

# A Business Case for Disability Human Rights?

Assessing affirmative action measures as a tool for enhancing the right to work  
and employment of persons with disabilities

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## Abbreviations

BHR	Business and Human Rights
CCRPD	Committee on the Rights of Persons with Disabilities
CDPF	China Disabled Persons' Federation
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
DPEA	Austrian Disabled People Employment Act
Framework	Protect, Respect and Remedy-Framework
GC	General Comment
GDP	Gross Domestic Product
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LPDP	Law on the Protection of Disabled Persons
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
ONEP	National Employment Office

ÖAR	Austrian Working Group on Rehabilitation
SRSG	Special Representative of the Secretary-General, Prof. John Ruggie
Standard Rules	UN Standards Rules on the Equalization of Opportunities for Persons with Disabilities
Thematic Study	Office of the High Commissioner for Human Rights' Thematic Study on the Work and Employment of Persons with Disabilities
UDHR	Universal Declaration of Human Rights
UNGPs	UN Guiding Principles on Business and Human Rights
UN	United Nations
US	United States of America
WKÖ	Austrian Economic Chamber
WPA	World Programme of Action Concerning Disabled Persons
WRD	World Report on Disability

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# 1 Introduction

Throughout history, persons with disabilities have been among the most politically marginalized and economically impoverished members of society.<sup>1</sup> Although types of disabilities differ, most people living with a disability share the common experience of being exposed to various forms of discrimination and social exclusion. Given their ongoing marginalization, continuous efforts to secure the human rights of persons with disabilities should be at the heart of the international human rights enterprise.

This thesis explores the value of affirmative action as a tool to further the human rights of persons with disabilities in the work environment. Particularly, it seeks to examine the impact of such measures on disabled people's right to work and employment in the open labour market. A rights-based perspective on persons with disability is comparatively new.<sup>2</sup> While the international approach to disability has traditionally been dominated by the medical model, the field has undergone a gradual shift towards a rights-based approach to disability, culminating 2006 in the adoption of the Convention on the Rights of Persons with Disabilities (CRPD).

Notwithstanding this paradigm shift, the rights of people with disabilities are still systematically violated. The lack of employment opportunities is one of the main impediments to the social inclusion and economic well-being of persons with disabilities. Although the right to work and employment is guaranteed in Article 27 CPRD, disabled persons' acceptance in a work environment that is open, inclusive, and accessible remains the exception rather than the rule.

In order to enhance the access of persons with disabilities to the mainstream labour market, states are not only obliged to employ a number of measures but also to ensure their observation, including by non-state actors.<sup>3</sup> Although the disability treaty takes the traditional

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<sup>1</sup> Stein (2007) p.121.

<sup>2</sup> Quinn/O'Mahoney (2012) p.265.

<sup>3</sup> Art.27 CRPD.



state-centered approach of international human rights conventions, the CRPD recognizes the fact that the fulfillment of disability rights, particularly the right to work and employment, heavily depends on private-sector implementation. The convention thus mirrors the international community's increasing recognition of the human rights obligations of non-state actors, most notably acknowledged in the form of the UN Guiding Principles on Business and Human Rights (UNGPs), which promote the "shared responsibilities" of states and non-state actors for giving effect to disability human rights.

In order to implement the right to work, states are not only obliged to expressly prohibit discrimination in the work environment but also to employ positive measures to increase the participation of persons with disabilities in employment.<sup>4</sup> As opposed to anti-discrimination measures, affirmative action is a group-based remedy, which aims at redressing the effects of a discriminatory society by correcting the position of members of the targeted group in order to obtain effective equality.<sup>5</sup> However, since affirmative action is both welcomed as a means to further the rights of marginalized groups and opposed because of its perceived unfairness, whether affirmative action measures are an appropriate tool to address disparities in employment rates remains contentious.<sup>6</sup>

In any case, while affirmative action measures have been largely discussed in relation to racial or gender discrimination, the impact of these measures on the right to work of persons with disabilities has rarely been explored. Furthermore, the debate is largely lacking empirical evidence on the potential of affirmative action to enhance employment of persons with disabilities. Given this lacuna, the thesis takes up the topic of disability rights and affirmative action, assessing the potential of affirmative action measures for enhancing the access of persons with disabilities to the open labour market. In view of the importance of private employers for providing work and the emerging business and human rights (BHR) paradigm, the thesis looks at the interplay between the UNGPs and the disability covenant

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<sup>4</sup> Art.27 CRPD.

<sup>5</sup> Heyer (2005) p.240.

<sup>6</sup> Cf. Ginsburg/Merritt (1999) p.281.

and examines the shared responsibilities of states and non-state actors in relation to affirmative action. Finally, the thesis concludes on the question whether there is a business case for disability human rights.

Consequently, this thesis seeks to respond to the following research question: *What is the impact of affirmative action measures on the right to work and employment of persons with disabilities?* In order to answer this question, the thesis addresses the following subquestions throughout: (1) *What are the reasons for the persisting low employment rate of persons with disabilities?* (2) *What is required of states and non-state actors respectively to remedy the low employment rate?* (3) *Do states and non-state actors comply with affirmative action employed to enhance work and employment for persons with disabilities?* And finally, (4) *how can these actors be informed by the shared responsibilities approach of the business and human rights paradigm?*

## **1.1 Methodology**

In order to address the research question, the thesis is roughly divided into two parts. The first part constitutes a conceptual analysis, reviewing existing theory and research in the area of affirmative action and employment of persons with disabilities. The conceptual analysis of the relevant developments in the right to work of disabled people and affirmative action acts as the backcloth to the empirical impact analysis which is to follow. The thesis is multidisciplinary, applying a socio-legal approach to the question of affirmative action and the right to work of persons with disabilities. Including both a legal and a social science perspective, the thesis looks at the *law in context* (as opposed to *black letter law*) because affirmative action for persons with disabilities is embedded in socio-economic contexts and its impact can hardly be assessed through legal analysis alone. For example, while the United States (US) has interpreted disability discrimination as a civil rights issue, other states such as Germany or Austria have established positive measures in accordance

with their more pronounced history of a welfare state. As a result, affirmative action measures are received in contrasting ways and have differing impacts in these contexts.<sup>7</sup>

The conceptual part of the thesis is conducted through a desk study, and relies foremost on an examination of legal sources and existing scholarly writing on the relevant topics. As primary sources, the thesis uses legal instruments such as international human rights treaties or jurisprudence from related treaty bodies. Given its status as the currently most relevant legal instrument in the field of disability rights, the CRPD will have a particularly prominent role in the thesis. Similarly, in view of their authoritative status within the UN system, the UNGPs will be the main focus in assessing the obligations of private corporations.<sup>8</sup> While these instruments provide an overview over the concept and status of the right to work and affirmative action, other legal instruments such as non-binding declarations and statements will be included to give a more comprehensive picture.

In addition to the primary sources, the thesis builds on writings by relevant legal scholars and other social scientists. Given the recentness of both the CRPD and the UNGPs, available scholarly literature on disability rights and affirmative action, particularly with regard to private sector obligations, is relatively scarce. The selection of the literature is, furthermore, a choice and therefore selective. However, in order to obtain reliable and objective data, the thesis features mostly literature from peer-reviewed journals and books which have been evaluated and quality controlled. The literature is scrutinized for potential conflicts of interest, bias, one-sidedness and exaggerations, and I am alert to scholars' implicit theories and paradigms. Furthermore, the literature's accuracy is ensured by including the most recent studies on the relevant subject areas.

The second part of the thesis constitutes an empirical analysis of the impact of affirmative action on the right to work and employment of persons with disabilities. The empirical part is similarly based on a desk analysis, reviewing official documents deriving from the UN,

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<sup>7</sup> Cf. Heyer (2005).

<sup>8</sup> Cf. Ruggie (2014) p.1.

states or private organizations, and virtual outputs, such as web sources. As starting point, I go through the 26 currently existing concluding observations of the Committee to the CRPD (CCRPD or Committee) to obtain a general overview of affirmative action in state parties. The CCRPD represents the most authoritative international review on whether states comply with the right to work under Article 27 CRPD and other relevant treaty provisions. Hence, the concluding observations provide concrete and empirical information, and are considered valuable data for the thesis to build on. The findings of the concluding observations serve as the basis for further research. Out of the state parties assessed by the CCRPD, four states (Argentina, Austria, China and Tunisia) are selected for a more detailed impact analysis. These countries have been selected because they present both a geographical variety and different income levels.<sup>9</sup> Furthermore, in order to assess the impact, selected states have some sort of affirmative action in place. However, the selection is limited in two important ways: First, only state parties to the CRPD are among the selected; important non-ratifiers such as the US are thus excluded. Second, only state parties which have already been reviewed by the Committee are examined. To date, only 26 out of the 153 state parties to the disability convention have been reviewed by the CCRPD.<sup>10</sup>

For the examination of the selected states, I start by analyzing state reports in order to identify relevant policies (such as national action plans or disability employment acts) on affirmative action, particularly in the private sector, and their potential impacts. These findings are then addressed in the context of business with the help of data from civil society reports, inter-governmental organizations, corporate actors, and the findings from existing scholarly writings. The impact of affirmative action measures is examined with regard to whether they produce positive outcomes in terms of increased employment of disabled persons. While quantitative data can provide statistical figures on possible impact, this methodological approach is unable to give a more complete picture of affirmative action. Ac-

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<sup>9</sup> Income levels according to the World Bank. Note: To date, no low-income country has been reviewed by the Committee (as of 04.05.2015).

<sup>10</sup> As of 05.05.2015.

cordingly, a qualitative analysis of the provided numbers is necessary to assess the nature of the employment enhanced through positive measures.

Due to time restraints, I have chosen not to conduct interviews, but mainly rely on document analysis to bring forth an overview of the state of affirmative action and disability employment. Since information is collected through a variety of sources such as UN documents as well as state party and civil society reports, it is important to keep in mind that these documents do not feature a similar level of objectivity and qualitative control mechanisms as professional and peer-reviewed articles. Hence, precautions must be taken when regarding these documents as representations of reality. In order to enhance their objectivity and accuracy, these documents are interpreted by having in mind both the context in which they were produced and their implied readership. Furthermore, I seek to rule out potential bias and conflict of interests by double-checking information with documentation and support from other sources. Finally, I am also aware that, through data interpretation, I am providing my own spin on the written documents. As a non-disabled person, I thus need to be particularly conscious about potential personal biases when researching the experience of persons with disabilities.

Notwithstanding the precautions taken, the thesis suffers from several limitations. Since statistical data on disability and employment is scarce and often outdated, a quantitative approach could have further informed the challenging qualitative impact assessment. In the case of China and Tunisia, the availability of data is also reduced by a personal language barrier. Furthermore, since information from the private sector is often not available to the public, there is limited access to data on disability employment from business. Accordingly, qualitative interviews could have provided valid additional data, particularly in the private sector. However, in spite of these limitations, the findings provided by the thesis are nevertheless indicative, thereby making a valuable contribution to the academic discussion.

## **1.2 Thesis outline**

The thesis is structured into seven main chapters. While chapter one presents the topic, methodology and purpose of the thesis, chapter two proceeds to introducing the emergence of disability rights. Starting out by briefly describing the historic marginalization of persons with disabilities, it continues to present the paradigm shift from the medical to the social model of disability and its reflection in the international human rights system, including in the CRPD. Chapter three outlines the right to work of persons with disabilities. First, it introduces reasons for the low employment rate of disabled persons, and then it turns to the right to work as a human right, examining its rationale and codification in international human rights law. The chapter ends by shifting the view to the potential duty-bearer's side, introducing a business perspective on the right to work.

Chapter four takes a closer look at the notion of shared responsibilities, beginning with an analysis of states' obligations in relation to the right to work, and then turning to the responsibilities of non-state actors. Chapter five introduces affirmative action as a measure for implementing the right to work of persons with disabilities, presenting its rationale, forms and controversies and briefly introducing the CCRPD's view on these measures. Chapter six empirically explores the impact of affirmative action measures on the right to work of persons with disabilities in four different countries. It identifies the measures employed by states and analyzes compliance with such measures, particularly in the private sector. Chapter seven is the research question revisited, drawing a conclusion on the impact of affirmative action measures and providing an outlook on future developments in this field.

## **1.3 Aim and purpose**

By focusing on the right of persons with disabilities to be employed in an open, inclusive and accessible work environment, including in the private sector, and the role of affirmative action measures in advancing this right, the thesis attempts to close an existing research gap. Despite the fundamental importance of the business sector for guaranteeing the right to work, disability and BHR is a rather neglected field in the study of disability human

rights. The thesis attempts to complement the existing literature on disability and poverty, and disability and development, and consolidates the topic of disability rights with the emergent field of BHR.

The interest for this topic stems from a personal experience of seeing people with disabilities failing to get their due share of attention. Although it is argued that the CRPD enhances the visibility of persons with disabilities within the international human rights system,<sup>11</sup> disabled persons were largely absent from the UN Forum on Business and Human Rights in December 2014, in which I took part. This deficiency seems to reflect a more general absence of disability from the BHR agenda. In my opinion, this under-representation of disability in the emergent BHR paradigm is particularly curious in the light of the importance of the private sector for mainstreaming persons with disability into the labour market.<sup>12</sup> In view of this lack, the thesis pursues a twofold aim: First, it attempts to contribute to the literature on disability human rights and the implementation of the recently enacted CRPD. In assessing affirmative action measures, it attempts to increase the knowledge on the convention's potential for improving the lives of persons with disabilities, particularly in the work environment. Second, it seeks to close a research gap in the field of BHR by introducing the role of private corporations in furthering the rights of persons with disabilities in general, and more specifically, their right to work and employment. The thesis thus also contributes to the growing literature on the human rights obligations of non-state actors.<sup>13</sup>

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<sup>11</sup> Quinn/O'Mahoney (2012) p.275.

<sup>12</sup> Cf. Kayess/French (2008) p.30.

<sup>13</sup> Cf. Stein/Stein (2014) p.1236.

## 2 The emergence of disability rights

Throughout history, persons with disabilities have been among the most socially and politically excluded and economically impoverished members of society.<sup>14</sup> There are currently more than one billion people living with a disability, many of whom face poorer health, lower education, less economic participation and higher rates of poverty than people without disabilities.<sup>15</sup> The prevalence of disability is expected to be rising in the future, due to the aging populations' higher risk of disability and with global terrorism and counter-terrorism as a worrying source of disability.<sup>16</sup> The negative effects of economic inequities and social exclusion on persons with disabilities are mutually reinforcing: Not only does disability add to the risk of poverty but conditions of poverty also add to the risk of disability.<sup>17</sup> Accordingly, ensuring the human rights of persons with disabilities as one of the most marginalized groups should be at the heart of the international human rights agenda.

However, persons with disabilities have largely been denied their fundamental human rights. Under the predominant medical model, persons with disabilities have been treated as objects of charity rather than holders of rights. The following sections will address the philosophical shift in the perception of disability from the medical to the social model, and describe its gradual reflection and incorporation into the international human rights framework. This step-wise incorporation culminated 2006 in the adoption of the CPRD as the first international disability-specific treaty. The last section of the chapter describes the CRPD as an attempt to remedy the historic gap in the protection of disability rights.

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<sup>14</sup> Stein (2007) p.121.

<sup>15</sup> WHO (2011) p.xi.

