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## Critiques on Contemporary Discourse of International Human Rights Law: a Global South Perspective

Cekli Setya Pratiwi <sup>a,1,\*</sup>, Prisca Listiningrum <sup>b,2</sup>, Muhammad Anis Zhafran Al Anwary <sup>b,3</sup>

<sup>a</sup> The Institute of Human Rights and Peace Studies, Mahidol University, Thailand

<sup>b</sup> Faculty of Law, Universitas Brawijaya, Indonesia

<sup>1</sup> cekli@umm.ac.id\*; <sup>2</sup> p.listiningrum@ub.ac.id; <sup>3</sup> begjakusuma@student.ub.ac.id

\* corresponding author

### ABSTRACT

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International human rights law faces various critiques among scholars such as Mutua and Posner. Mutua claims that international human rights law fails to accommodate cultural values, while Posner demands about its effectivity. Referring to Langford, this paper uses critical analytic approach to evaluate Posner's critique and Mutua's main thoughts. Langford counter critiques of Mutua and Posner are significant to mediate the discourses by providing current evidence. While opposing Posner and Mutua's critiques of international human rights law, this paper supports Langford's counter critiques because of three reasons. First, Langford's comprehension can ensure that IHRL not only accommodates individual rights but also communal rights. Second, Langford's recent study indicates the effectiveness of international human rights law. Third, Langford develops a new optimism that social rights are justiciable although the strategic idea of integrating human rights with development still needs to be elaborated further. Therefore, it is significant to follow Langford's suggestion to optimizing the international human rights law as the most recognized general standard to prevent human rights violation against the abusive power.

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*"The arc of the moral universe is long, but it bends toward justice."*

(Martin Luther King) ([Schroeder, 2012](#)).

### 1. Introduction

After more than seven decades, International Human Rights Law (IHRL) faces various critiques among scholars. IHRL is a set of international rules, norms, and principles to be made and agreed upon by the international community to be used as a general standard in



achieving the rights and dignity of all human beings without discrimination. Human Rights instruments include the UDHR, nine core treaties, including general comments from the treaties, as well as various Human Rights Commission resolutions. Posner in *“The twilight of human rights law”* questions about the effectivity of IHRL and claims that the ratification of HR treaties unsuccessful to influence in reducing HR violations ([Posner, 2014](#)). Moreover, Mutua in *“Human Rights: Political and Cultural Critique”* argues that IHRL is “Western” concept and fails to accommodate cultural values to protecting communal rights ([Mutua, 2002](#)). The two statements of the figures departed from the view that human rights cannot be seen in a universal framework. de Sousa Santos in *“Human rights as an emancipatory script?”* as cited by Meekosha and Soldatic expressed a similar view, where the universality of human rights can only be justified when viewed from the perspective of the Western countries ([Meekosha and Soldatic, 2011](#)).

Arguments related to the nature of HR values cannot be separated from the discourse that distinguishes between countries in the world based on their geographical location, namely the Global North and the Global South. However, the two terms do not only represent geographical aspects, but have developed through observations of changes in social structure, political movements, and the strengthening or weakening of the economy of each country which become new parameters in determining or classifying the position of each country in the group. Historically speaking, poverty, hunger, low quality of education, high rates of disease spread, to authoritarian government are generally some of the indicators used to describe the living conditions of people in the South. However, recent developments continue to show that improvements in social, political, and economic governance can improve conditions in Southern countries, although the negative situation as previously mentioned can still be found ([Kowalski, 2020](#)).

The discrepancy between the Global North and the Global South also affects the perspective on the practice of respecting and protecting HR in the two regions. In general, the Southern region sees that HR are a product of developed countries which tend to be difficult to be implemented by considering various negative parameters previously mentioned. According to Bartelson as quoted by Langford, HR values have no sociological legitimacy to be applied in the Southern Hemisphere considering that the core values that underlie the people in the region are fundamentally different from the values adopted by Northern Hemisphere countries. Bartelson, who tends to agree with Posner and Mutua's opinion, argues further, that the imposition of universal HR values can have an impact on the emergence of resistance at the grassroots which can trigger social and political disintegration ([Langford, 2018](#)).

Regarding to these statements, Langford's counter critique in *“Critiques of Human Rights”* can mediate the discourses by providing quite strong evidence to support IHRL. Referring to



Langford, this paper uses critical analytic approach to evaluate Posner and Mutua's main arguments. This paper supports Langford's counter critiques because of three reasons elaborated within three sections. The first section is how Langford's counter critique on Mutua provides meaningful argument and can comprehend that the concept of IHRL accommodates both individual and communal rights. The second section elaborates Langford's study that acknowledges the progressive advances of HR's enforcement and social movement. The third section validates Langford's study that social rights are justiciable, and it brings equality towards vulnerable groups. Finally, this paper provides concluding sentences with recommendation.

