultural features of the local populations, are frequently more legitimate and often include central enforcement mechanisms. On the other hand, the above discussion on local harmful cultural features<sup>102</sup> and deeply ingrained biased socio-cognitive processes exposes some of the fundamental weaknesses of domestic legal institutions. Local discriminatory socio-cultural features are often invisible to dominant local groups and decision-makers (*inter alia*, due to ‘automatic’ cognitive processes). Thus, for example, stereotype-driven interpretations may lead domestic governmental officials or judges to interpret local legal rules prohibiting discrimination as inapplicable to particular discriminatory practices against a disadvantaged racial group.

The latent nature of many discriminatory cognitive processes influencing local officials is more likely to be discerned by external actors, and the latter actors (including international institutions) are better positioned to expose such invisible biases, which may lead to the operation of social control mechanisms to pressure domestic actors to better implement the international legal prohibitions on racial discrimination.<sup>103</sup> It is noteworthy, however, that such intervention by an external ‘optical community’ is

<sup>98</sup> G. Ritzer, *Introduction to Sociology* (2nd edn, 2015), at 593ff; J. Weinstein, *Social Change* (2010), at 9–10; J.J. Macionis, *Sociology* (14th edn, 2012), at 561ff.

<sup>99</sup> E.g., Fiske and Taylor, *supra* note 2, at 21; Zerubavel, *supra* note 6, at 27–28, 61.

<sup>100</sup> E.g., HRC, Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, UN Doc. A/HRC/ 35/36, 19 April 2017, para. 32. Patalakh, ‘Promotion of LGBTI Rights Overseas: An Overview of EU and US Experiences’, 8(2) *JANUS.NET, e-Journal of International Relations* (2017) 70, at 76–77.

<sup>101</sup> Thus, for example, ICERD, *supra* note 11, Art. 2(1)(d), requires states to enact domestic legislation to ‘bring to an end’ racial discrimination.

<sup>102</sup> On such harmful cultural practices concerning racial discrimination, see, e.g., all three versions of CERD, Concluding Observations, *supra* note 21, para. 11; Smita, ‘Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective’, 26 *Wisconsin International Law Journal* (2008) 255, at 268, 297ff; Thornberry, *supra* note 13, at 387.

<sup>103</sup> On international social control mechanisms and the prohibition on racial discrimination, see Part 4.D below.



liable to encounter resistance from some local officials and groups,<sup>104</sup> which are often indispensable for attaining a meaningful social change in the local society. Thus, while international legal rules and institutions cannot substitute local ones, they should complement and occasionally serve as a catalyst for change in domestic legal rules and institutions.

### *C Shifting from Automatic to Deliberate Cognitive Processes*

In light of the significant role of automatic cognitive processes in feeding discriminatory practices, international legal measures may aim at supporting a shift from a default automatic mode of thinking to a deliberate one regarding racial groups. People in society are more likely to shift to deliberate cognition (and override stereotypical schemata) when, for example, their attention is attracted to a problem; where they are motivated to do so; their routines are disrupted or they encounter disconfirming information.<sup>105</sup> Thus, governmental bodies, non-state actors and international institutions may be committed (through ‘hard’ or ‘soft’ law) to expose latent discriminatory processes,<sup>106</sup> disseminate information contradicting widely held racially stereotyped beliefs and highlight the harm that discriminatory practices cause to disadvantaged racial groups and society as a whole. For example, international institutions may construct international indices,<sup>107</sup> assessing and comparing the pervasiveness of racially discriminatory beliefs in various societies as well as publicizing prevalent stereotypes sustaining discriminatory practices. If successfully implemented, such measures are likely to bring to the fore the misleading content of racial stereotypes and the societal damage incurred by automatic discriminatory processes; thus, enhancing peoples’ motivation to shift to deliberate thought when interacting with people belonging to disadvantaged racial groups.