<sup>16</sup> Ibid; Rehmann (2011) p.601.

<sup>17</sup> Stein/Stein (2007) p.1203.



## 2.1 From the medical model to a rights-based approach

The prevalent paradigm for considering disability has not always been universal human rights. Under the predominant medical model, persons with disabilities have been perceived as diseased, handicapped, or even sub-human, neither worthy of the recognition as a dignified human being nor of the protection of human rights.<sup>18</sup> The medical model puts the emphasis on impairment and implies that persons with disabilities are in need of medical attention or medical solutions. This model has largely influenced the way how disability is to be understood, not only in the medical field, but also in other social and political areas.<sup>19</sup> Under the medical model, the limitations encountered by a person with disabilities are viewed as inherent, and the social and political exclusion of persons with disability is perceived as something natural, stemming directly from that inherent handicap.<sup>20</sup>

As a result of the medical model, persons with disabilities have been perceived and treated as holders of charity rather than holders of rights. Moreover, persons with disabilities have not only been treated as objects of pity, but also as burdens on their families and society as a whole. As Kayess and French note, the implied mandate to “cure” sets the focus on medically treating persons with disabilities, changing *them* in order to facilitate their participation in mainstream society.<sup>21</sup> Given its focus on “fixing” persons with disabilities, the medical model does not recognize the fact that a person with disability has the capacity to live a fulfilling life *with* that disability.<sup>22</sup> As a result of the medical model, society has generally tended not to invest in persons with disabilities, leaving them with little more than unfilled potential and segregation.<sup>23</sup>

The disabling feature of the medical model started being recognized in the 1970s, when the disability rights movement established its reinterpretation of disability as social oppres-

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<sup>18</sup> Harpur (2012) p.10; Mégrèt (2008) p.500.

<sup>19</sup> Rehman (2010) p.601.

<sup>20</sup> Stein/Stein (2007) p.206.

<sup>21</sup> Kayess/French (2008) p.5.

<sup>22</sup> Harpur (2012) p.2.

<sup>23</sup> Quinn/O'Mahoney (2012) p.293; Lawson (2007) p.571.

sion.<sup>24</sup> Proponents of the resulting “social model”, such as Oliver, established a separation between disability and impairment, demonstrating that it is not a person’s impairment that makes them disabled but the way in which society is structured, which only makes that an impairment becomes disabling.<sup>25</sup> Under this new paradigm, the disabling force is seen in the social reactions of the larger society to persons with disabilities rather than in the bodily impairment.<sup>26</sup> Accordingly, persons with disabilities are no less capable of performing social functions than non-disabled people are.<sup>27</sup> Locating disability in the social environment implies a need for taking action to dismantle the social and physical barriers to the inclusion of persons with disability.<sup>28</sup>

However, the exclusive focus on social and environmental factors has similarly been objected by scholars of critical disability studies. Shakespeare, while agreeing on the separation between disability and impairment, notes that the actual impairment should not be ignored because pain and other difficulties do sometimes affect and prevent the participation of persons with disabilities.<sup>29</sup> Similarly, the newly emergent disability human rights paradigm, while building on the social model, incorporates the specific experience of persons with disabilities and accepts impairment as a manifestation of human diversity, establishing the value of all persons based on their inherent dignity.<sup>30</sup> Disability, under the human rights paradigm, is considered a universal variation rather than an aberration, and measures should attempt to provide persons with disabilities the possibility to fully develop their capacities. The following section will address how the international human rights system has accompanied this paradigm shift.

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<sup>24</sup> Kayess/French (2008) p.6.

<sup>25</sup> Oliver (1990) p.11; see also Harpur (2012) p.3.

<sup>26</sup> Reid-Cunningham (2009) p.104.

<sup>27</sup> Stein (2007) p.87.

<sup>28</sup> Kayess/French (2008) p.6; Lawson (2007) p.573.

<sup>29</sup> Shakespeare (2006); see also Albin (2015) p.72.

<sup>30</sup> Stein (2007) p.77; Kayess/French (2008) p.6.

## 2.2 Disability rights in international instruments

Disability rights have long been a missing piece in the international human rights framework.<sup>31</sup> Although the undeniable application of conventional human rights to persons with disabilities, disabled people have for some reason been left behind.<sup>32</sup> Thus, although each of the core UN treaties applies to disabled persons in theory, they are rarely applied in practice.<sup>33</sup> The following subsections will first address the issue of disability in conventional human rights and then turn to the emergence of disability-specific soft law instruments.

### 2.2.1 Disability rights in international human rights treaties

Before the adoption of specific instruments, persons with disabilities have been protected by the general human rights regime, made up of the Universal Declaration of Human Rights (UDHR) and the core UN human rights treaties. The UDHR, often designated as a milestone and starting point for the modern human rights system, famously states in its Article 1 that “[a]ll human beings are born free and equal in dignity and rights.” The emphasis on *all* human beings clearly encompasses persons with disabilities. Similarly, despite the fact that, with the exception of the Convention on the Rights of the Child (CRC), disability is not specifically mentioned in the core human rights treaties, these conventions are nonetheless universal in their scope and technically include all persons with disabilities.<sup>34</sup>

Given the absence of specific disability reference in international human rights law, persons with disabilities largely remained invisible within the UN system.<sup>35</sup> For example, none of the equality clauses of the International Bill of Rights mentions persons with disabilities as a protected category.<sup>36</sup> As an illustration, in the non-discrimination clause in article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), disabil-

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<sup>31</sup> Kayess/French (2008) p.12.

<sup>32</sup> Lawson (2007) p.564; Mégrèt (2008) p.497.

<sup>33</sup> Stein (2007) p.79.

<sup>34</sup> Ibid, p.81.

<sup>35</sup> Anderson et al (2012) p.19.

<sup>36</sup> Kayess/French (2008) p.12.

ity is not explicitly referred to as a prohibited ground. Rather, disability is encompassed by the notion of “any other status”.<sup>37</sup> Consequently, in their reports to treaty bodies, state parties have devoted very little attention to the issue of the rights of persons with disabilities.<sup>38</sup> Moreover, the majority of state parties focused in their reports on issues of welfare and protection rather than on participation and equality.<sup>39</sup> As an attempt to draw attention to the rights of persons with disabilities, the Committee to the ICESCR (CESCR) reviewed and emphasized in its General Comment (GC) No. 5 “some of the ways in which issues concerning persons with disabilities arise in connection with the obligations contained in the Covenant.”<sup>40</sup> However, the CESCR remained one of only a few treaty bodies to adopt a GC on the issue of human rights and disability.<sup>41</sup>

The assertion of human rights being the same for all is both helpful and insufficient.<sup>42</sup> In practice, the legal obligations under the existing human rights treaties rarely applied to persons with disabilities, because these instruments were not designed to address the specific needs encountered by disabled people.<sup>43</sup> In the light of the continuous absence of express reference to disability under hard law, a number of resolutions, declarations, and protocols explicitly referring to disability emerged from the 1970s on.<sup>44</sup> As soft law, these instruments are, however, not legally enforceable.

### 2.2.2 Disability-specific soft law instruments

Although the recognition of disability as a human rights issue has developed gradually from the 1970s, early instruments still tend to reflect the medical model of disability.<sup>45</sup> The enactment of the Declaration on the Rights of Mentally Retarded Persons in 1971 and the

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<sup>37</sup> Art.2(2) ICESCR.

<sup>38</sup> CESCR/GC/5, para.2.

<sup>39</sup> Quinn/Degener (2002) p.53,82.

<sup>40</sup> CESCR/GC/5, para.2.

<sup>41</sup> The other treaty bodies are the Committee to the CRC adopting GC 9 on the rights of children with disabilities and the Committee to the CEDAW with general recommendation 18 on the issue of disabled women.

<sup>42</sup> Mégrèt (2008) p.497.

<sup>43</sup> Anderson et al (2012) p.10.

<sup>44</sup> Stein/Stein (2014) p.1238.

<sup>45</sup> Kayess/French (2008) p.14.

Declaration on the Rights of Disabled Persons in 1975 presented the first step towards recognizing persons with disabilities as subjects of international human rights law.<sup>46</sup> While still being influenced by the medical approach, they are nonetheless a first acknowledgment of the inherent equality of persons with disabilities.<sup>47</sup>

The United Nations proclaimed the year of 1981 as the International Year of the Disabled, establishing the right of persons with disabilities to take fully part in their societies, including to enjoy living conditions equal to those without disabilities, and to have an equal share in improved conditions resulting from socio-economic development.<sup>48</sup> The adoption of the World Programme of Action Concerning Disabled Persons (WPA) a year later marked the beginning of the shift away from the medical model.<sup>49</sup> Clearly inspired by the notion of “equalization of opportunities”,<sup>50</sup> the WPA acknowledges the social model of disability, stating that “it is largely the environment which determines the effect of an impairment or a disability on a person's daily life.”<sup>51</sup> In this line, the WPA promotes positive measures, including quota-levy systems, reserved employment or financial incentives for achieving the equalization of opportunities of persons with disabilities.<sup>52</sup> However, the aims of disability prevention and rehabilitation in the WPA still reflect the traditional ones found in the medical model.<sup>53</sup>

The succeeding period was named the International Decade of Disabled Persons (1983-1992), and was characterized by a thorough acknowledgment of the social and political environment as a determinant in the effect of impairment on a person's life. At the end of the International Decade in 1993, the international community adopted the UN Standard

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<sup>46</sup> 1971 Declaration; 1975 Declaration; see also Kayess/French (2008) p.14.

<sup>47</sup> Stein (2007) p.88.

<sup>48</sup> WPA, para.3; see also Anderson et al (2012) p.21.

<sup>49</sup> Kayess/French (2008) p.15.

<sup>50</sup> WPA, para.12: “Equalization of opportunities” is defined as “the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and *work opportunities*, cultural and social life, including sports and recreational facilities, are made accessible to all” (emphasis added).

<sup>51</sup> Ibid, para.21.

<sup>52</sup> Despouy (1993) para.240.

<sup>53</sup> Anderson et al (2012) p.21.

Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules), arguably the most significant soft law instrument relating to persons with disabilities.<sup>54</sup> The Standard Rules highlight the equality of persons with disability, shifting the perspective from prevention and rehabilitation to human rights.<sup>55</sup> The Standard Rules define disability as a byproduct of social construction, underscoring the need to change societal misconceptions about persons with disability to support their inclusion.<sup>56</sup> The universality of human rights has also been reaffirmed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993, stating once again that persons with disabilities are entitled to all human rights enjoyed by others.<sup>57</sup>

However, the overall impact of these soft law instruments has been limited.<sup>58</sup> In his report, Leandro Despouy, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, cited continuous widespread human rights abuses in the area of disability. He further commented on the fact that, as opposed to other vulnerable groups, persons with disabilities did not have the protection under a thematic human rights treaty and its respective monitoring body.<sup>59</sup> Thus, notwithstanding the above-mentioned developments, there clearly remained a need to continue the efforts for mainstreaming disability into the existing UN human rights machinery. The enactment of the CRPD as a legally binding instrument for the protection of disability rights is the international community's attempt to close the gap in the protection of persons with disabilities.

### **2.3 The adoption of the CRPD: embracing the disability rights paradigm**

The CRPD is the first binding international instrument explicitly addressing the human rights of persons with disabilities.<sup>60</sup> The enactment of the disability treaty indicated a sig-

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<sup>54</sup> Stein/Stein (2014) p.1239.

<sup>55</sup> Anderson et al (2012) p.23.

<sup>56</sup> Standard Rules, Rule 1 and 4; see also Stein (2007) p.89.

<sup>57</sup> VDPA, para.63-64.

<sup>58</sup> Kayess/French (2008) p.16; Lawson (2007) p.582; Ingstad/Whyte (1995) p.246.

<sup>59</sup> Despouy (1993).

<sup>60</sup> Harpur (2012) p.4.

nificant shift in how the international community is willing to rethink the human rights protection afforded to persons with disabilities.<sup>61</sup> The CRPD is a comprehensive human rights treaty, combining civil and political rights with economic, social and cultural rights, thereby overcoming the traditional division.<sup>62</sup> In principle, the treaty does not introduce new rights but applies existing human rights to the particular circumstances of persons with disability.<sup>63</sup> The CRPD attempts to remedy the historic invisibility of disability, making sure that existing human rights are applied to persons with disabilities.<sup>64</sup>

However, the disability convention not only restates existing human rights, but also reformulates these rights, making it clear how they should be applied to persons with disabilities.<sup>65</sup> As Mégrèt points out, the convention suggests that there is something specific in the experience of persons with disabilities, which cannot adequately be taken into account by general human rights instruments.<sup>66</sup> International human rights treaties are necessarily expressed in a high degree of abstraction. As a result, they often fail to provide adequate guidance on the implementation of their rights, leaving substantial scope for interpretation to states.<sup>67</sup> However, since rights may mean different things for different actors, certain rights can only be fully realized if their content and implementation is defined narrowly in the treaty itself.<sup>68</sup> In order to ensure that its rights are realized, the CRPD creates incidental rights, thereby providing existing rights with greater clarity.<sup>69</sup> By significantly prolonging a number of existing rights, the Convention even comes close to creating new rights, inherent in the experience of disability and specific to persons with disabilities.<sup>70</sup>

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<sup>61</sup> Stein (2007) p.85.

<sup>62</sup> Quinn/O'Mahoney (2012) p.268.

<sup>63</sup> Kayess/French (2008) p.20.

<sup>64</sup> Quinn/O'Mahoney (2012) p.275.

<sup>65</sup> Mégrèt (2008) p.503.

<sup>66</sup> Ibid, p.497.

<sup>67</sup> Stein (2007) p.97; Harpur (2012) p.5.

<sup>68</sup> Mégrèt (2008) p.515.

<sup>69</sup> Harpur (2012) p.2.

<sup>70</sup> Mégrèt (2008) p.498.

The CRPD is a reflection and clearly influenced by the rights-based approach to disability.<sup>71</sup> Building upon the social model, the CRPD recognizes disability as an evolving concept which “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”<sup>72</sup> While the Standard Rules still put the focus on “different functional limitations occurring in any population”,<sup>73</sup> the CRPD includes under the notion of persons with disabilities “those who have long-term physical, mental, intellectual or sensory impairments which *in interaction with various barriers* may hinder their full and effective participation in society on an equal basis with others” (emphasis added).<sup>74</sup> The CRPD thus differs from earlier UN instruments in the way that, with one very limited exception, it does not refer to the prevention or treatment of mental or physical impairment.<sup>75</sup> By formally recognizing the fact that society needs to change to include persons with disabilities, not vice versa, the CRPD provides a framework for interpreting disability human rights in a way that maximizes social inclusion.<sup>76</sup>

Despite its obvious achievements and innovative characteristics, the CRPD retains some of the regular flaws of conventional human rights treaties. In the absence of meaningful enforcement mechanisms other than the monitoring bodies, the implementation of treaties depends on the willingness of national governments.<sup>77</sup> Since it is questionable how much impact the CRPD will have as one more convention in the presence of many existing and unimplemented instruments, this thesis explores the potential of the disability covenant and its monitoring body for advancing the rights of persons with disabilities in the work environment. The following chapter will take a closer look at the right to work, and return to the CRPD when addressing the right to employment of persons with disabilities under Article 27 of the convention.

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<sup>71</sup> Kayess/French (2008) p.3.

<sup>72</sup> Preamble section (e) CRPD.