## 2. Research Methods

This manuscript was written based on the results of socio-legal qualitative research that was theoretically first introduced by Ziegert in 2005 ([Bedner et al., 2012](#)). Further back, citing Banakar and Travers, the socio-legal method in legal research was first developed by Wiles and Campbell in the '70 ([Banakar and Travers, 2005](#)). This method is used to distinguish between the method in question and the study of the sociology of law which is often equated. According to Wiles and Campbell, the difference between socio-legal and sociology of law lies in the use of social studies or approaches in the research to be carried out, where in the sociology of law tends to shift the focus of researchers from the core legal studies into understanding social sciences, while socio-legal only use social science studies as a tool to analyze the substance of research material or data collection ([Banakar and Travers, 2005](#)). Banakar and Travers cite Wheeler and Thomas who stated that socio-legal is an alternative way to conduct interdisciplinary research between legal and social studies with the aim of looking at the position and enforceability of law as an entity where the law exists or applies ([Banakar and Travers, 2005](#)). Specifically in this study, related to the criticism of IHRL, qualitative socio-legal research was used with secondary data sources because there were limitations in mobility to obtain primary data directly. The use of secondary data in socio-legal research can be justified because in every composition of data, primary or secondary, there is still an empirical dimension in it ([Immanuel Nalle, 2015](#)).

## 3. Discussion

### 3.1. Discourse on IHRL: Between Individualism and Communalism

First, among the criticisms of IHRL that exist one of them is whether IHRL accommodates communal rights. Mutua argues that the conceptualization of "universality of human rights" is problematic. According to Mutua, this concept is considered to override culture values that have taken root in a pluralistic society and compelling of what had happened to the movement of African's values in the 1970s and in the 1980s of Asian values. However, both the communal rights and the rights to development remain unpopular



([Mutua, 2002](#)). Therefore, Mutua believes that IHRL was setting up to protect only for individual rights rather than communal rights. For example, Mutua calls his own experience and other Africans who were forcedly converted to Christianity by a colonized Western country ([Mutua, 2002](#)). This kind of human rights violation probably is not relevant anymore to be addressed. Still, it could be happened in a very small number of cases and particularly in a country under an authoritarian regime. However, in many constitutions of democratic countries have articulated that the right of proselytism is not an absolute right. Mutua considered that IHRL did not protect the communal rights of Africans to defend their native religion, where their religions should not be disturbed through proselytism.

Thus, the conceptual gap of IHRL can be resolved by reconciling universalism and relativism to accommodate the protection of communal rights through state discretion. According to Langford, States may utilize the limitation clause or margin appreciation doctrine to apply certain restriction on implementing human rights as long as the restrictions are carried out strictly, without intending to violate any essential rights, and not aiming to discriminate against certain group of people ([Langford, 2018](#)). These aspects are not addressed by Mutua when discussing the right of religious proselytism. Mutua focuses only on the demand to amend IHRL and suggests that the right of proselytism should be not an absolute right. Mutua also implied that the right to dissemination of thought need to be limited ([Mutua, 2002](#)). However, Mutua forgets that this limitation clause has clearly accommodated in IHRL. These Mutua's arguments indicate that he does not comprehend about the limitation clause provided in *International Covenants on Civil and Political Rights* (ICCPR). The ICCPR Article 18 (3) and Article 19 (3) clearly stated that the right of expression and the right to manifest religion are not absolute rights and therefore can be limited. The limitation clauses are very commonly applied by the domestic and the regional courts when dealing such cases. The reservation of certain provisions of the human rights treaties provides a persuasive way for countries to prepare the domestic legal readiness in carrying out the contents of the agreement as consistent as possible ([Goodman, 2002](#)). Mutua's critique is irrelevant since IHRL provides a way to protect communal rights.