### *D Participation of Mass Media in International Regimes*

Racial groups are socially constructed, and non-state actors are often involved in this construction as well as in various biased processes constituting the socio-cognitive infrastructure underpinning racial discrimination.<sup>108</sup> The role of the mass

<sup>104</sup> The significant variations between legal cultures and socio-cultural patterns prevailing in different states present an impediment to the implementation of the international legal strategies suggested below. This difficulty applies to numerous international legal instruments in the sphere of human rights, underlining the vital need to adapt international legal rules to the particular features characterizing local communities and legal cultures. See, e.g., Hirsch, ‘The Sociological Perspective on International Law’, in J.L. Dunoff and M.A. Pollack (eds), *International Legal Theory: Foundations and Frontiers* (forthcoming), at 15–16, available at <https://ssrn.com/abstract=3309114>.

<sup>105</sup> See Parts 3 and 4.C above.

<sup>106</sup> On increasing awareness to hidden discrimination and reduction of discrimination, see Hoff and Walsh, ‘The Whys of Social Exclusion: Insights from Behavioural Economics’, 33(1) *World Bank Research Observer* (2018) 1, at 10–11.

<sup>107</sup> Assessing and comparing racial discriminatory beliefs face measurement difficulties. Some innovative techniques, however, have been devised in this sphere. See, e.g., Pager and Shepherd, *supra* note 16, at 181–186; R.M. Blank, M. Dabady and C.F. Citro (eds), *Measuring Racial Discrimination* (2004), at 71ff.

<sup>108</sup> On the role of private persons in racial segregation, see CERD, General Recommendation 19 on Art. 3 (1995), paras 3–4

media<sup>109</sup> is particularly noticeable in the dissemination of racial stereotypes,<sup>110</sup> but it is also often involved in the formation and diffusion of racially biased perceptions and categorizations.<sup>111</sup>

Direct participation of mass media outlets in multilateral efforts may enhance the effectiveness of the struggle against racial discrimination. The participation of mass media actors in such international regimes is likely to increase the motivation of these influential actors to combat racial discrimination. Negotiations between the representatives of diverse mass media outlets, states and international institutions may result in an agreed set of guidelines balancing between the importance of freedom of expression and the vital need to combat racial discrimination. A discussion on the content of such voluntary codes of conduct exceeds the limits of this study, but it may commit, for example, the mass media actors to a discussion regarding the largely unnoticed racial biases in society and de-emphasizing boundaries between the racial groups.

Publicizing the results of comparative surveys of mass media outlets' activities in this field may exert pressure to curtail publications contributing to socio-cognitive biases. Generally, international social control mechanisms promote compliance with international legal rules embodying international norms.<sup>112</sup> The legal prohibition on racial discrimination expresses a social norm in the international community,<sup>113</sup> and following the publication of comparative surveys in this field, a variety of international actors may pressure the laggard mass media outlets to reduce the publication of items contributing to the cognitive biases feeding discriminatory practices.

<sup>109</sup> On the use of the Internet and social media to propagate racism and racial discrimination, see, e.g., Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doc. A/HRC/26/49, 6 May 2014, paras 13–21.

<sup>110</sup> E.g., Wal, 'Conclusions', in J. ter Wal (ed.), *Racism and Cultural Diversity in the Mass Media* (2002) 46, at 48, 67.

<sup>111</sup> On the role of popular forms of media in constructed conceptions of race, see Brekhus *et al.*, *supra* note 63, at 64. On the mass media and racial stigmas, see, e.g., E. Mykhalovskiy *et al.*, 'Callous, Cold and Deliberately Duplicitous': *Racialization, Immigration and the Representation of HIV Criminalization in Canadian Mainstream Newspapers* (2016), available at <https://ssrn.com/abstract=2874409>. On the role of the media in 'priming', see Aronson, *supra* note 22, at 125.

<sup>112</sup> International social control mechanisms include a broad range of actors providing positive and negative rewards in promoting conformity with international norms. Such measures include, for example, various statements expressing condemnation or praise by significant inter-governmental institutions, states, non-governmental organizations and the international mass media outlets. Hirsch, *supra* note 22, at 167ff.

<sup>113</sup> On the construction and diffusion of the international norm against racial discrimination, see K. Ivanova, *The Life of Norms: A Critical Assessment of the Construction and Diffusion of the Race Anti-Discrimination Norm* (2016), available at [http://etheses.lse.ac.uk/3390/1/Ivanova\\_The\\_life\\_of\\_norms.pdf](http://etheses.lse.ac.uk/3390/1/Ivanova_The_life_of_norms.pdf).