<sup>73</sup> Standard Rules, para.17.

<sup>74</sup> Art.1(2) CRPD.

<sup>75</sup> Kayess/French (2008) p.24.

<sup>76</sup> Harpur (2012) p.5;11.

<sup>77</sup> Umeasiegbu et al (2013) p.58f.



### 3 The right to work

While persons with disabilities have often been denied the full range of economic, social and cultural rights, the effects of disability-based discrimination have been particularly prominent in the field of employment.<sup>78</sup> The lack of employment opportunities significantly contributes to the fact that many of the one billion people living with a disability are impoverished.<sup>79</sup> Although a high percentage of persons with disabilities are able and willing to work, both developing and developed countries present persisting low employment rates for persons with disabilities.<sup>80</sup>

In general, statistical data on the employment situation of persons with disabilities is scarce and often outdated. Furthermore, since non-working people who do not actively look for jobs are not included, data often do not give a comprehensive picture of the employment and unemployment of people with disabilities.<sup>81</sup> Differing definitions of disability within and across countries additionally contribute to the inaccuracy of data.<sup>82</sup> Nonetheless, available data suggest that the unemployment rates for persons with disabilities are much higher than those for the overall population.<sup>83</sup> In developing countries, unemployment rates for persons with disabilities are sometimes as high as 80 per cent.<sup>84</sup> Similarly, a study examining differences in employment rates in developing countries found that there is an employment gap in the majority of the countries under review.<sup>85</sup> However, developed countries also lack behind. In the United States for example, the employment rate of disabled persons of a working age in 2007 was only 36.9 per cent compared to the 79.7 per cent among

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<sup>78</sup> CESCR/GC/5, paras.1,15; see also Despouy (1993) para.187.

<sup>79</sup> Stein/Stein (2014) p.1233; Fritsch (2010) p.403.

<sup>80</sup> Harpur (2012) p.4.

<sup>81</sup> WHO (2011), p.237.

<sup>82</sup> A/HRC/22/25.

<sup>83</sup> WHO (2011) p.237f; OECD (2010) p.10; Mont (2004) p.7f; Shima et al (2008) p.4.

<sup>84</sup> UN Enable; WRD (2011) p. 237.

<sup>85</sup> Mizunoya/Mitra (2012) p.39.

working-age people without disabilities.<sup>86</sup> In OECD countries, the huge labour market disadvantage of persons with disabilities is reflected in employment rates being 40 per cent below the overall level on average, and unemployment rates typically being double as high.<sup>87</sup>

Naturally, people with disabilities are not a homogenous group, and while unemployment rates vary greatly among persons with different disabilities, individuals with intellectual impairments or mental health difficulties are generally the most excluded.<sup>88</sup> However, work and employment plays an equally important role for the personal development and notion of self-worth of all persons with disabilities. This chapter will first introduce reasons for the low employment rate of persons with disabilities, delineating the context in which affirmative action measures operate. After presenting the rationale and codification of the right to work in international human rights instruments, in the last section, the thesis shifts the focus to the private sector, introducing the importance of non-state actors for implementing the right to work and presenting the emerging BHR paradigm. While it is clear that the right to work is experienced differently among persons with differing disabilities,<sup>89</sup> the thesis will disregard these differences in the following analysis.

### **3.1 Reasons for the low employment rate of persons with disabilities**

The persistently low employment rate of people with disabilities can be traced back to the existence of various barriers. According to the Office of the High Commissioner for Human Rights' (OHCHR) thematic study on the work and employment of persons with disabilities (Thematic Study), there are physical, attitudinal, information-, communication-, and transport-related barriers that prevent persons with disabilities from seeking, obtaining and maintaining work.<sup>90</sup> Additionally, legal barriers such as the non-recognition of a disabled

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<sup>86</sup> Erickson/Lee (2008) p.24ff.

<sup>87</sup> OECD (2010) p.10,23.

<sup>88</sup> WHO (2011) p.237.

<sup>89</sup> Ibid, p.7.

<sup>90</sup> A/HRC/22/25, para.26; see also CCRPD/GC/2, para.7.

person's legal personality can be an obstacle to employment.<sup>91</sup> Furthermore, the World Report on Disability (WRD) lists the lack of access to formal education and relevant training as a central barrier to entering the labour market.<sup>92</sup>

In agreement with proponents of the social model of disability, the stereotypes and negative attitudes towards persons with disabilities can be delineated as one of the key factors depriving disabled persons from entering the workforce.<sup>93</sup> According to Shakespeare, prejudices against people with disabilities are not only interpersonal but also implicit in cultural representations, language, and socialization.<sup>94</sup> Media, charity imagery, and popular assumptions, influenced by the medical model and portraying persons with disabilities as useless, abnormal and unsuitable to the full participation in working life, play an important role in reinforcing the position of disabled persons as subordinate.<sup>95</sup> Consequently, persons with disabilities are often perceived as incapable of carrying out working tasks as required in the open labour market. Moreover, people with disabilities seem to be subverting the ideal worker because their bodies or circumstances restrict their ability to achieve “independence, self-reliance, and personal autonomy”, values perceived as essential in a worker.<sup>96</sup> At the same time, the stigma about disabled people is further reinforced by the temporality of disability; those who are currently not disabled may become so at any moment.<sup>97</sup> As a result, persons with disabilities are seen as better off in protected environments of sheltered workshops or profiting from social benefits.<sup>98</sup>

Not only do employers often fail to understand that a physical disability does not mean an inability to perform the required work, but even fellow workers are sometimes opposed to the employment of persons with disabilities.<sup>99</sup> Particularly in the case of the regular labour

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<sup>91</sup> Lawson (2007) p.567ff.

<sup>92</sup> WHO (2011) p.239.

<sup>93</sup> Stein/Stein (2007) p.1207,1226; see also Despouy (1993) para.185.

<sup>94</sup> Shakespeare (1994) p.296.

<sup>95</sup> Ibid, p.294; A/HRC/22/25, para.67; Mor (2006) p.69.

<sup>96</sup> Cf. Murphy (1990).

<sup>97</sup> Reid-Cunningham (2009) p.106; Lawson (2007) p.618; Albin (2015) p.64.

<sup>98</sup> A/HRC/22/25, para.8.

<sup>99</sup> Despouy (1993) para.184(b); see also McLaughlin et al (2004).

market, society has largely rationalized the exclusion of persons with disabilities on the assumption that they are more expensive and less productive than non-disabled persons.<sup>100</sup> Some persons with disabilities even hold these views themselves.<sup>101</sup> As the Thematic Study points out, employers are often reluctant to employ workers with a disability based on the fear of having to make expensive workplace adjustments.<sup>102</sup> The perceived unproductiveness of disabled workers is reinforced by the fact that the market currently does not value alternative contributions such as the maximization of human resources or the promotion of human dignity and social cohesion.<sup>103</sup> Economic considerations on the employee's side, such as lower market wages or the loss of social benefits in case of employment, are a further obstacle to disabled persons' inclusion into the labour market.<sup>104</sup>

To sum up, economic underpinnings highlight personal deficits as the cause of exclusion from the work environment,<sup>105</sup> while widespread assumptions and cultural practices have normalized the exclusion of persons with disabilities from the mainstream market.<sup>106</sup> These shared beliefs about the inferiority of persons with disabilities constitute the context in which measures such as affirmative action seek to enhance the right to work and employment of disabled people. The following section will introduce why the exclusion from the labour market constitutes a violation of human rights, outlining both the rationale and legal bases of the right to work.

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<sup>100</sup> Stein (2007) p.103; WHO (2011) p.240; Albin (2015) p.83.

<sup>101</sup> WHO (2011) p.240; Albin (2015) p.83.

<sup>102</sup> A/HRC/22/25, para.33.

<sup>103</sup> WHO (2011) p.236; see also Albin (2015) p.66.

<sup>104</sup> WHO (2011) p.236ff.

<sup>105</sup> Roulstone (2000) p.429.

<sup>106</sup> Umeasiegbu et al (2013) p.61.

## 3.2 The right to work as a human right

### 3.2.1 Work and employment: why a human right?

The right to work is one of the most fundamental human rights.<sup>107</sup> It is crucial for the realization of the universal principles of dignity and justice for all, including persons with disabilities.<sup>108</sup> Work and employment are an essential precondition for realizing other human rights, such as securing the basic necessities of food, clothing, and shelter.<sup>109</sup> Work not only contributes to the survival of the individual and the larger family, but it also contributes to the individual's development and recognition within the community.<sup>110</sup> For persons with disabilities, the lack of employment opportunities results in their continuous marginalization, poverty, dependence and isolation.<sup>111</sup>

However, the right to work is not merely instrumental for achieving other human rights; rather, work and employment have intrinsic value.<sup>112</sup> In place of employment, persons with disabilities often receive welfare benefits. Yet, the right to social security is generally protected separately from the right to work.<sup>113</sup> Therefore, it can be assumed that it is the job itself that matters, not the guaranteed income through welfare benefits.<sup>114</sup> The possibility to do proper work is central to the life and being of a person, because a job creates a sense of achievement and self-esteem, and allows people to develop social relationships.<sup>115</sup> To sum it up in Collins' words, "[t]he right to work therefore addresses simultaneously basic human necessities for survival [...] and values [...] such as human dignity, freedom, and self-

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<sup>107</sup> A/HRC/22/25 para.3.

<sup>108</sup> Fritsch (2010) p.405.

<sup>109</sup> Sarkin/Koenig (2011) p.3; Collins (2015) p.18.

<sup>110</sup> CESCR/GC/18, para.1.

<sup>111</sup> Fritsch (2010) p.403; Despouy (1993) para.182.

<sup>112</sup> Collins (2015) p.19,35; Wiggins (2015) p.13.

<sup>113</sup> For ex Art.22 UDHR.

<sup>114</sup> Collins (2015) p.23.

<sup>115</sup> Mantouvalou (2015) p.1.

esteem.”<sup>116</sup> Thus, although work might be hard and unpleasant, most people prefer wage employment to the restricted alternatives that are available.<sup>117</sup>

Consigning persons with disabilities to lives of unproductive dependency and welfare benefits has not only harmful consequences for the individual with disability, but it is also detrimental to the general economy.<sup>118</sup> As noted in the WRD, the economic costs of disability benefits have led countries like Sweden and the Netherlands to take steps to reduce disability benefits and to foster labour market inclusion instead.<sup>119</sup> Given its fundamental importance, the right to work is codified in several international human rights instruments, and its content set forth in these instruments will be discussed in the next subsection.

### 3.2.2 The right to work in legal instruments

To begin with, Article 23 UDHR recognizes that everyone has the right to work, including free choice of employment, to just and favourable conditions of work and to the protection against unemployment.<sup>120</sup> In the ICESCR, Article 6 (1) guarantees the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. For example, the blanket consignment of persons with disabilities to certain limited forms of occupation may amount to a violation of their right to work that is freely chosen.<sup>121</sup> Article 7 ICESCR further develops the individual dimension of the right to work, recognizing the right of everyone to the enjoyment of just and favourable conditions of work, particularly to safe working conditions and equal pay for work of equal value. Whereas people with disabilities employed in the open labour market are often paid less for work of equal value because of their disability, the right to just and favourable work conditions also applies to disabled workers in sheltered facilities.<sup>122</sup> As the CESCR has elaborated in GC 18, the right to work is a right to decent work. Decent work provides an

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<sup>116</sup> Collins (2015) p.17.

<sup>117</sup> Ibid, p.18.

<sup>118</sup> Stienstra et al (2002) p.x.

<sup>119</sup> WHO (2011) p.43.

<sup>120</sup> Art.23(1) UDHR; see also A/HRC/22/25, para.3.

<sup>121</sup> CESCR/GC/5, para.21; see also Lawson (2007) p.605.

<sup>122</sup> CESCR/GC/5, para.25; Despouy (1993) para.33.

income that allows workers to support themselves and their families, and includes respect for the mental and physical integrity in exercising the right to work.<sup>123</sup> Finally, Article 8 ICESCR refers to the collective dimension of the right to work, guaranteeing the right of everyone to form and join trade unions.<sup>124</sup>

The International Covenant on Civil and Political Rights (ICCPR) refers to the right to work by prohibiting forced labour.<sup>125</sup> Further, the right to work is also guaranteed in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>126</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>127</sup> the CRC,<sup>128</sup> and the International Convention on the Protection of the Rights of All Migrant Workers (CMW).<sup>129</sup>

Most recently, the right to work is reaffirmed in the CRPD.<sup>130</sup> Article 27 CRPD spells out the content of the right to work in detail, highlighting how the right is to be implemented and guaranteed.<sup>131</sup> Rather than included in the mainstream labour market, workers with disabilities are often restricted to employment in segregated settings.<sup>132</sup> Furthermore, where persons with disabilities are employed in the open labour market, they are likely to be in low-wage jobs with poor promotional prospects.<sup>133</sup> While not explicitly prohibiting sheltered workshops, Article 27 CRPD not only promotes decent employment, but also places an over-riding emphasis on the inclusion and participation of persons with disabilities in the mainstream labour market.<sup>134</sup>

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<sup>123</sup> CESCR/GC/18, para.7.

<sup>124</sup> Cf. A/HRC/22/25, para.4.

<sup>125</sup> Art.8(3)(a) ICCPR.

<sup>126</sup> Art.5(e)(i) CERD.

<sup>127</sup> Art.11(1)(a) CEDAW.

<sup>128</sup> Art.32 CRC.

<sup>129</sup> Arts. 11, 25, 26, 40, 52, 54 CMW.

<sup>130</sup> Mégrèt (2008) p.499.

<sup>131</sup> Ibid, p.504.

<sup>132</sup> CESCR/GC/5, para.20; see also Harpur (2011) p.11.

<sup>133</sup> A/HRC/22/25, para.8; WHO (2011), p.239,250.

<sup>134</sup> Kayess/French (2008) p.30.

In addition to the core human rights treaties, the right to work is also guaranteed in the instruments of the International Labour Organization (ILO). In its Disabled Persons Convention (No. 159), the ILO promotes the right of persons with disabilities to access to the open labour market, encouraging decent work for persons with disabilities and providing a means for breaking down barriers which prevent full access to the labour market.<sup>135</sup> Furthermore, while not being mentioned in the Millennium Development Goals, the right to work is now also referred to in goal 8 of the draft Sustainable Development Goals. Specifically, target 8.5 attempts to “achieve full and productive employment and decent work for, inter alia, persons with disability.”<sup>136</sup>

As seen above, the right to work includes a number of several interrelated but separate rights.<sup>137</sup> While work relations are often of an exploitative nature,<sup>138</sup> in discussing the right to work of persons with disabilities, the following sections will mainly focus on the problem of getting access to employment.

### **3.3 Business and the right to work**

Notwithstanding its rationale and inclusion in legal instruments, the right to work has been criticized for its impracticality. Particularly, it has been questioned whether it is possible for states in a market society to provide a job for everyone who seeks one.<sup>139</sup> Since private-sector employers constitute one of the main providers of jobs in the open labour market, these non-state actors have become increasingly important for giving effect to the right to work of persons with disabilities.<sup>140</sup> The following subsections will first introduce the role of non-state actors in the implementation of the right to work and then describe the general trend in the international community towards the acceptance of the human rights obligations of non-state actors.

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<sup>135</sup> ILO 159; see also Fritsch (2010) p.408.