Moreover, related to Mutua's critique that HR is a product from the West because it was designed by Western countries and their allies, therefore it is not suitable to be applied in third world countries ([Mutua, 2002](#)). In contrast, Langford's counter argument provides quite strong evidence and claims that IHRL protects individual and communal rights and gains both social and legal legitimacy. First, according to Glendon cited by Langford argues that the concept of HR adopts both East and West values in which non-Western States and experts had strongly contributed on the drafting of UDHR ([Langford, 2018](#)). A preceded world-wide study and the declaration itself were drafted by both East countries such as the Soviet Union, Lebanon, China, Chile, and West countries the United States, France, Australia, and United Kingdom. Human right treaties have legal legitimacy due to the very high number





of their ratifications and implementations ([Neumayer, 2005](#)). Second, the utilization of the IHRL through social movement is happening in everywhere. Civil society in various countries use IHRL as a framework to fight for human rights protecting against human rights violators ([Merry and Levitt, 2017](#)). Therefore, Mutua's criticism seems to have ruled out the role of developing countries in the formation of the IHRL foundation. Basically, if the role of developed countries does bring benefits, then these services should be recognized and appreciated. If there are deficiencies in the IHRL framework and its implementation, it is a shared responsibility to make improvements.

In general, Mutua's criticism of IHRL puts the idea of HR as technical and individualistic values that have an impact on derogating HR's goals to ensure the realization of distributive justice and communal community participation. Langford breaks down this criticism into several parts to extract the essence of the criticism he wants to convey so that he can produce an appropriate counter argument. There are four classifications of criticism of HR's position in the realm of international law, namely material, democratic, instrumental, and epistemological criticisms ([Langford, 2015](#)). The material criticism of the IHRL was expressed by D'Souza, as quoted by Langford, as a weakening of its enforcement efforts when compared with other international legal instruments such as international economic law which contains economic rights, but tends to be individualistic in the practical implementation, in which the protection of economic rights is only felt by interested business subjects ([Langford, 2015](#)). Thus, when IHRL in general, which is supposed to protect as many parties as possible, has a weaker position when it comes to the rights of business actors. Moreover, the IHRL enforcement is generally quasi-judicial, thus structural weakening occurs in an effort to protect IHRL.

Critiques of IHRL in a democratic context focuses on the weaknesses of IHRL's institutionalization. The lack of agency that occurs because the IHRL discourse often clashes with the concept of state sovereignty makes it difficult to protect HR, especially through activism. Madlingozi shared based on his experience in various countries, that the weak position of IHRL in protecting HR activists led to the emergence of new victims to reduce victims, which is very ironic ([Langford, 2015](#)). Furthermore, Mutua's critique of IHRL also touches on the epistemological aspect which underlines the universalism of IHRL as the biggest weakness because of its nature which is considered a core value, thus overriding group or communal interests ([Langford, 2015](#)). The last group of critics, instrumental, points out that IHRL's universalism in theory is contradicted with its practice that tends to be regionalist or nationalistic. Where the existing IHRL instruments are centralized, but their implementation in the field obscures this centralized nature with regional or national interests which are often not in line with the objectives of the IHRL itself. Thus, IHRL is considered only as an isomorphic prototype that becomes a facade investment with the aim of tricking its weaknesses ([Langford, 2015](#)).



Various criticisms that come in the groups as described above in Langford's writing are supported by empirical evidence showing that IHRL does not have a significant impact on the protection of civil and political rights as stated by Hafner Burton and Ron. Activism by NGOs or similar community institutions that operate based on a right-based approach tends to be localized and tied to local power, so that the universality of IHRL is only a theoretical sweetener. Some examples cited by Langford include those written by Rajagopal, namely in the form of the weak role of the judiciary in India in protecting people's rights which have an impact on mass evictions such as the modernization of urban governance that displaces street vendors and the abolition of land rights for farmers and indigenous communities in rural areas. The eviction of the poor in Cape Town, South Africa as written by Pieterse is also a clear example of how weak IHRL is in achieving its goal of implementing the universality of human rights values, because even though the court decision in the Grootboom case has stated that the national housing program initiated by the South African government unconstitutional, the eviction is still carried out ([Langford, 2015](#)).

The same practice also occurs in Indonesia, where the role of the Constitutional Court as the Guardian of the Constitution which includes respect for, and protection of human rights values does not have a significant empirical impact. In various legal considerations of its decisions, the Court often pays attention to the human rights clauses contained in international human rights declarations and covenants such as the UDHR and the ICCPR. Moreover, the Constitutional Court's decision also has the nature of *erga omnes* which means binding for all parties, so that it can be interpreted that the decision is a form of law or part of a new law that must be obeyed and implemented. However, unfortunately, the constitutional awareness of the Indonesian people, especially policy makers, to obey the Constitutional Court's decision is still under the radar. Hence, the IHRL values used by the Court as part of its legal considerations are not implemented properly ([Nugroho, 2019](#)).