## E Rules of Evidence

International tribunals and semi-judicial bodies may play a role – alongside additional social actors – in supporting a socio-legal change regarding racial discrimination.<sup>114</sup> Rules of evidence functionally operate as a judicial cognitive system, notably filtering in/out some evidence and granting different weight to different items of evidence. Existing rules of evidence regarding the proof of prohibited discrimination have not been clearly regulated in international treaties or jurisprudence,<sup>115</sup> and different human rights tribunals have adopted different standards of proof.<sup>116</sup> Particular rules of evidence may be employed to offset cognitive racial biases existing in some social groups. The previous discussion indicates that, once social classification involving inter-group relations (the ‘us and them’ distinction) prevails in a society, the prospects for discriminatory beliefs and behaviour increase significantly<sup>117</sup> and that some settings are particularly susceptible to racially cognitive biases. For example, people in a state of ‘arousal’ (or in other situations characterized by limited cognitive resources) are more likely to rely on discriminatory stereotypes.<sup>118</sup> Consequently, where international adjudicatory or semi-adjudicatory bodies encounter social settings more vulnerable to such biases (for example, during a major armed conflict or immediately after a natural disaster), it is desirable that they apply a relatively less demanding standard of proof.<sup>119</sup>

## F Standard of Care and Due Diligence Obligations

The above-mentioned studies reveal that discriminatory practices often do not aim to discriminate against other racial group members but, rather, are motivated by positive favouritism towards in-group members.<sup>120</sup> Furthermore, racially biased processes are often performed unconsciously, and discriminatory practices are often subtle and unintentional.<sup>121</sup> Notwithstanding that some legal systems require complainants to show discriminatory intention,<sup>122</sup> the above socio-cognitive patterns support the tendency in international human rights jurisprudence (including the CERD)<sup>123</sup> not to require proving intention as a prerequisite for a legal finding regarding racial discrimination.<sup>124</sup> It

<sup>114</sup> The success of judicial decisions in generating long-term social change is not certain and depends on interactions between diverse social and non-social factors. This complex issue exceeds the limits of this study but see, e.g., D.L. Horowitz, *The Courts and Social Policy* (1977), at 22–38; Cotterrell, *supra* note 95, at 225–243; Friedman, ‘Litigation in Society’, 15 *Annual Review of Sociology* (1989) 17, at 25–27.

<sup>115</sup> Henrard, *supra* note 13, at 16.

<sup>116</sup> E.g., Silverstone *et al.*, *supra* note 14, at 110.

<sup>117</sup> See Part 2 above.

<sup>118</sup> See Part 4.B above.

<sup>119</sup> Adjudicators are also exposed to various biases prevalent in their respective societies (including racial ones), and some socio-cognitive strategies, which are addressed in Parts 4.D and 6.B above as well as this subsection, can also be pertinent to judges.

<sup>120</sup> See Part 2 above.

<sup>121</sup> See Part 4.E above.

<sup>122</sup> Moeckli, Shah and Sivakumaran, *supra* note 12, at 166; Silverstone *et al.*, *supra* note 14, at 71.

<sup>123</sup> CERD, General Recommendation no. 19, 47th Session (1995), para 3; Thornberry, *supra* note 13, at 114.

<sup>124</sup> C.F.J. Doebbler, *The Principle of Non-Discrimination in International Law* (2007), at 33; W. Schabas, *The European Convention on Human Rights: A Commentary* (2015), at 566.

should be emphasized that the justification<sup>125</sup> here does not relate to difficulties in proving intent but, rather, to the absence of discriminatory intent in many cases of racially discriminatory practices.