<sup>136</sup> Sustainable Development Goals.

<sup>137</sup> Sarkin/Koenig (2011) p.25.

<sup>138</sup> Albin (2015) p.70.

<sup>139</sup> Collins (2015) p.19.

<sup>140</sup> A/HRC/22/25, para.11.



### 3.3.1 The recognition of non-state actors in human rights instruments

Although states are the primary duty-bearers and thus ultimately accountable for the compliance with human rights, it is increasingly accepted that non-state actors also have human rights responsibilities.<sup>141</sup> Already in the preamble of the UDHR it is famously stated that “every individual and every organ of society” should promote respect for human rights. Since every individual must comply with human rights, non-state actors, too, ought to be held responsible for human rights violations.<sup>142</sup>

Non-state actors, such as private corporations, have a particularly important role for enhancing the right to work and employment of persons with disabilities. However, in general, the existing human rights regime does not adequately address the fact that the state is not always the main threat to the realization of human rights.<sup>143</sup> As an attempt, the CESCR stresses in GC 18 that private corporations have a crucial role in the creation of jobs, the establishing of fair hiring policies and the securing of non-discriminatory access to work.<sup>144</sup> The rights in the CRPD, as Mégrèt argues, “focus on the societal dimension of the rights experience, thereby departing from human rights’ traditional emphasis on the relationship of the individual to the state.”<sup>145</sup> Accordingly, the CRPD to a certain extent takes into account that the rights of persons with disabilities are often as much at risk of being violated by the private sphere or by society as by acts of the state.<sup>146</sup>

### 3.3.2 The emergence of business and human rights

The enhanced sensitivity to issues of structural power and oppression in the private sphere reflects a general trend in the international human rights community. While the power of business corporations has increased enormously throughout the world since the enactment of the UDHR in 1948, the relative strength of, foremost multinational, corporations has

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<sup>141</sup> CESCR/GC/18, para.52; Stein/Stein (2014) p.1246.

<sup>142</sup> Preamble UDHR; see also Stein/Stein (2014) p.1246.

<sup>143</sup> Mégrèt (2008) p.515.

<sup>144</sup> CESCR/GC/18, para.52.

<sup>145</sup> Mégrèt (2008) p.507.

<sup>146</sup> Ibid.

been met with the slow capacity of states to protect its population from adverse human rights impacts of business.<sup>147</sup> The significance of corporate economic power manifests itself in the fact that many multinationals have turnovers vastly in excess of the Gross Domestic Products (GDPs) of the countries in which they operate.<sup>148</sup> These imbalances between corporations and states create the “governance gaps”, which allow for corporate human rights violations.<sup>149</sup> The ongoing march of globalization and the increasing importance of multinational corporations also strongly influence the context of the right to work.<sup>150</sup>

While the international human rights regime is still state-centered, the framework to regulate business activities is largely composed of non-binding, soft law standards, most prominently in the form of the UNGPs. These standards promote voluntary compliance, requiring non-state actors to respect human rights and not to become complicit in human rights violations of others.<sup>151</sup> Resting on the three independent but mutually supportive pillars of the state duty to protect, corporate responsibility to respect, and the access to remedy, the UNGPs promote the shared responsibilities of states and non-state actors for achieving universal respect for human rights. The three pillars form a complementary whole, each pillar supporting the other in achieving sustainable progress.<sup>152</sup> Although this policy framework continues to being marked by gaps between existing standards and the corporate reality, the field has undergone a paradigm shift from the charity approach under corporate social responsibility (CSR) to the acknowledgment of rights and obligations under the current BHR approach.<sup>153</sup>

Whereas non-state actors seem to have acknowledged their human rights responsibility in such areas as indigenous peoples’ rights, women’s rights and children’s rights, they seem to

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<sup>147</sup> A/HRC/8/5, para.3; A/HRC/17/31, para.1.

<sup>148</sup> RAID (2015) p.8.

<sup>149</sup> A/HRC/8/5, para.11f.

<sup>150</sup> Sarkin/Koenig (2011) p.24.

<sup>151</sup> Cf. Stein/Stein (2014) p.1247.

<sup>152</sup> A/HRC/8/5, para.9ff.

<sup>153</sup> Cf. Ruggie (2014) p.5.

continue to regard disability as falling outside their human rights mandate.<sup>154</sup> Similarly, while relevant stakeholders are often occupied with rights *at* work, the right *to* work has played only a marginal role on the BHR agenda.<sup>155</sup> In view of the persisting low employment rate of persons with disabilities, there seems to be a need for raising awareness about disability as a vulnerable group, establishing the right to work of persons with disabilities as a human rights issue, which needs to be addressed by corporations.<sup>156</sup> Therefore, the following chapter will take a closer look at the shared responsibilities for disability rights, addressing the respective obligations of states and corporations with regard to the right to work and employment of persons with disabilities.

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<sup>154</sup> Cf. Stein/Stein (2014) p.1273.

<sup>155</sup> Cf. Sarkin/Koenig (2011) p.35ff.

<sup>156</sup> A/HRC/8/5, para.56ff; cf. also Stein/Stein (2014) p.1273.

## 4 Shared responsibilities

After years of debate, it has now generally become accepted that non-state actors ought to be holding human rights responsibilities.<sup>157</sup> However, while the obligations of states have been laid out in detail,<sup>158</sup> the scope and content of corporate responsibilities had remained largely unclear. To shed light on the respective responsibilities of states and non-state actors, Harvard Professor John Ruggie (SRSG) was mandated by the UN to identify and clarify the human rights obligations of corporations.<sup>159</sup> The resulting “Protect, Respect and Remedy” Framework (Framework) and subsequent UNGPs have been endorsed by the Human Rights Council and are supposed to provide “an authoritative focal point around which the expectations and actions of relevant stakeholders could converge.”<sup>160</sup>

The Framework rests on three pillars. The first pillar, the state duty to protect against corporate human rights abuses, reflects the very core of the international human rights regime. The second pillar, the corporate responsibility to respect human rights, implies that business enterprises should avoid infringing on the rights of others. The third pillar states the need to provide access to effective remedies to victims of human rights abuses.<sup>161</sup> The UNGPs build on the Framework, providing concrete and practical recommendations for its implementation.<sup>162</sup> Rather than constituting a set of international legal norms, the 31 principles and corresponding commentaries elaborate on the implications of existing international obligations of both states and corporations.<sup>163</sup> But do the UNGPs offer the clarification needed to define the responsibilities of states and corporations with regard to the right to work and employment of persons with disabilities?

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<sup>157</sup> Stein/Stein (2014) p.1246; for a normative justification of *why* business should held human rights obligations, see for example Deva (2012), p.120ff.

<sup>158</sup> For an elaboration on the typology of human rights obligations, see Eide (1987) paras.67-69; see also CESCR/GC/3 for the state obligations with regard to economic, social and cultural rights.

<sup>159</sup> E/CN.4/RES/2005/69.

<sup>160</sup> A/HRC/17/31, para.5.

<sup>161</sup> A/HRC/8/5.

<sup>162</sup> A/HRC/17/31, para.9.

<sup>163</sup> A/HRC/8/5; see also Lopez (2013) p.59.

Seeking to answer subquestion two, the following sections will elaborate on the obligations conferred upon states and non-state actors in relation to the right to work. While the UNGPs lay down the framework for BHR, the disability convention can strengthen the interpretation of the UNGPs. Accordingly, the thesis examines the interplay between the CRPD and the UNGPs. The sections will focus on the first and second pillar of the Framework. The third pillar, access to remedy, will not be addressed.

#### **4.1 Obligations of states**

Article 27 CRPD establishes the right of persons with disabilities to work, including the opportunity to gain a living by work freely chosen or accepted in a work environment that is open, inclusive and accessible. As opposed to other instruments, Article 27 CRPD spells out in detail how states should implement the right to work of persons with disabilities. The article sets out a list of appropriate steps to safeguard and promote the realization of the right to work, thereby providing greater clarity towards the state's obligation for ensuring this right.<sup>164</sup> State parties are required to create an enabling and conducive environment for employment, in both the public and private sector.<sup>165</sup> Accordingly, states not only have the obligation to respect and fulfil the right to work, but also to protect this right against non-state actor abuses. These two aspects are discussed separately in the following subsections.

##### **4.1.1 Progressive realization and immediate obligations**

Under Article 27 CRPD, states have twofold obligations. First, as a socio-economic right, the right to work is subject to "progressive realization". This means that states have a positive duty to implement the right to work to the extent of its available resources.<sup>166</sup> Article 27 CRPD states that "States Parties shall safeguard and promote the realization of the right to work [...] by *taking appropriate steps* [...]" (emphasis added). Thus, states must "move as expeditiously and effectively as possible" towards the full realization of the right to

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<sup>164</sup> Mégrèt (2008) p.506; Harpur (2012) p.6.

<sup>165</sup> A/HRC/22/25, para.11.

<sup>166</sup> CESCR/GC/5, para.9.

work; retrogressive measures are prohibited.<sup>167</sup> Rather than merely abstaining from negatively impacting the right to work, states are required to take *positive measures* to reduce structural disadvantages of persons with disabilities and to achieve their full inclusion in the work environment.<sup>168</sup>

Second, the principle of progressive realization of socio-economic rights is established without prejudice to the need to implement the civil and political rights immediately.<sup>169</sup> Under Article 27 (1) (a) CRPD, states have the duty to protect persons with disabilities from unjust exclusion from the labour market, including by discriminatory employers, by prohibiting discrimination in the private sector as such.<sup>170</sup> The prohibition of disability-discrimination is an obligation with immediate effect.<sup>171</sup> Furthermore, the CESCR also comprehends the obligation “to take steps” to implement the right to work as an immediate obligation.<sup>172</sup>

Obtaining meaningful employment is contingent on other connected rights, such as the availability of healthcare, accessible transportation, or vocational training.<sup>173</sup> In addition to Article 27 CRPD, Articles 8 and 9 CPRD play an important role for the right to work.<sup>174</sup> Article 8, requiring the promotion of a fundamental change in social attitudes, obliges states to combat stereotypes and prejudices and to foster respect for the rights and dignity of persons with disabilities in the labour market.<sup>175</sup> Article 9 obliges states to ensure accessible environments in both the public and the private sphere. The Committee underlines the role of accessibility as a vital precondition for the right to work, noting that “[p]ersons with

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<sup>167</sup> Cf. CESCR/GC/3, para.24; CESCR/GC/18, paras.19-20.

<sup>168</sup> Art.27(1) CPRD.

<sup>169</sup> Art.4.2 CRPD; see also Lawson (2007) p.592.

<sup>170</sup> Cf. Fritsch (2010), p 412.

<sup>171</sup> A/HRC/22/25, para.21; cf. Art.4.2 CPRD.

<sup>172</sup> CESCR/GC/18, para.19.

<sup>173</sup> Stein/Stein (2007) p.1211.

<sup>174</sup> WHO (2011) p.235; Kayess/French (2008) p.28; Quinn/O’Mahoney (2012) p.281.

<sup>175</sup> See also Kayess/French (2008) p.28.

disabilities cannot effectively enjoy their work and employment rights [...] if the workplace itself is not accessible.”<sup>176</sup>

The CRPD places over-riding emphasis on the inclusion and participation of disabled persons in the mainstream labour market.<sup>177</sup> Under Article 27, states have an obligation to promote work and employment, through hiring persons with disabilities in the public sector and through the adoption of policies designed to facilitate their employment in the private sector.<sup>178</sup> Rather than providing for isolated institutional settings, states are required to promote the employment of persons with disabilities in the private sector through appropriate means, including affirmative action measures.<sup>179</sup>

#### 4.1.2 The state duty to protect

Notwithstanding the transformation brought by the BHR paradigm, the primary duty for implementing human rights rests with the state. According to the state duty to protect, the state is not only responsible for not directly violating disability human rights, but also for protecting persons with disabilities from harm by third parties.<sup>180</sup> States have an obligation to guide and, where necessary, constrain the conduct of non-state actors, through the enactment and implementation of effective policies, legislation, regulations and adjudications.<sup>181</sup> Accordingly, states must take active measures to protect, prosecute, and punish private actors who commit disability human rights violations. A failure to do so would trigger state responsibility for an act which otherwise would solely be attributed to the private actor.<sup>182</sup>

The obligations of states in relation to the right to work go further than the mere state duty to protect, entailing also the obligation to respect and fulfill the right to work. To cover the whole range of duties with regard to this right, states need to develop policies where they

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<sup>176</sup> CCRPD/GC/2, para.41.

<sup>177</sup> Kayess/French (2008) p.30.

<sup>178</sup> CRPD/C/D/2/2010, para.6.2.

<sup>179</sup> A/HRC/22/25, para.35; Stein/Stein (2007) p.1224.

<sup>180</sup> UNGP 1, A/HRC/17/31, p.6; see also Wettstein (2013) p.246.

<sup>181</sup> UNGP 1, A/HRC/17/31, p.6; cf. Meyersfeld (2013) p.211.

<sup>182</sup> UNGP 1, A/HRC/17/31, p.6.

address the issue of disability employment in a comprehensive way. In the light of the privatization of public services and a growing reliance on the free market, states are required to ensure the equitable treatment of persons with disabilities in the private sphere.<sup>183</sup> In GC 5, the CESCR stresses the importance of state interventions to “temper, complement, compensate, or override the [unsatisfactory] results produced by market forces.”<sup>184</sup> While many states replace former compulsory disability employment policies with programmes that rely on market forces, competition and individual employer responsibility, it is clear that under the UNGPs, the state cannot resign from its wide range of obligations when going into dialogue with business.<sup>185</sup> UNGP 5 reminds states of their duty to meet human rights obligations even when they contract with private business for public services. As the Commentary to UNGP 5 specifies, while a state does not relinquish its human rights obligations when contracting out, the contracted company acquires additional responsibilities through such a concession.<sup>186</sup>

The state-centered framework is increasingly questioned by the reality of globalized labour markets, which are no longer limited to the confines of a state.<sup>187</sup> This global dimension further aggravates the problem of the already low number of job opportunities for persons with disabilities.<sup>188</sup> As in other areas, governance gaps might allow for added discrimination or exploitation of persons with disabilities in the work environment.<sup>189</sup> Given the fact that in today’s globalized world states are often unable or unwilling to implement human rights, the existence of a self-standing corporate responsibility to respect is crucial. The scope of this responsibility is discussed in the next section.

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<sup>183</sup> CESCR/GC/5, para.11.

<sup>184</sup> Ibid, para.12.

<sup>185</sup> Cf. Metts (2000) p.25.

<sup>186</sup> UNGP 5, A/HRC/17/31, p.10.

<sup>187</sup> Mundlak (2015) p.300; cf. Albin (2015) p.66.

<sup>188</sup> Cf. Mundlak (2015) p.304.

<sup>189</sup> Cf. Meyersfeld (2013) p.208.



## 4.2 Responsibility of non-state actors

### 4.2.1 Private-sector employers as duty-bearers

While private corporations have long been protected from international human rights obligations due to their status as non-state actors, it is now increasingly recognized that private actors share the responsibility for implementing human rights, including the rights of persons with disabilities.<sup>190</sup> This development can be partially seen as a result from corporations' increasing potential to impact human rights. In general, there are two ways of how corporations can affect disability human rights. *External* impacts refer to the ways corporations can influence rights that are external to the operations of the corporation itself. For example, changes to the environment or community resettlements in the course of corporate activity may affect persons with disabilities more severely than non-disabled persons. *Internal* impacts, on the other hand, deal with issues internal to the operations of the cooperation, such as fair wages, equal opportunities, positive discrimination, and affirmative action.<sup>191</sup> Although influenced by economic externalities, the right to work of persons with disabilities mainly falls within internal operations.