Related to the argumentative theory and empirical examples that show the weakness of the IHRL that seems forced to be universal, Langford in his writing attempts to examine practice in a wider scope such as his findings on evictions, in which the role of judicial institutions that use IHRL in the majority its decisions can prevent evictions by increasing the sensitivity of the community and the government together to oversee the implementation of development programs. Likewise with the role of NGOs which obtain moral and legal support structurally through court decisions. Thus, in the downstream, all elements of society can communally 'force' policy makers to think and produce more innovative development policies based on respect and protection of human rights values ([Langford, 2015](#)).

Langford also revealed that the weakness of criticism of IHRL is that the legal instrument is positioned as a rigid ideology. In fact, human rights values are often widespread and provide new challenges in various political spectrums and the fault of IHRL is always considered as a



weapon of opposition, so that emerging perspectives often show their weaknesses in dealing with power. According to Langford, human rights are not an ideology, but a critical norm. Thus, as other norms in social life, human rights can be used as a tool for marginalized people to be able to stand together with other communities and side by side with the government in fulfilling their rights and carrying out their obligations ([Langford, 2015](#)). That is why the IHRL can be justified as a legal instrument that is universal and able to guarantee communal rights because like a boat, the IHRL is not a rigid boat, but the oar that is used to direct the movement of the boat. In short, this paper supports Langford wisely viewing Mutua's critique as a whip for the advancement of IHRL. However, Langford is more optimistic and progressive in ensuring that IHRL accommodated individual and communal rights.

### 3.2. The Current Studies Evidence of the Effectivity of IHRL

The second critique of IHRL is concerning about its effectivity. Posner's study done in 2012 argues that the ratifications have less impact on decreasing HR violations since some States do not comply IHR treaties ([Posner, 2014](#)). Posner's research finding reports that from the time of the ICCPR entry into force, in 1976 to 2012, there were 170 countries ratified the ICCPR but HR protection in some of these countries such as China or Russia are not good enough ([Posner, 2014](#)). Moreover, the United Nations HR monitoring system is ineffective and inefficient, and its recommendations are not always followed by the States ([Posner, 2014](#)). However, Posner's study has generalized the condition in authoritarian countries such as China or Russia. Posner ignored many other facts that most members of the HR treaties enhance on protecting human rights.

While Langford counters critique is more optimist and objective considering the current fact IHRL's enforcement is happening not only in international but also in national level. First, Langford refers to Simons argues that the effectiveness of the law changes from time to time, depends on the political restrain of the country ([Langford, 2009](#)). For example, in international level, in contrast to the Posner's data, Langford refers to White who states that the *Universal Periodic Report* (UPR) mechanism and the *European Court of Human Rights* (EctHR) are quite successful (Langford 2018). Second, Langford cites Sikkin's recent study and indicates that one of the positive effects of ratification is the change of States' attitude and willingness to protect HR ([Sikkink, 2017](#)).

Furthermore, the effectivity of IHRL should be evaluated not only through international monitoring mechanisms but also through domestic adjudication. Langford indicates that the effectiveness of domestic adjudications happens in around continents. For instance, in the last two decades around two hundred thousand cases brought before the national court in Brazil ([Langford, 2009](#)). Langford argues that IHRL has been embedded in the constitutional laws to accelerate the protection of economic and social rights such as the right to social security, health care, and education in many countries ([Langford, 2018](#)). Many



studies present that constitutional courts in various countries play the important role to adjudicate human rights violation ([Bokshi, 2018](#)). This adjudication has brought benefits to large population or *obligatio erga omnes* such as in Latin America ([Langford, 2018](#)). For example, the Constitutional Court of the Republic of Kosovo has adjudicated with legal binding decision of Case No. K108/09, Applicant, the Independent Union of Workers in Ferizaj to claiming for compensation of unpaid salaries of 572 employees of the socially owned IMK Steel Pipe Factory in the amount of EUR, 25.649.250, 00 ([Bokshi, 2018](#)). Many other cases brought before the Constitution Court of Kosovo demands for protecting both civil and political rights as well as economic, social, and culture rights such as the rights of peaceful enjoyment of their possessions (Case No. K165/15), the right of payment of unpaid salary (Case No. K191/16), the right to having property register (Case No. K165/15) can be looked at Bokshi studies ([2018, p. 124-130](#)). See also the most prominent Constitutional Court in the world such as in the U.S., Japan, Germany.

