

CHAPTER I

INTRODUCTION

A. Context of study

The Number of human trafficking cases increased in Indonesia.¹ Most of the victims of human trafficking are the women and children, although there are also any men and boys who are also being exploited. In 2007, UNICEF² (United Nations Children's Emergency Fund) explain that 40.000 until 70.000 children become the human trafficking victims every years.³ The recapitulation data of human trafficking from Indonesian general attorney in period 2010, 77 cases which reported, then in 2011 there were 203 cases.⁴ It show the increase of human trafficking case in Indonesia, but still any case which not reported to the police only settlement between the parties. Therefore, it cannot be reference the number case of human trafficking.

Human trafficking is categorized as human rights violation because it done by threat, forcefulness, abduction, deception, untruth, and abuse of power that

¹Farhana, 2010, *Aspek Hukum Perdagangan Orang di Indonesia*, Sinar Grafika, Jakarta, First editions, p.10.

²The United Nations Institution which protect the children.

³Retno Iriani & Joko Wuryanto, 2010, "Material and Formal Aspect in Act No.21 year 2007 about Elimination of Human Trafficking", Semarang, paper in law seminar high attorney of Central Java, p.1.

⁴Sources from Kejaksaan Agung Indonesia (Kejagung) means the Indonesian general attorney about recapitulation settlement case of human trafficking period 2010-2012.

aims to prostitution, pornography, slavery and forced labour. If one of the substances has fulfilled, the human trafficking include as human rights violations.⁵

Human Trafficking does not only happen in a country but also happens cross border between two countries in an organized manner. As the result, human trafficking is regarded as the globally organized crime.⁶

Even now, human trafficking is equal as slavery, which is defined as a condition of a person who is under the ownership of other people.⁷ The violation of Human Rights in the form of slavery, generally, is committed by depriving the freedom of persons, which is done by powerful economic groups to the poor economy conditions.⁸

There are many factors that cause the people to commit crime, especially human trafficking. The factors such as difficult to get the proper job, poverty, the debt ('girls/daughter' can be property of their parents to pay the debt), the low levels of education, etc.

Human Trafficking brings Negative implications to both victims and to the humanity because this is a form of modern a slavery that includes the process such as intimidation, physical, mental, sexual, social and economic, by using

⁵Farhana, *op.cit.*, p.11.

⁶Nyoman Serikat Putra Jaya, 2011, ''Globalisasi Fenomena Trafficking Global dan Kebijakan Kriminal'', in stadium general of trafficking in Sentra Diklat High Attorney of Central java.

⁷Henny Nuraeny, 2011, *Tindak Pidana Perdagangan Orang kebijakan hukum pidana dan pencegahannya*, Sinar Grafika, Jakarta, First edition, p.27 (see also C.S.T.Kansil (et al), 2009, *Tindak Pidana dalam Undang-Undang Nasional*, Jala Permata Aksara, Jakarta, p.129).

⁸*ibid.*,p.40.

persuasion, deception, rude coercion, and deprivation. In Indonesia, the issue of human trafficking has reached the stage of concern.⁹

Increased number of Human Trafficking cases and also complex of various modus operandi need a comprehensive and serious treatment.¹⁰ Human trafficking has violate the human rights and the freedom of the victims especially women and children. It also may endanger the mental growth of the children, which in turn will be hamper the development process as well as reducing the potential and quality of Human Resources of Indonesia. Crime of human trafficking should be prevented and the effort to protect the children needs to conducted because future potential Indonesian generation.¹¹

The phenomenon of Human Trafficking is very dangerous if there is no strict legal enforcement, strict regulations or Act to combat and punish the perpetrators of Human Trafficking and also need the Act which is to protect the victims of trafficking.

The importance of the protection on human trafficking victims gets the serious concern. The Declaration of Basic Principles of Justice for victims of crime and Abuse of Power by the United Nations as a result of the Seventh United Nation Congress on the Prevention of Crime and the Treatment of offenders which held in Milan Italia in September 1985 is international legal instrument that

⁹Speech by the head of high attorney of Central Java about “prevention of Trafficking in Persons”, May, 2011.