### 4.2.2 The corporate responsibility to respect

As seen above, the human rights obligations of corporations are mainly regulated by soft law instruments. But are these soft law standards, particularly the UNGPs, disability-sensitive? In addition to the state duty to protect, the second pillar of the Framework and the UNGPs is the corporate responsibility to respect human rights. Importantly, this responsibility also applies in contexts which are characterized by inadequate laws and regulations by the state.<sup>192</sup> In other words, corporations have to respect human rights even when governments fail to meet the state duty to protect. However, according to the SRSG, this complementary but self-standing responsibility of corporations does not simply mirror the

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<sup>190</sup> Art.23(4) ILO 159; cf. Stein/Stein (2014) p.1235.

<sup>191</sup> Cf. Meyersfeld (2013) p.202.

<sup>192</sup> Commentary to UNGP 11, A/HRC/17/31, p.13; see also Wettstein (2013) p.246.

duties of states.<sup>193</sup> Therefore, the UNGPs attempt to identify the distinctive responsibilities of corporations in relation to human rights.<sup>194</sup> But do the UNGPs provide concrete and practical recommendations for the implementation of disability human rights, particularly the right to work and employment?

As economic actors, corporations have unique responsibilities; but no limitations are set on the list of rights applicable to private enterprises.<sup>195</sup> The scope of the responsibility to respect refers, at a minimum, to the rights expressed in the International Bill of Rights and the ILO core conventions. However, the Commentary to UNGP 12 points out that business may need to consider additional standards, especially where their activities might have an adverse impact on groups such as persons with disabilities.<sup>196</sup> Accordingly, when addressing the rights of persons with disabilities, the CRPD must be taken into account as an additional standard.

However, the UNGPs do not seem to provide much guidance on how this far-reaching responsibility to respect should be fulfilled in practice.<sup>197</sup> As a guiding concept, the UNGPs introduce the notion of due diligence as the process through which the responsibility to respect is to be operationalized.<sup>198</sup> Due diligence imposes three key obligations: Business need to identify human rights impacts, prevent and mitigate the identified impacts, and account and redress once impacts occur.<sup>199</sup> This ongoing process should help companies to avoid infringing on human rights or becoming complicit in the human rights violations of others.<sup>200</sup> Elaborating on due diligence, the Commentary to UNGP 18 states that in this process “business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vul-

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<sup>193</sup> A/HRC/8/5, para.6.

<sup>194</sup> Ibid, para.53.

<sup>195</sup> Ibid, para.6.

<sup>196</sup> Commentary to UNGP 12, A/HRC/17/31, p.13f.

<sup>197</sup> Cf. Michalowski (2013) p.222.

<sup>198</sup> Meyersfeld (2013) p.205.

<sup>199</sup> UNGP 17, A/HRC/17/31, p.16; see also Bilchitz/Deva (2013) p.ix.

<sup>200</sup> Lopez (2013) p.60.

nerability or marginalization.”<sup>201</sup> Given the recognition of the specific challenges that may be faced by, *inter alia*, persons with disabilities in the Commentary to UNGP 3, it can be assumed that persons with disabilities are included in the group considered “at risk of becoming vulnerable or marginalized”.

For the right to work, the responsibility of private-sector employers may seem to be confined to prohibitions against unjustified discrimination in recruiting and hiring processes.<sup>202</sup> However, the corporate responsibility to respect is not merely a negative duty.<sup>203</sup> Rather, the principle of “doing no harm” may also entail positive steps. Particularly, private actors are required to provide reasonable accommodation to disabled workers.<sup>204</sup> However, according to the CRPD, the obligation to provide reasonable accommodation is constrained by the “hardship” defense of a “disproportionate or undue burden”.<sup>205</sup> Since it remains unclear what exactly would be required of employers under the notion of “reasonable accommodation”, further guidance of the UNGPs in this area would be helpful.<sup>206</sup>

Furthermore, it is also unclear whether the responsibility to respect goes so far as to require corporations to positively contribute to the realization of disability human rights.<sup>207</sup> For example, the still contentious concept of “silent complicity” refers to the failure of a company to raise the question of systematic or continuous human rights violations in its interactions with state authorities.<sup>208</sup> Under the UNGPs, however, it remains unclear whether corporations have an obligation to speak out against or raise the issue of systematic discrimination against persons with disabilities in employment with the appropriate state authorities.

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<sup>201</sup> A/HRC/17/31, p.17.

<sup>202</sup> Collins (2015) p.25.

<sup>203</sup> A/HRC/11/13, para.59; see also Michalowski (2013) p.221.

<sup>204</sup> A/HRC/22/25, para.31

<sup>205</sup> Art.27(1)(i) CRPD; see also Art.2 CRPD.

<sup>206</sup> Cf. Albin (2015) p.78.

<sup>207</sup> Lopez (2013) p.67.

<sup>208</sup> Wettstein (2013) p.250.

According to the UNGPs, the corporate responsibility to respect is based on “the basic expectation society has of business in relation to human rights.”<sup>209</sup> Yet, section 3.1 of this thesis listed negative preconceptions of disabled people’s productivity as one of the main impediments to disability employment. Accordingly, the basic expectation of society might be the notion that persons with disabilities are better off in sheltered employment or not working at all. To put it differently, the argument that business need to comply with disability rights in order to obtain the “social license” to operate loses force in the light of the negative attitudes against persons with disability of society as a whole.<sup>210</sup>

The UNGPs promote the utility of human rights risk management for the reduction of costs and the protection of corporate profits. The so-called “business case for human rights” endorses human rights for their ability to prevent potential threats to companies, such as possible legal action, negative media coverage, protests, shareholder action and consumer boycotts.<sup>211</sup> Given this language of risk management, it is difficult to see how the UNGPs can ensure that the rights-holders remain at the heart of the implementation of these principles.<sup>212</sup> In the case of disability and the right to work, an emphasis on the business case for disability human right could even hinder the right to work, given that prevailing prejudice portray persons with disabilities as unproductive and costly.<sup>213</sup> As Bilchitz and Deva argue, human rights compliance should be a non-negotiable precondition for business, not just becoming relevant when they negatively impact the operational success of a company.<sup>214</sup>

On the other hand, the business case for human rights allows for crafting ideas about disability rights in a language that is accessible to economists.<sup>215</sup> Today’s globalized and highly competitive market stipulates that business must have full access to talent in order to suc-

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<sup>209</sup> A/HRC/17/31, para.6.

<sup>210</sup> A/HRC/11/13, para.46; see also Lopez (2013) p.61.

<sup>211</sup> AI (2009) p.4.

<sup>212</sup> RAID (2015) p.1; cf. Bilchitz/Deva (2013).

<sup>213</sup> WRD (2011) p.236.

<sup>214</sup> Bilchitz/Deva (2013) p.13.

<sup>215</sup> Cf. Stein/Stein (2014) p.1277.

ceed.<sup>216</sup> The business case for hiring disabled workers recognizes that, if given the opportunity to employment in accordance with their abilities, people with disabilities not only make good employees, but they also bring many other benefits.<sup>217</sup> Persons with disabilities not only present a neglected resource of skills and talents, but they also improve the understanding for customers with disabilities, a largely overlooked market segment.<sup>218</sup> Further, empirical studies have shown that heterogeneous teams often achieve better scores because of the different experiences and perceptions at hand, and such corporations also enhance their attractiveness for both employees and consumers.<sup>219</sup> Finally, persons with disabilities not only show extraordinary engagement if accommodated adequately, but they are also less likely to leave a company.<sup>220</sup>

However, given the negative preconceptions referred to in section 3.1, private-sector employers need to be made fully aware of the business case for disability human rights. Since UNGP 12 still only refers to a responsibility to *respect*, it is the duty of the state to make this knowledge available to business.<sup>221</sup> This state duty to raise awareness among employers is set out in more detail in Article 8 CRPD, which requires states to combat stereotypes and prejudices and to promote awareness of the capabilities and contributions of persons with disabilities.<sup>222</sup> On the other hand, Article 27 establishes the need for *positive measures* to promote the employment of people with disabilities in the private sector. Accordingly, while Article 8 pushes for a change in the mindset of employers in order to achieve change in practice, Article 27 attempts to achieve a change in the mindset through the practical experience of employing persons with disabilities. As such, the latter rests on the assumption that through the promoted and enforced employment of persons with disabilities, employers would become aware of their equal productivity, which in return would reduce their prejudice. The following chapter will introduce affirmative action as a measure to

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<sup>216</sup> ILO (2007) p.3.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid, p.5; UN Enable, p.3.

<sup>219</sup> MyHandicap; AI (2009) p. 4.

<sup>220</sup> MyHandicap.

<sup>221</sup> UNGP 12, A/HRC/17/31, p.13.

<sup>222</sup> Art.8(1) CRPD.

enhance the right to work and employment of persons with disabilities in the open labour market in accordance with Article 27 CRPD.

## 5 Affirmative action: implementing the right to work

### 5.1 Non-discrimination v. affirmative action

In addition to the prohibition of discrimination as an immediate obligation, measures for ensuring the right to work of persons with disabilities also include the provision of affirmative action. Both anti-discrimination laws and affirmative action aim at ending discriminatory practices; but the implementation and effectiveness of these measures vary substantively.<sup>223</sup> While non-discrimination makes it illegal to take an employment decision on the basis of a person's disability, affirmative action requires additional, positive measures to fight the historical as well as contemporary disadvantages of persons with disabilities.<sup>224</sup>

Anti-discrimination measures have been a major focus under the social model of disability.<sup>225</sup> However, while their introduction was positive, there is mixed evidence on the success of such laws.<sup>226</sup> For example, Quinn and O'Mahoney argue that traditional anti-discrimination laws as a tool are too narrow to break the deep-rooted structural barriers which keep many disabled persons from working.<sup>227</sup> Accordingly, states are required to adopt positive measures in order to achieve the full inclusion of persons with disabilities in the work environment.<sup>228</sup> The following section will introduce affirmative action as a measure for implementing the right to work by outlining its rationale and legal foundations. Further, it will delineate different forms of affirmative action and present the debate over such measures. While authors sometimes refer to positive or special measures in place of affirmative action, I will use these terms interchangeably.

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<sup>223</sup> Harper/Reskin (2005) p.358; WHO (2011) p.240.

<sup>224</sup> WHO (2011) p.241; Albin (2015) p.70.

<sup>225</sup> Stein/Stein (2007) p.1207.

<sup>226</sup> WHO (2011) p.241; Harpur (2012) p.6.

<sup>227</sup> Quinn/O'Mahoney (2012) p.269.

<sup>228</sup> Ibid, p.268.

## 5.2 Affirmative action

### 5.2.1 Definition and rationale

Historically, affirmative action has been used to advance the rights of ethnic or racial minorities, such as the rights of African Americans in the US or underprivileged classes in India. In referring to the historical disadvantage suffered by African Americans, former US president Lyndon B. Johnson stated that “[y]ou do not take a person who has been hobbled by chains and liberate him and then say, ‘You are free to compete with others’, and still believe [that you are] being fair.”<sup>229</sup> However, since then, the concept has been expanded to include other marginalized groups, such as those being discriminated on the grounds of disability.<sup>230</sup> Today, affirmative action can be viewed as a group-based remedy, which aims at ending persisting discriminatory exclusion by taking into account race, sex, ethnicity, and other characteristics, such as disability.<sup>231</sup> It attempts to correct the effects of discriminatory practices by redressing the continuous deprivations of equality rights and advancing the economic and social well-being of minority groups that, amongst others, disproportionately experience unemployment.<sup>232</sup> As opposed to the concept of reasonable accommodation, which must be provided to an individual in order to comply with the requirement of non-discrimination, affirmative action is directed towards persons with disabilities as a group. Thus, affirmative action can be described as “a coherent package of measures, of a temporary character, aimed specifically at correcting the position of members of a targeted group [...] in order to obtain effective equality.”<sup>233</sup>

### 5.2.2 Affirmative action and international human rights

The concept of affirmative action can be found in different provisions in international law. In GC 5, the CESCER requires states “to take positive action [...] and to give appropriate

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<sup>229</sup> Lyndon B. Johnson, cited in Bacchi (2004) p.132.

<sup>230</sup> See for example Ginsburg/Merritt (1999) p.277.

<sup>231</sup> Harper/Reskin (2005) p.357f.

<sup>232</sup> Heyer (2005) p. 240; Ginsburg/Merritt (1999) p.254.

<sup>233</sup> Bossuyt (2002) para.6.



preferential treatment to people with disabilities [...].”<sup>234</sup> It further establishes that positive measures are not discriminatory because they attempt to reverse existing discrimination and establish equal opportunities for persons with disabilities.<sup>235</sup> The Human Rights Committee (HRC) refers to affirmative action in GC 18, noting that “the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.”<sup>236</sup> According to both the ICESCR and the ICCPR, a prohibition of discrimination does not preclude positive measures being taken in favour of structurally disadvantaged groups.<sup>237</sup>

Of the other core human rights treaties, both the CERD and the CEDAW endorse affirmative action as a means of advancing substantive equality. Article 2 (2) CERD obliges states to take special measures to ensure the protection of certain racial groups or individuals, while Article 1 (4) CERD declares that special measures taken for the advancement of those groups or individuals should not be considered as racial discrimination. Similarly, Article 4 CEDAW states that the adoption of temporary positive measures, which are aimed at establishing equality, should not be considered discriminatory.

With regard to disability rights, Article 27 (1) CRPD requires states to “promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include *affirmative action programmes*” (emphasis added). Article 5 (4) CRPD further establishes that specific measures which are necessary to accelerate or achieve substantive equality of persons with disabilities do not constitute discrimination. Accordingly, positive measures designated to increase the number of disabled persons in the workforce shall not be prohibited.<sup>238</sup>

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<sup>234</sup> CDESCR/GC/5, para.9.

<sup>235</sup> Ibid, para.18.

<sup>236</sup> HRC/GC/18, para.10.

<sup>237</sup> CDESCR/GC/5, paras.9,18; HRC/GC/18, para.10; see also Bossuyt (2002) para.52.

<sup>238</sup> See also Lawson (2007) p.599.

### 5.2.3 Soft v. hard forms

Under the heading of affirmative action, there is a range of positive measures to enhance opportunities for disadvantaged groups.<sup>239</sup> One can distinguish between “soft” and “hard” forms of affirmative action.<sup>240</sup> For example, broadly advertising for job openings to avoid exclusion stemming from network recruitment can be regarded as a soft form of affirmative action.<sup>241</sup> Other soft forms may entail the provision of special training skills or disability outreach programmes. While these measures encounter little resistance, more radical steps such as strict quota requirements are faced with powerful opposition.<sup>242</sup>

Bossuyt distinguishes “affirmative mobilization” and “affirmative fairness” on the one hand from “affirmative preferences” on the other hand. Under affirmative mobilization measures, persons with disabilities are actively encouraged and sensitized to apply and compete for jobs. Affirmative fairness complements these efforts by attempting to eliminate non-intentional discriminatory practices.<sup>243</sup> On the other side, affirmative preferences can entail measures that either *prioritize* a disabled person in the case of two equally qualified applications, or *favourize* a member of a designated group even if a competitor is better qualified.<sup>244</sup> In general, affirmative preferences are the most controversial. While in the case of the former they are opposed because they are seen as unfair, reverse discrimination, in the form of the latter they meet additional resistance because of their perceived economic inefficiency.<sup>245</sup>

### 5.2.4 Merit v. preference

The main controversies about affirmative action revolve around the concepts of merit and preference. As Harper and Reskin put it, “[t]he creation of protected groups collided with

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<sup>239</sup> Cf. Ginsburg/Merritt (1999) p.254.