The more appropriate standard of care is expressed in the principle of 'due diligence',<sup>126</sup> and states' obligations in this sphere constitute 'obligations of conduct' (rather than 'obligations of result').<sup>127</sup> Generally, treaties' provisions regarding racial discrimination require states to refrain from racial discrimination<sup>128</sup> and employ adequate positive measures to prevent racial discriminatory practices undertaken by non-state actors.<sup>129</sup> In light of the flexible nature of the due diligence principle,<sup>130</sup> it is desirable that international supervisory bodies<sup>131</sup> adopt interpretative instruments elaborating on states' commitments aimed at addressing the socio-cognitive infrastructure of racial discrimination. With regards to governmental decisions affecting disadvantaged racial groups, it is advisable that such an interpretative instrument include some bias-reduction procedures, including mandatory participation of people external to the particular dominant group's 'optical community' in the decision-making process (preferably members belonging to the disadvantaged group). Such 'external' members may turn attention to certain facts or a different interpretation of some facts often unnoticed by members of a homogenous community.

With respect to states' due diligence obligations regarding private parties' activities, the need to address certain socio-cognitive processes before they culminate in discriminatory behaviour suggests that some positive obligations included in anti-discrimination treaties (such as Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination)<sup>132</sup> should be interpreted expansively.<sup>133</sup> It is also desirable that an interpretative instrument would elaborate on governments' duties regarding private parties, such as obligations to monitor racial biases prevailing in society and to actively refute racial stereotypes disseminated by non-state actors.

<sup>125</sup> The standard of care suggested here applies to judicial, supervisory and monitoring bodies.

<sup>126</sup> This standard is also supported by ICERD, *supra* note 11, Arts 2(1), 2(1)(d).

<sup>127</sup> E.g., Study Group on Due Diligence in International Law, 'First Report', 76 *International Law Association Report Conference* (2014) 947, at 964.

<sup>128</sup> E.g., ICERD, *supra* note 11, Arts 2(1)(a), (b).

<sup>129</sup> E.g., *ibid.*, Arts 2(1)(d), 4, 7.

<sup>130</sup> On the growing trend to recognize due diligence obligations as constituting 'indirect responsibility' in international law, see J. Kulesza, *Due Diligence in International Law* (2016), at 159–160.

<sup>131</sup> On the jurisprudence of global and regional human rights tribunals regarding state's obligations to exercise due diligence to prevent violations of human rights, see Marks and Azizi, 'Responsibility for Violations of Human Rights Obligations', in J. Crawford *et al.*, (eds), *The Law of International Responsibility* (2010) 725, at 728–732.

<sup>132</sup> ICERD, *supra* note 11, Art. 7, binds state parties, *inter alia*, to adopt measures in the fields of culture and information.

<sup>133</sup> *Ibid.*, Art. 4, also addresses some issues relating to discriminatory beliefs (mainly regarding theories of superiority). CERD, General Recommendation no. 15 on Article 4 (1993), and CERD, General Recommendation no. 7 Relating to the Implementation of Article 4 (1985), however, do not address this issue.

## 6 Concluding Remarks

Cognitive sociology underlies the idea that socio-cultural factors affect cognitive processes. Consequentially, processing information varies cross-culturally, historically and within social groups. Cultural beliefs are involved in discriminatory cognitive processes and are significantly involved in non-compliance with international legal obligations prohibiting racial discrimination. Social groups influence their members, for instance, to classify other people according to their 'race', overestimate differences *vis-à-vis* other racial groups and attribute stereotyped traits to people belonging to other racial groups. Such socio-mental lenses do not only reflect cultural patterns prevailing in a particular society but also constitute a cognitive infrastructure facilitating and fuelling discriminatory practices against disadvantaged racial groups. Understanding the socio-cultural dimension of biased cognitive processes may not only shed light on the daunting obstacles faced by the fight against racial discrimination but also generate some proposals regarding international legal strategies that may address the socio-cognitive infrastructure underpinning racial discrimination. The proposed measures aim at influencing societal attitudes towards disadvantaged racial groups (for example, concerning the participation of the mass media in international regimes and encouraging a shift from automatic to deliberate cognitive processes) as well as adjudicatory or semi-adjudicatory proceedings (for example, concerning rules of evidence and standard of care). The strategies suggested above are not expected to eradicate racial discrimination within a short or medium time frame; however, they may well raise awareness to largely invisible socio-cognitive biases, exert social pressure to address these issues and mitigate racial discrimination.