In line with the examples presented by Langford above, the latest practices related to climate change litigation are also starting to occur and are getting more appreciation from judicial institutions in various countries. Referring to data from the United Nations Environment Program (UNEP) in the *Global Climate Litigation Report: 2020 Status Review*, in 2017 there were at least 884 cases of climate change brought to court in 24 countries. In the next three years, the number of cases nearly doubled to 1,550 in 38 countries ([Law Division, 2020](#)). In general, these lawsuits are filed together or class action lawsuits which show that in new phenomena such as climate change litigation which is closely related to various human rights such as the right to life and the right to a safe, clean, healthy, and sustainable environment, comes from global interests are contained in various international legal instruments, but their implementation and enforcement relies heavily on the internal role of each country.

Moreover, IHRL influences on the development of new rights in many European countries such as the right of LGBT ([Langford, 2018](#)). Through social movements, many countries reform their domestic laws, or they utilize their various courts to accommodating human rights protection such as in criminal courts and in administrative courts. Langford demonstrates Merry-Levitt, that the process of vernacularization had happened in many countries such as Hongkong, the U.S.A. Even, it also happened in authoritarian regimes such as in China, people adopt IHRL to fight for their rights ([Langford, 2018](#)).

Hence, Posner's study seems out of date or only relevant until 2012 but fails to acknowledge that HR enforcement is not only happened in international but also in domestic level. Posner's argument is not strong enough since Posner does not look deeply into how legal institutions applied IHRL in various cases, because Posner sees IHRL as a rigid -ism, so the universalism of IHRL is understood as an unimplementable entity. In fact, according to





Langford, effectiveness IHRL is a dynamic and fluctuating entity, highly dependent on space and time, as well as the willingness and the ability of a country to use its power to protect the human rights of its citizens.

### 3.3. Social Rights Are Justiciable

In this section, Langford's counter critiques towards Nickel's argument who claim that human rights are non-justiciable. Nickel in Langford critique that IHRL is difficult to achieve distributive political equality and the natural resource ([Langford, 2018](#)). Nickle also argues that HR fails to address equality between disempower vulnerable and empower (Langford 2018). However, Langford argues that integrating human rights and development would help to reach the equality for vulnerable groups who still marginalized by States ([Langford, 2018](#)). Langford focuses on material equality such as economic, social and culture rights. Langford believes that equality can be achieved through sustainable development programs. He elaborates on his other study concerning the MDGs problematics and offering six ways to resolve the problem of poverty. However, Langford's strategy to integrate human rights and development need to be elaborated further.

For example, Langford's research in 2014 published in Housing Rights Litigation: Grootboom and Beyond, it can be clearly seen that litigation efforts based on IHRL values are very influential on the development of the fulfillment of community rights in several areas, especially regarding the right to a better place to live. its form is a communal or shared right. Some of the cases investigated include the cases of Grootboom, Valhalla, Modderklip, Olivia Road, Bardale, Joe Slovo, Makause, and Mandeville. Based on the analysis of the a quo cases, especially related to practice after the decisions on these cases, there are several findings such as the absence of degradation in the quality of housing by 88%, 63% improvement in services or provision of emergency shelter for the short term, availability of housing formally within a period of 5 and 10 years by 50% and 100% respectively, an increase in the quality of communal organizations by 69%, and the occurrence of policy changes to become more innovative by 75% ([Langford, 2013](#)). This concrete example is one of the many precedents that show that social rights have standing to be positioned as a real effort to obtain justice.

Langford also provides some evidence that social rights are justiciable. For instance, various social rights such as education rights were successfully claimed through the courts in Brazil where the decision benefited 78% of citizens, including marginal groups ([Brinks and Gauri, 2014](#)). In addition, Langford noted in Latin America and Colombia, claiming the fulfillment of the right to health was also successfully decided by the court in dealing with the HIV/AIDS crisis and other health policies. These examples verify that social rights are justiciable and bring equality towards vulnerable groups.



## 4. Conclusion

Contemporary critiques of IHRL are part of a long arc to justice. In contrast to Posner and Mutua, Langford is more optimistic and comprehend about the historical context, conceptual balance, and the progress enforcement of IHRL. Rather than lament to the discourse of universalism versus relativism that never ends or deplore the lack effects of ratification of HR treaties, it is significant to follow Langford's suggestion to optimizing IHRL as a framework and the most recognized general standard to prevent HR violation against the abusive power. In addition to support the integration of human rights and development, it is urgent to increase the country's commitment of HR protection through simplifying international HR monitoring mechanisms, to raise people's awareness of HR in each country, and to provide experts to support social movements or vernacularization process in the national level.

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