<sup>240</sup> Harper/Reskin (2005) p.358.

<sup>241</sup> Ibid, p.367.

<sup>242</sup> Ginsburg/Merritt (1999) p.255; Bacchi (2004) p.132.

<sup>243</sup> Bossuyt (2002) paras.72ff.

<sup>244</sup> Ibid, para.76f.

<sup>245</sup> Ibid, para.78; for economic objections, see Cooter (1994).

the ideologies of equal opportunity and meritocracy.”<sup>246</sup> On the one hand, traditional justifications for affirmative action reach from the remediation of historical injustice and structural discrimination to the preemption of social unrest and a means of nation-building.<sup>247</sup> In case of persons with disabilities, many states seem to stipulate employment quotas for disabled persons on the assumption, that, based on discrimination and fears of cost increase, employers would not hire persons with disabilities without quotas.<sup>248</sup> In the absence of affirmative action, it is argued, particularly unconscious or half-conscious discrimination against persons with disabilities would continue unhindered.<sup>249</sup>

On the other hand, affirmative action is seen as unfair, reverse discrimination against non-disabled individuals who might not have been responsible for past or present wrongdoing.<sup>250</sup> While non-disabled persons seem to be concerned about the preference given to persons with disabilities, disabled persons themselves sometimes oppose affirmative action because of its potential harm.<sup>251</sup> For example, measures aimed at protecting disabled workers, such as shorter working days, more rest periods or adjusted minimum wages can reinforce negative attitudes and stereotypes, portraying persons with disabilities as less productive and more costly.<sup>252</sup> Particularly in the form of quotas, affirmative action is opposed because it depicts persons with disabilities as less qualified and less deserving workers, who would not have achieved the same result without the quota.<sup>253</sup> The framing of affirmative action as bestowing undeserved benefits encourages disabled persons to dissociate themselves from it. Rather than receiving benefits, they wish to be judged on their “mer-

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<sup>246</sup> Harper/Reskin (2005) p.369.

<sup>247</sup> Bossuyt (2002) paras.17ff.

<sup>248</sup> WHO (2011) p.241.

<sup>249</sup> Cf. Ginsburg/Merritt (1999) p.279.

<sup>250</sup> Ibid, p.281.

<sup>251</sup> Heyer (2005) p.242.

<sup>252</sup> Albin (2015) p.67.

<sup>253</sup> Bacchi (2004) p.135.

its”.<sup>254</sup> Furthermore, when persons with disabilities believe that they were only selected on the basis of their group membership, affirmative action can reduce their self-esteem.<sup>255</sup>

However, as Harper and Reskin note, opposition to affirmative action seems to be based on several misconceptions. First of all, affirmative action is often equated with quotas due to the lack of understanding about different forms of affirmative action.<sup>256</sup> Furthermore, the belief that affirmative action for persons with disabilities severely limits the opportunities of non-disabled and generally prioritizes disability status over qualification has not been supported by empirical evidence.<sup>257</sup> Although it is understandable “that reforms which put in question the way we allocate resources and privileges will be [...] strongly resisted”,<sup>258</sup> it seems highly unlikely that a company would hire an unqualified person with disability only to fulfill a quota, which probably results in higher costs than the ones associated with a compensation tax.<sup>259</sup> To put it differently, quota are most likely opposed because they attempt to reconstruct existing workplace hierarchies.<sup>260</sup> In view of the controversies around affirmative action, particularly those around quota systems, the following section examines the view on affirmative action measures taken by the CCRPD.

### **5.3 Affirmative action: the view of the CCRPD**

In its concluding observations on state parties, the Committee often refers to the necessity of establishing programmes, *including affirmative action measures*, to further the right to employment. Whereas a study for the European Commission analyzing employment policies for disabled persons concluded that most countries were going away from quotas, many of the states examined by the CCRPD had some form of quota in place or included

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<sup>254</sup> Ibid.

<sup>255</sup> Harper/Reskin (2005) p.370.

<sup>256</sup> Cf. Johnson (1992) p.1059.

<sup>257</sup> Harper/Reskin (2005) p.370f.

<sup>258</sup> Bacchi (2004) p.143.

<sup>259</sup> Cf. MyHandicap

<sup>260</sup> Stein/Stein (2007) p.1231.

quota systems in newly emerging disability strategies.<sup>261</sup> While the Committee promotes affirmative action measures beyond hiring quotas, it nevertheless records the absence of employment quotas in the private sector when a state has established a quota system in the public sector. For Belgium, for example, the Committee notes the absence of a quota system in the private sector, and recommends the state to take the necessary regulatory measures and incentives for enhancing disability employment.<sup>262</sup> Paraguay is similarly encouraged to promote equal employment opportunities, including through the adoption of affirmative action measures,<sup>263</sup> while Peru is advised to promote the inclusion of persons with disabilities into the labour market, for example through tax incentives.<sup>264</sup> In the concluding observations on Mexico, the Committee not only urges the state to “set up a mechanism to monitor achievement of the public sector quota” but also to “roll out similar affirmative action measures in the private sector.”<sup>265</sup>

The Committee does not specifically require affirmative action in the form of employment quotas. However, where a state has established a quota system for the private sector, the committee is often concerned about the lack of effective implementation of these schemes. For example, in the case of Azerbaijan, the CCRPD notes that since very few persons with disabilities benefit from the quota system, the state should ensure its enforcement through effective sanctions for non-compliance.<sup>266</sup> South Korea similarly lacks effective implementation of the mandatory employment quota, resulting in the disproportionately high unemployment rate of persons with disabilities as opposed to the abled-body population.<sup>267</sup> For Mongolia, the Committee notes that the sanctions for noncompliance with the quota system are not appropriate,<sup>268</sup> and in the case of Croatia, the Committee states that, in the light of

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<sup>261</sup> Metts (2000) p.10; ECOTEC (2000) p.207f.

<sup>262</sup> CRPD/C/BEL/CO/1, paras.38f.

<sup>263</sup> CRPD/C/PRY/CO/1, paras.63f.

<sup>264</sup> CRPD/C/PER/CO/1, para.41.

<sup>265</sup> CRPD/C/MEX/CO/1, para.52(d).

<sup>266</sup> CRPD/C/AZE/CO/1, paras.42f.

<sup>267</sup> CRPD/C/KOR/CO/1, paras.51f.

<sup>268</sup> CRPD/C/MNG/CO/1, paras.41f.

the high unemployment among persons with disabilities, the quota system should be complemented with other incentives for employers.<sup>269</sup>

While often referring to the private sector, it seems that there is potential for the CCRPD to better include the dimension of non-state actor compliance into its views on the right to work and employment. As seen in chapter 4, the state duty to protect entails the obligation to adequately promote the employment of persons with disabilities in the private sector.<sup>270</sup> In its view on an individual complaint on the right to work, the CCRPD concludes that while the intention behind the affirmative action scheme concerned appears to be designated to encourage private employers to hire persons with disabilities, by requiring the employer to go through an additional, uncertain application process, the integration subsidies scheme rather serves as a deterrent to employment inclusion.<sup>271</sup> Since it is not always easy to separate affirmative action measures that genuinely assist the beneficiaries from such measures that perpetuate stereotypes hindering the achievement of full inclusion,<sup>272</sup> the Committee could and should provide further guidance on the societal dimension of disability rights violations.

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<sup>269</sup> CRPD/C/HRV/CO/1, paras.41f.

<sup>270</sup> Art.27(1)(h) CRPD.

<sup>271</sup> CRPD/C/D/2/2010, para.6.2.

<sup>272</sup> Cf. Ginsburg/Merritt (1999) p.269.

## 6 Assessing the impact of affirmative action

While affirmative action measures for racial groups or women have been the topic of considerable academic debate, similar scholarship is lacking in the area of disability. Moreover, as Hochschild claims, “the debate over the empirical consequences of affirmative action [...] is striking for its high ratio of claims to evidence.”<sup>273</sup> While there are a few empirical studies on quota systems, many affirmative action measures have not yet been empirically assessed.<sup>274</sup> Accordingly, this chapter, although limited, aims to provide further empirical evidence on the impact of affirmative action. By analyzing positive measures in four states (China, Austria, Argentina and Tunisia), the chapter examines whether affirmative action measures produce any positive outcome in terms of increased employment of persons with disabilities. The country sections first introduce the measures that have been employed and then assess whether they increased the number of employment opportunities. However, while these figures provide indications of a possible impact, they are unable to give a complete picture of affirmative action. Therefore, the country sections subsequently examine the nature and quality of employment opportunities in order to assess whether employment opportunities fulfill the requirements of the right to work set out in section 3.2. Given that data is sometimes scarce, some of the states will be analyzed more thoroughly than others. Furthermore, since data is more readily available for quota-levy systems, the assessment of these schemes will take up a larger amount of the analysis. While the scope of this thesis does not allow for a comprehensive impact analysis of each of the states presented, its findings nonetheless provide indications of the impact of affirmative action measures on the right to work and employment of persons with disabilities.

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<sup>273</sup> Hochschild (1995) p.100.

<sup>274</sup> MyHandicap; WHO (2011) p.242.

## 6.1 China

China, the largest developing country in the world, joined the CRPD in 2008. According to the Chinese government, China comprises a total of 85 million persons with disabilities, making up 6.34 per cent of the overall population.<sup>275</sup> The unemployment rate among persons with disabilities in urban areas in 2010 was at 8.6 per cent; however, since many people do not register with the employment agencies through which statistical data is collected, the real unemployment rate is probably around 50 per cent.<sup>276</sup> In the course of economic growth and changes towards a market-based economy, China has introduced affirmative action measures to enhance the employment opportunities of persons with disabilities. Instituted in 1991, the Law on the Protection of Disabled Persons (LPDP) requires a minimum quota for disabled workers, which has been set at no less than 1.5 per cent of the total number of employees.<sup>277</sup> The quota system is enforced through a fine for employers who fail to meet the quota. In “earmarked” entities, established solely for the purpose of employing disabled persons, 25 per cent of the full time positions must be held by persons with disabilities. When meeting the target, employers enjoy tax reductions.<sup>278</sup> Other forms of affirmative action include financial assistance, incentives and other special support granted to employers, and employment aid and training for disabled individuals.<sup>279</sup>

### 6.1.1 Potential impact

While the impact of soft affirmative action measures is difficult to assess, the implementation of the quota-levy system has, arguably, led to more employment opportunities for people with disabilities.<sup>280</sup> According to statistics by the China Disabled Persons' Federation (CDPF), the state's employment rate increased from 60 per cent in 1988 to 82.5 per cent in

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<sup>275</sup> CRPD/C/CHN/Q/1/Add.1, para.1; note that this number significantly diverges from the WHO's *World Health Survey* (cited in WHO (2011) p.25) estimating that persons with disabilities make up 15 per cent of a population; see also IDA (2012) p.3.

<sup>276</sup> CRPD/C/SR.78, para.46.

<sup>277</sup> Art.30 LPDP.

<sup>278</sup> Art.33 LPDP; CRPD/C/CHN/1, para.113.

<sup>279</sup> CRPD/C/CHN/1, paras.113ff; see also Zhang (2007) p.554.

<sup>280</sup> See for example Zhang (2007) p.553; Myers/Sai (2013) p.47.



2000.<sup>281</sup> By the end of 2011, out of the total disability population, about 21.9 million were employed, with 4.4 million in urban areas and 17.5 million in rural areas.<sup>282</sup> According to Zhang, along with economic growth and societal change, expanded job opportunities for disabled workers were the result of relevant legislation and affirmative action.<sup>283</sup> Substantiating this impact, a quantitative study comparing disability income in China and the US concludes that for wage differentials, “China’s affirmative action policies produce better results for persons with disabilities than the anti-discrimination policies in the USA.”<sup>284</sup>

From the data provided by the state, it is not clear how many employers actually fulfill the quota of 1.5 per cent. Providing information on compliance, the CCRPD notes, however, that both public and private employers often prefer to pay the disability employment fee rather than employing disabled workers.<sup>285</sup> Although public employers are also bound by the quota, according to the local disability rights NGO Yirenping, the highest percentage of disabled employees in any governmental department was only 0.39 per cent.<sup>286</sup> While employers attempt to avoid their obligations despite the existence of government sanctions and the prospect of incentives, this lack of adequate implementation results in the continuously significant number of unemployed disabled workers.<sup>287</sup>

Furthermore, although these figures indicate an impact of affirmative action, they cannot account for the nature and quality of the provided employment. Given that the lack of education is often a barrier to employment, the discrepancy between the high employment rate among disabled workers on the one hand and other indicators such as literacy and school enrollment rates on the other hand might indicate that employment is often only of symbolic value.<sup>288</sup> As Fengming and Wharton note, even some of the “earmarked” corporations

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<sup>281</sup> CDPF (2001), cited in Huang et al (2009) p.47.

<sup>282</sup> CRPD/C/CHN/Q/1/Add.1, para.74.

<sup>283</sup> Zhang (2007) p.554.

<sup>284</sup> Myers/Sai (2013) p.47.

<sup>285</sup> CRPD/C/CHN/CO/1, para.41; see also IDA (2012) p.15.

<sup>286</sup> China Labour Bulletin.

<sup>287</sup> Washington Post (2014); Fritsch (2010) p.419; cf. Harper/Reskin (2005) p.368.

<sup>288</sup> CRPD/C/SR.78, para.25; CRPD/C/CHN/CO/1, para.41; IDA (2012) p.14.

employ disabled workers only on paper in order to receive the tax exemptions.<sup>289</sup> While such examples of nominal employment improve the statistics, they make little difference to the social and economic situation of persons with disabilities.<sup>290</sup>

The CCRPD indicates the prevalence of the medical model and the “deep-rooted causes of discrimination in employment” in China as a response to subquestion one on the reasons for the low employment of persons with disabilities.<sup>291</sup> In line with section 3.1 of the thesis, persisting societal prejudice is depicted as one of the main reasons for the limited impact of affirmative action. Fritsch even claims that “prejudice against persons with disabilities is ingrained in Chinese society.”<sup>292</sup> While Article 8 CRPD obliges states to tackle such negative stereotypes through awareness-raising measures, employment quotas may bring forward a positive picture of persons with disabilities through their “forced” inclusion in the open labour force.<sup>293</sup> However, the assumption that by making disability employment compulsory, employers would reduce their prejudice and comply with or even exceed their obligations, does not seem to be supported by the figures of disability employment provided by official statistics. Although the CDPF reports between 70,000 and 90,000 newly employed disabled workers resulting from the quota scheme every year, absolute numbers of disability employment do not similarly increase between 2009 and 2013.<sup>294</sup> Based on these figures, it is further puzzling that absolute numbers are declining between 2009 and 2011, and that the numbers for 2013 equal those from 2009.<sup>295</sup> While the reason for this inaccuracy could not be established, it underlines the fact that the available statistical data is not always reliable. Furthermore, if compared to the increase in the overall disability population from 80 million in 2006 to 85 million in 2010, these numbers are not able to verify the exact impact of the quota system.<sup>296</sup> Arguing from a human rights perspective, the quota

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<sup>289</sup> Fengming/Wharton (2010) p.242.

<sup>290</sup> China.org.cn (2013)

<sup>291</sup> CRPD/C/CHN/CO/1, paras.15,41.

<sup>292</sup> Fritsch (2010) p.416.

<sup>293</sup> Cf. Stein/Stein (2007) p.1233.

<sup>294</sup> Statistical Communiques 2009-2013.

<sup>295</sup> CRPD/C/CHN/1, para.3; CRPD/C/CHN/Q/1/Add.1, para.1; Statistical Communiques 2009-2013.

<sup>296</sup> Ibid.

system alone, without appropriate awareness-raising measures, merely provides short term enhanced economic status rather than lasting change in societal perception of persons with disabilities.<sup>297</sup>

### 6.1.2 Shared responsibilities?

Given the importance of societal perception for the impact of affirmative action, in accordance with subquestion four, how could the BHR approach inform the implementation of the right to work? China, as a member of the Human Rights Council, endorsed the UNGPs in 2011. However, the UNGPs have not yet been widely applied by the government or the private sector, and China has not started a process to adopt a national action plan on BHR.<sup>298</sup> Generally, there seems to be minimal awareness among companies and the government about business and disability rights.<sup>299</sup>

The scope of the state duty to protect is, in the case of disability rights, set out by the CRPD, which recognizes the societal dimension of employment discrimination.<sup>300</sup> With regard to the right to work, the state duty to protect in accordance with UNGP 3 entails both an obligation to foster a positive picture of persons with disabilities, and to promote employment in the private sector through affirmative action measures.<sup>301</sup> However, through monetary incentives such as avoiding paying a fine or receiving tax breaks when meeting the quota, China seems to be constructing the business case for human rights based on financial gains external to the value of the disabled worker itself.<sup>302</sup> Consequently, the corporate responsibility to respect seems to comprise a company's choice between employing disabled workers and paying the cost for failing to meet the quota. In order to reconcile the quota requirements with the corporate responsibility to respect, the state should foster a different "basic societal expectation".<sup>303</sup> In order to remedy the chronic marginalization of

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<sup>297</sup> Fenming/Wharton (2010) p.243; see also CESCR/GC/5, para.11.

<sup>298</sup> BHRRRC (2014) p.10,23ff.

<sup>299</sup> Ibid.

<sup>300</sup> Art.27(1)(h) CRPD

<sup>301</sup> Art.8 and 27(1)(h) CRPD; UNGP 3, A/HRC/17/31, p.8.

<sup>302</sup> CRPD/C/CHN/1, para.113.

<sup>303</sup> A/HRC/17/31, para.6.

persons with disabilities, the business case for disability rights should rather bring forward the potential worth and contribution of persons with disabilities. Similarly, affirmative action measures should be remodeled to adequately reflect this alternative business case for disability rights in order to enhance their impact.

## 6.2 Austria

Like China, Austria ratified the CRPD in 2008. However, despite the early ratification, persons with disabilities keep experiencing many disadvantages in accessing the open labour market.<sup>304</sup> According to the online platform [www.arbeitundbehinderung.at](http://www.arbeitundbehinderung.at) (work and disability), 57.594 persons with disabilities were unemployed in 2014. The general unemployment rate was 5.1 per cent, and persons with disabilities were making up 18.03 of the total number of unemployed persons.<sup>305</sup>

Austria has both soft and hard forms of affirmative action measures in place. Hard measures include a quota-levy system, while soft measures comprise other schemes designed to increase the employment of persons with disabilities. However, data on the labour situation of persons with disabilities, particularly in the open labour market, is largely lacking.<sup>306</sup> The already rare existence of data on the number and situation of the employment of persons with disabilities is further hindered by the lack of a uniform definition of disability, partly due to the Austrian federal system with its dispersed jurisdictions.<sup>307</sup> For benefitting from some of the disability measures, a person needs to be legally registered as “severely disabled”, implicating a disability leading to a work capacity reduction of 50 per cent.<sup>308</sup> According to the Austrian Economic Chamber (WKÖ), the unemployment rate for severely disabled persons was 9.4 per cent in 2013.<sup>309</sup> However, severely disabled persons which

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<sup>304</sup> ÖAR (2013) p.8.

<sup>305</sup> BMASK (2015).

<sup>306</sup> ÖAR (2013) p.66.

<sup>307</sup> Ibid, p.11.

<sup>308</sup> Art.2(1) DPEA.

<sup>309</sup> WKÖ (2014b).

present less than 50 per cent work performance (and are considered “unfit for work”) are not covered in the unemployment statistics.<sup>310</sup>

### 6.2.1 Promoting employees or obligating employers?

Soft affirmative action measures include work and vocational training assistance, personal assistance and technical equipment in the workplace, job coaching and strength-weakness analyses on the supply side. On the demand side, measures comprise financial incentives for companies employing persons with disabilities, such as integration subsidies, wage subsidies, job safeguarding subsidies, and grants for providing training or adapting the workplace.<sup>311</sup> Given the lack of empirical evidence and comparable data on such measures, their impact is difficult to assess. The Austrian Working Group on Rehabilitation (ÖAR) suggests, however, that because of the requirements and conditions of the individual employment programmes, mostly young persons who are particularly fit and who tend to be easily placeable are benefiting from these measures.<sup>312</sup> A disability human rights perspective, conversely, mandates the inclusion of the most socially marginalized.<sup>313</sup> Furthermore, while the increase in the unemployment of persons with disabilities shown in available statistics might be attributable to the general market situation, the increase in the percentage of disabled persons of the general unemployment rate does not indicate any positive impact of these measures.<sup>314</sup>

The employment quota system is set out in the Austrian Disabled People Employment Act (DPEA), which stipulates both the obligations of employers and the compensation for non-compliance with the quota requirements. Article 1 obliges employers to hire one worker with disabilities for every 25 non-disabled workers; smaller ventures are excluded from this quota requirement of 4 per cent. Noncompliance results in an obligation to pay a compensation tax, which ranges from EUR 248 to EUR 379 per month, according to a company’s

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<sup>310</sup> ÖAR (2013) p.67.

<sup>311</sup> CRPD/C/AUT/1, paras.287ff; CRPD/C/AUT/Q/1, para.36; ÖAR (2013) p.67.

<sup>312</sup> ÖAR (2013) p.70.

<sup>313</sup> Stein/Stein (2007) p.1228.

<sup>314</sup> Arbeit und Behinderung.

size.<sup>315</sup> The quota system only includes persons who are legally registered as severely disabled.<sup>316</sup> Less than a quarter of companies adhered to the quota, with the majority preferring to pay the compensation tax.<sup>317</sup> However, employers who are partially complying also figure as non-compliers.<sup>318</sup>

According to a study by the OECD, the mandatory employment quota in Austria, although generally well-enforced,<sup>319</sup> does not seem to increase the employment rates of people with disabilities.<sup>320</sup> Since the quota requirement neither includes persons with disabilities with a work reduction of less than 50 per cent nor those which are considered “unfit for work”, the quota does not have any impact for this large group of persons with disabilities who do not fit the narrow definition.<sup>321</sup> Conversely, for those who do benefit from the quota system, an economic study by Lalive et al indicates that the employment quota increases disability employment by 12 per cent, meaning that one disabled individual in 25 is additionally employed because of the quota.<sup>322</sup> Furthermore, the study suggests that a raise in the compensation tax would increase the employment rate. This substantiates a claim of the ÖAR, namely that the impact of the quota system is hindered by the low financial incentives provided by the compensation tax.<sup>323</sup> Since the tax is considered by many employers as a minor additional cost, it is regarded as less important than the costs associated with working place adaptations for disabled employees.<sup>324</sup> However, even if an increase in the compensation tax might stimulate impact, empirical evidence suggests that the quota foremost helps to secure working places of employed persons attaining a disability while being employed, and contributes little to new occupations of disabled persons.<sup>325</sup> Accordingly, it can be not-

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<sup>315</sup> Art.9(2) DPEA; for the compensation tax rate of 2015, see Arbeit und Behinderung.

<sup>316</sup> Art.2(1) DPEA.

<sup>317</sup> CRPD/C/SR.105, para.24; CRPD/C/AUT/CO/1, para.45.

<sup>318</sup> CRPD/C/SR.105, para. 58.

<sup>319</sup> Numbers vary according to sources: Fuchs (2014) p.5 notes a fulfillment of 60 per cent, Lalive et al (2013) p.56 claim 100 per cent.

<sup>320</sup> OECD (2010) p.135.

<sup>321</sup> Ibid, p.143.

<sup>322</sup> Lalive et al (2013) p.56.

<sup>323</sup> ÖAR (2013) p.8.

<sup>324</sup> Fuchs (2014) p.4.

<sup>325</sup> Humer et al (2007) p.21; Lalive et al (2013) p.56; see also OECD (2010) p.135.

ed that the quota system in Austria not only has limited effect, but the impact is also confined to a narrow group of persons with disabilities.

### 6.2.2 Shared responsibilities?

Commenting on the limited impact of the quota system, the CCPRD attributes the resistance of employers to hire persons with disabilities to the negative attitudes towards disabled workers, fueled by a definition of disability dominated by the medical model.<sup>326</sup> It echoes civil society organizations, which stress the need to highlight the contributions of persons with disabilities to business and to establish positive incentive systems to encourage companies to believe in the capabilities of persons with disabilities.<sup>327</sup>

The Austrian government also acknowledges the fact that “[c]ompanies which offer jobs are indispensable for inclusion”, and that they thus need to be advised on the existing possibilities in employing persons with disabilities.<sup>328</sup> In return, the WKÖ underlines the significance of sustainable integration, while stressing that integration needs to be carried out with consideration for business processes.<sup>329</sup> According to the WKÖ, employment quotas are often not fulfilled, because there are not sufficient disabled workers with adequate qualifications available. Hence, the non-state actor organization warns of a further increase in the compensation tax, and asks for the implementation of incentives and supporting measures for business, such as bonus for over-compliance.<sup>330</sup> Conversely, the study by Lalive et al concludes that paying a bonus for companies exceeding the quota diminishes the effect of the compensatory tax.<sup>331</sup>

Argued from the business case for disability human rights as envisaged by subquestion four, in order to be effective, affirmative action should adequately address the demand side.

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<sup>326</sup> CRPD/C/AUT/CO/1, paras.21,47; CRPD/C/AUT/Q/1, para.2.

<sup>327</sup> CRPD/C/AUT/1, para.301; ÖAR (2013) p.23.

<sup>328</sup> BMASK (2012) p.76.

<sup>329</sup> CRPD/C/AUT/1, para.299.

<sup>330</sup> WKÖ (2014a); see also Roulstone (2000) p.439.

<sup>331</sup> Lalive et al (2013) p.56.

As seen above, quotas present only a small incentive to hire disabled workers.<sup>332</sup> While Austria may rely on the quota system because it is a relatively low priced programme, which is easy to finance, the employment of a quota system is not enough to fulfill the state duty to protect.<sup>333</sup> Rather, by providing a complimenting mix of sanctions, incentives, and support, Austria could further advance the business case for disability human rights, potentially increasing the positive impact on the right to work of persons with disabilities.<sup>334</sup> However, this must be supported by providing information and raising awareness among employers.<sup>335</sup> Because enforcement and organizational commitment, particularly the commitment of top leaders, matter for the impact of affirmative action,<sup>336</sup> the UNGPs require business to express their commitment to meet the responsibility to respect through a policy statement which is to be “approved at the most senior level of the business enterprise.”<sup>337</sup> While Austrian companies sometimes refer to persons with disabilities under their diversity policy, clear disability rights statements in conformity with UNGP16 (a) seem generally lacking.<sup>338</sup> Although Austria has not (yet) taken any steps to produce a national action plan on BHR, the above outlined issues should be taken into account in such an endeavor.<sup>339</sup>

### 6.3 Argentina

Argentina, which adopted the CRPD in 2008, is, according to data from 2003, home to about 2.2 million persons with disabilities.<sup>340</sup> Although the ratification has brought some progress in Argentina, as in the states presented above, persons with disabilities face serious difficulties in accessing the open labour market. While reliable data for the employment situation is scarce, official statistics stemming from the national inquiry on persons with disabilities from 2003 indicate an unemployment rate among persons with disabilities

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<sup>332</sup> Fuchs (2014) p.5.

<sup>333</sup> Cf. Fuchs (2014) p.5.

<sup>334</sup> Ibid, p.7.

<sup>335</sup> ÖAR (2013) p.67.

<sup>336</sup> Harper/Reskin (2005) p.368.

<sup>337</sup> UNGP 16(a), A/HRC/17/31, p.15.

<sup>338</sup> See for example CSR Reports of voestalpine (2013), OMV (2013), or RZB Group (2013).

<sup>339</sup> OHCHR

<sup>340</sup> INDEC (2003).



of 15.8 per cent.<sup>341</sup> However, civil society organizations and academic literature claim that the data does not provide an adequate picture of the employment situation of persons with disabilities.<sup>342</sup> By not including unemployed individuals who are not actively looking for work (mainly because of the knowledge that employment is difficult to obtain), the data underestimates the economically active population.<sup>343</sup> If this larger group had been included, the unemployment rate would be significantly higher.<sup>344</sup>

### 6.3.1 Promoting employment in the public sector

In Argentina, affirmative action measures differ for the public and the private sector. For the public sector, including private concessionary companies for public services, Law No. 22.431 establishes the obligation of an employment quota of at least 4 per cent reserved for persons with disabilities.<sup>345</sup> As opposed to the quota-levy system in China or Austria, there are no other sanctions or enforcement mechanisms than inspections in the case of noncompliance.<sup>346</sup> Also, there seems to be a general lack of data on the compliance with the quota of 4 per cent, particularly for the concessionary companies, which makes assessing compliance a difficult undertaking.<sup>347</sup> However, data provided by the National Employment Office (ONEP) from 2013 suggest a very limited impact of the quota. Stating that only 7 out of 182 ministerial departments and decentralized administrative entities to which the quota requirement applies actually adhere to the quota, the total of disabled workers employed in the public sector is 0.77 per cent.<sup>348</sup> Since the fulfillment of the quota could enhance the visibility of the working capacity of persons with disabilities, the lack of enforcement seems to be a major obstacle to the inclusion of persons with disabilities in the work environment.<sup>349</sup> The absence of sanctions together with the lack of data on the compliance of concessionary companies is also troubling from the point of view of the state duty to pro-

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<sup>341</sup> INDEC (2003); see also REDI (2012) p.69.

<sup>342</sup> REDI (2012) p.69; Ferrante (2008) p.178f.

<sup>343</sup> Ferrante (2008) p.173.

<sup>344</sup> REDI (2012) p.69.

<sup>345</sup> Art.8 Law No. 22.431.

<sup>346</sup> Cf. REDI (2012), p.72; CRPD/C/ARG/1, para.501.

<sup>347</sup> CRPD/C/ARG/CO/1, para.43.

<sup>348</sup> ONEP (2013) p.2,13; REDI (2012) p.70.

<sup>349</sup> REDI (2012) p.71.

tect. As UNGP 5 makes clear, a state does not relinquish its human rights obligations when contracting out services to private companies. The state duty to protect seems to oblige the state, at least, to ensure that the employment quota is monitored.<sup>350</sup> Echoing this claim, the CCRPD urges the state party to reinforce its measures for monitoring and enforcing compliance with the employment quota, and recommends the systematic collection of data to assess the compliance with the quota scheme.<sup>351</sup>

### 6.3.2 Promoting employment in the private sector

A quota requirement similar to the one in the public sector does not exist for the private sector. However, the state party lists a number of other affirmative action measures that have been designed to increase the employment of persons with disabilities in the open labour market.<sup>352</sup> These positive measures include employer tax benefits and other financial incentives for employers to help disabled workers find jobs in the mainstream market.<sup>353</sup> With regard to these measures, the state reports that they have been very successful. However, this success is somewhat opaquely measured by the fact that the state received “repeated requests” from employers, and that persons with disabilities who have found jobs have become fully integrated into the workforce.<sup>354</sup> Overall, Argentina notes that affirmative action has had a positive impact, not only because of the short-term benefit of those who have found work but also because of the change in attitude of their co-workers, who see that the company attaches value to its workers as human beings.<sup>355</sup> This argument closely resembles the business case for disability rights outlined in section 4.2.

### 6.3.3 Shared responsibilities?

However, despite the existence of financial incentives for employers, the CCRPD notes that cultural barriers and prejudices present a major obstacle to the employment of persons

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<sup>350</sup> Cf. UNGP 5, A/HRC/17/31, p.10.

<sup>351</sup> CRPD/C/ARG/CO/1, para.44.

<sup>352</sup> CRPD/C/ARG/1, para.519.

<sup>353</sup> Art.23 Law No. 22.431; CRPD/C/ARG/1, para.519.

<sup>354</sup> CRPD/C/ARG/1, para.513.

<sup>355</sup> Ibid, para.514.

with disabilities, particularly in the private sector.<sup>356</sup> The state itself acknowledges that “[s]ome entrepreneurs who are not aware of the potential of persons with disabilities have questions and misgivings that are not borne out of the experience of those who have employed persons with disabilities.”<sup>357</sup> Rather, those companies who have employed disabled workers have found their performance to be comparable to abled workers.<sup>358</sup> However, since the number of persons with disabilities who are in the job market is still small, misconceptions about what it needs to adapt the workplace in order to create equal opportunities are still widespread.<sup>359</sup> Furthermore, the negative preconceptions about the limited productivity of disabled workers result in the fact that the few employment positions covered by disabled workers still respond to a CSR approach.<sup>360</sup> A BHR approach, however, would strive to make the real working capabilities of persons with disabilities known. Since Argentina is in a process of producing or at least committed to producing a national action plan on BHR, in accordance with UNGP 3, it should include the development of a public policy and awareness-raising campaigns to promote the inclusion of disabled workers in the open labour market.<sup>361</sup> Without targeting private employers and the larger public, the impact of the existing affirmative action measures in the private sector will remain limited.<sup>362</sup>

## 6.4 Tunisia

Tunisia ratified the CRPD in 2008 and submitted its initial report to the Committee in 2010, just a few months before the self-immolation of Mohamed Bouazizi was to start the Arab revolts. Although the general employment situation has improved since the revolution, persons with disabilities are frequently excluded from accessing jobs in the labour market. According to official statistics, there were 151,423 persons living with a disability

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<sup>356</sup> CRPD/C/ARG/CO/1, para.43.

<sup>357</sup> CRPD/C/ARG/1, para.514.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid, para.515.

<sup>360</sup> REDI (2012) p.72.

<sup>361</sup> OHCHR; UNGP 3, A/HRC/17/31, p.8.

<sup>362</sup> CRPD/C/ARG/CO/1, para.44.

in Tunisia in 2003, and the official disability rate had increased to 2 per cent in 2010.<sup>363</sup> This low number seems rather unlikely,<sup>364</sup> and unofficial estimates put the number of people with disabilities in the country at around 700,000.<sup>365</sup> The lack of accurate data may be traced back to the fact that the disability rate is currently measured on the basis of a voluntary declaration by an individual with disabilities, which is to be supported by medical evidence.<sup>366</sup> According to the state, out of the total population of persons with disabilities, in 2004 there were 19,500 working, and the proportion of persons with disabilities in work was 18.1 per cent.<sup>367</sup> It does not become clear how many of these are employed in the mainstream labour market, and how many are occupied in sheltered workshops.<sup>368</sup>

#### 6.4.1 Potential impact

In order to enhance the rights of persons with disabilities, Tunisia enacted Law No. 83 in 2005. The Law introduces a quota system in both the public and the private sector. While Article 29 establishes a quota of 1 per cent for public employers, Article 30 obliges companies that have 100 or more employees to reserve 1 per cent to individuals with disabilities.<sup>369</sup> In the private sector, the quota system is enforced through penalties in case of non-compliance, which is doubled for repeat offenses.<sup>370</sup> A national agency is monitoring the employment of persons with disabilities in both the public service and the private sector.<sup>371</sup> Enforcement is furthered by the heads of the Labour Inspection Office inspection and conciliation sections, which are installed to inform private entities and monitor the employment quota.<sup>372</sup> The requirement to hire persons with disabilities is further encouraged

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<sup>363</sup> CRPD/C/TUN/1, para.6; CRPD/C/5/SR.3, para.33.

<sup>364</sup> CRPD/C/5/SR.3, paras.29,31.

<sup>365</sup> Handicap International.

<sup>366</sup> IDA (2010) p.2; CRPD/C/TUN/Q/1/Add.1, para.69.

<sup>367</sup> CRPD/C/TUN/Q/1/Add.1, para.168.

<sup>368</sup> CRPD/C/TUN/Q/1, para.23.

<sup>369</sup> CRPD/C/TUN/1, paras.192f.

<sup>370</sup> Ibid, para.196.

<sup>371</sup> CRPD/C/TUN/Q/1/Add.1, para.173.

<sup>372</sup> Ibid, para.174.

through financial incentives for employers. These include exemptions from payments as well as breaks from vocational training and housing fund contribution taxes.<sup>373</sup>

According to the initial report, since the introduction of Law No. 83 in 2005, 600 disabled workers have been recruited to the public sector as a result of the quota.<sup>374</sup> Commenting on compliance, the state reports that the quota requirements in the public sector have been met by 98 per cent of the target. The compliance rate in the private-sector is with the stated 90 per cent similarly high.<sup>375</sup> However, since the total number of disabled workers in either sector is unknown, the impact of these measures cannot be fully assessed. Furthermore, given that only medium and large companies are included in the quota scheme, the impact of the quota is seriously reduced, and the level of inclusion of persons with disabilities in the private sector remains low.<sup>376</sup>

#### 6.4.2 Shared responsibilities?

While the state seems eager to create a database to obtain comprehensive statistics on the implementation of instruments, adequate data to assess the impact of affirmative action is currently lacking.<sup>377</sup> Moreover, the nature and quality of the enhanced employment opportunities do not become clear from the data provided. In spite of the alleged successes, the Committee seems concerned about persisting negative patterns hindering the inclusion of persons with disabilities in the work environment.<sup>378</sup> Furthermore, civil society organizations point out that, due to prevailing misconceptions about persons with disabilities, sheltered workshops are increasingly replacing opportunities to enter the open labour market.<sup>379</sup>

Recognizing the need to raise awareness in connection with the employment of persons with disabilities, the state has begun to provide information on this issue during the visits of labour inspection officials to corresponding institutions, for example the Tunisian Union

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<sup>373</sup> CRPD/C/TUN/1, para.196.

<sup>374</sup> Ibid, para.192.

<sup>375</sup> Ibid, para.192f.

<sup>376</sup> CRPD/C/TUN/CO/1, para.33.

<sup>377</sup> CRPD/C/5/SR.3, para.17.

<sup>378</sup> Ibid, para.15.

<sup>379</sup> IDA (2010) p.10.

for Trade and Industry.<sup>380</sup> While the obligation to promote a conducive environment for the employment in the private sector through awareness-raising is part of the state duty to protect, it should not be forgotten that the state itself is one of the most important employers. Accordingly, a more binding employment quota with the possibility of sanctions in case of noncompliance in the public sector could remind the state of its own state duty to protect, which remains at the core of the international human rights regime.<sup>381</sup>

## **6.5 Affirmative action: impact across four countries**

Although the scope of this thesis does not allow for a comprehensive comparative analysis, the findings of the four country sections nonetheless point to a number of recurrent themes in the impact assessment of affirmative action measures. Answering subquestion one on reasons for the low employment rate of persons with disabilities, the analysis found that the existence of negative attitudes and social prejudice against disabled workers constitutes an obstacle to the employment of persons with disabilities in all four states. Although the field of disability rights has undergone a paradigm shift towards a rights-based approach, the medical model of disability is still largely dominant, either in definitions of disability as in the case of Austria, or in the lack of awareness-raising as in the case of China.<sup>382</sup>

For subquestion two, it can be noted that all four states have introduced a range of affirmative action measures in accordance with their obligation to promote the employment of persons with disabilities, including in the private sector. While the states under review also have a quota system in place, these schemes vary with respect to their scope of application and the existence of enforcement mechanisms. In addition to negative preconceptions, the lack of adequate enforcement mechanisms found in all states presents an important obstacle to the implementation of the right to work of persons with disabilities. Accordingly, as shown for subquestion three on compliance, even where sanctions or financial incentives

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<sup>380</sup> CRPD/C/TUN/Q/1/Add.1, para.29; A/HRC/17/31, p.4.

<sup>381</sup> MyHandicap; A/HRC/17/31, p.4.

<sup>382</sup> CRPD/C/CHN/CO/1, para.15.

exist such as in Austria, China and Tunisia, both public and private employers often prefer to pay the penalties. While companies are technically “complying” with the scheme by paying a compensation tax, this does not enhance the right to work of persons with disabilities in the open labour market. Interestingly, the negative preconceptions about persons with disabilities are both the rationale for employing affirmative action measures and one of the main reasons for why they do not produce greater impact.

In all four states, the lack of reliable and updated data hamper a thorough investigation of the impact of affirmative action measures, as contemplated in the research question. Nonetheless, a positive impact in terms of increased employment opportunities is found for Austria, and China notes an increase in disability employment as a result of the establishment of affirmative action measures. Furthermore, Argentina additionally lists the change in attitudes of employers and co-workers, who experienced the comparable productivity of persons with disabilities, as a positive impact of affirmative action measures. However, despite these successes, since provided jobs in China are often only of a symbolic value and, as in the case of Austria, only the group of disabled persons fitting the narrow definition of disability benefit from these schemes, the overall impact of affirmative action remains limited. Also, given that some measures only apply to medium and large scale companies as in the case of Tunisia, their impact is further reduced.

Examining the shared responsibilities in accordance with subquestion four, it becomes apparent that, in order to enhance the impact of affirmative action, states need to comply with their state duty to foster a positive picture of disabled workers, making private employers aware of their potential and advising business on disability employment possibilities. Corporations, in return, are obliged to accept that corporate activities such as discriminatory employment practices impact on disabled people and the community as a whole, and that this leads to their corporate responsibility to respect the rights of persons with disabilities. Finally, the genuine move away from a CSR to a BHR approach could also lead to a move away from the medical to the rights-based model of disability.

## 7 Conclusion

While persons with disabilities have long been denied their basic human rights, with the adoption of the CRPD, they finally can get their due share of attention. Since the lack of employment opportunities significantly contributes to disabled persons' economic and social marginalization, the right to work as guaranteed in Article 27 CRPD importantly sets out the obligation of states to promote the employment of persons with disabilities in the open labour market, including through the adoption of affirmative action measures.

This thesis explored the impact of affirmative action measures on the right to work and employment of persons with disabilities. Answering subquestion one, it first depicted the existence of prejudice and negative attitudes towards disabled workers as a main reason for the low employment rate. Describing the respective requirements of relevant actors to remedy the low employment rate as envisaged by subquestion two, the thesis outlined the obligations of states and non-state actors to give effect to the right to work. While the wide obligations of states include the duty to promote measures, including affirmative action, that enhance the employment opportunities of persons with disabilities, corporations in return need to address the right to work and comply with affirmative action measures in accordance with their responsibility to respect.

Providing empirical evidence on the impact of affirmative action in four selected states, the thesis found for the question on compliance that, particularly with regard to employment quotas, both public and private employers tend to avoid their obligations under these schemes. Although some positive impact could be identified, responding to the research question, it can be stated that the overall impact of these measures remains limited, both in the number and in the nature of enhanced employment opportunities. As such, both the negative attitudes towards persons with disabilities and the lack of adequate enforcement mechanisms seem to obstruct affirmative action measures' potential for improving the employment situation of persons with disabilities.



Notwithstanding the low impact of affirmative action measures, it is important to keep in mind that the right to work as a socio-economic right is subject to progressive realization. Accordingly, states are only obliged to take deliberate steps towards the full realization of this right. Notwithstanding their limitations, affirmative action measures can be seen as starting steps towards enhancing the right to work and employment of persons with disabilities. However, as the analysis has shown, they need to be complimented by additional measures in order to achieve permanent and significant success.<sup>383</sup> Given the recentness of the CRPD and the fact that the Committee is currently only in the first round of states assessments, future reviews could improve the impact of affirmative action measures. While this thesis clearly established a need for more reliable data, the monitoring procedures of the CPRD could enhance data collection,<sup>384</sup> bearing with it the potential for more comparative analysis in the future.

Furthermore, as elaborations on subquestion four have shown throughout the thesis, affirmative action measures could and should increasingly be informed by the BHR paradigm. In looking at the interplay between the UNGPs and the CRPD, this thesis attempted to close a research gap in the literature of disability rights and the human rights obligations of non-state actors. Although the results are limited, they seem to establish a further need to examine the shared responsibilities of states and non-state actors and to clearly bring forward the business case for disability human rights in order to enhance the rights of persons with disabilities.

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<sup>383</sup> Cf. Waddington (1996) p.71.

<sup>384</sup> Cf. Art.31 CRPD.

## 8 Table of reference

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CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965
CRC	Convention on the Rights of the Child, 20 November 1989
CRPD	Convention on the Rights of Persons with Disabilities, 13 December 2006
CWM	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990
ICCPR	International Covenant on Civil and Political Rights, New York: 16 December 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 16 December 1966
ILO 159	International Labour Organisation Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons), 20 Juni 1983
UDHR	Universal Declaration of Human Rights, 10 December 1948

### Soft Law Instruments

1971 Declaration	Declaration on the Rights of the Mentally Retarded Persons, 20 December 1971
1975 Declaration	Declaration on the Rights of Disabled Persons, 9 December 1975
Standard Rules	Standard rules on the equalization of opportunities for persons with disabilities, 20 December 1993
VDPA	Vienna Declaration and Programme of Action, 12 July 1993

WPA World Programme of Action concerning Disabled Persons, 3 December 1982

#### National Laws and Regulations

DPEA Disabled Persons Employment Act (BEinstG), Federal Ministry of Labour, Social Affairs and Consumer Protection, 11 December 1969

Law No.22.431 Argentina, LEY 22.431 De Protección Integral para los Discapacitados, 16 March 1981

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