¹⁰Farhana, *loc.cit.*

¹¹*ibid.*

protects the rights of human trafficking victims, in one of the statute recommendations, it stated that:¹²

“Offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and restoration of rights.”¹³

The UN Declaration has suggested four points for protecting the victims of criminal conduct, they are:¹⁴

1. Access to justice and fair treatment
2. Restitution (the payment from the suspect to the victims)
3. Compensation financial
4. Assistance (material assistance, medical, psychological and social, both through state victim, volunteer or community)

Many social events show that Justice and Human Rights are less getting the serious attention from the government. Whereas, it is very clear that Pancasila¹⁵ (five principles) as the life philosophy of the Indonesian society,

¹²*ibid.*, p.161-162.

¹³The result of the Seventh United Nation Congress on the Prevention of Crime and the Treatment of offenders.

¹⁴Rena Yulia, 2010, *VIKTIMOLOGI, Perlindungan Hukum Terhadap Korban Kejahata*, Graha Ilmu, Yogyakarta, First editions, p.177-178.

¹⁵Pancasila is the five principle philosophy of life the Indonesian citizen.

humanity, and justice provides the embodiment of the point justice and civilized humanity, and equal justice for all the people of Indonesia. So far, the legal protections of the victims of the crime get less attention from the law enforcement.¹⁶

The example is the case of human trafficking which happened in small village in Purworejo. It was begun when the women were tricked to get proper job in Sumatera as the waiters of night cafe. However, actually she became the prostitute and was exploited by the defendant who bought her. As the result, the defendant was only punished with 2 years 6 months of being prisoner because he violated article 297 Criminal Code, by the District Court of Purworejo.

Another case happened in East Jakarta that dealt with human trafficking of child. The child was forced to become the worker in the foreign country by manipulating the identity. Therefore, the defendant was punished with 5 years prisons because of economic exploitation against the child.

The case is happened when the poor young girl was offered a job as a maid in Europe. However, actually she was forced to work as a prostitute in Europe, in order to repay the cost of the trip and her living expenses. After two years of servitude, the police arrested the trafficking victims as a prostitute because she did not have legal immigration document. As the result, she was deported back to the home country without any aid or counseling. Moreover, the society labeled her as

¹⁶Farhana, *op.cit.*, p.162.

a “prostitute” and ostracized her and her family. She could not get a job and never be able to marry because of the stigma which was attached to her.¹⁷

Besides, there are also cases about the father who sold his young daughter because of the economic conditions and case of the parents who sold the baby twins because of the economic condition.¹⁸ Another example of human trafficking is the syndicate of trafficking organs.¹⁹ There are still many cases of human trafficking in Indonesia which not only report to the police, but also note by the agencies. The number of human trafficking case which is report to the police cannot be analyzing about the increase or decline of this case. Because of the case did not report to the police only settle between the parties.²⁰

In October 17, 2012, a women migrant worker from Indonesia testified and become informant in United Nation Convention Anti-Trans National Organize Crime in Vienna, Austria.²¹ Initially in March 2006 Memey (incorrect name) go to Malaysia promised got the job as waiters in restaurant, but actually, she become prostitute in Kuching Malaysia. Finally, in last march she back to hometown and she have HIV/AIDS and divorce with husband²² because of the human trafficking crime that she got.

Those examples show that there is still weak law enforcement in handling the case of trafficking, many victims of human trafficking are neglected and get

¹⁷Cherish Adams, 2011, “Re-Trafficked victims: How much a human Rights Approach can Stop the Cycle of Re-victimization of Sex Trafficking Victims”, 43 *Geo. Wash. Int'l L. Rev.*, p.201.

¹⁸News, “Redaksi Pagi”, Trans 7, (27 september 2012 and 23 February 2012)

¹⁹News, “Sindiket Perdagangan Organ Tubuh”, RCTI, 08 may 2012

²⁰Farhana, *op.cit.*, 8-9.

²¹<http://www.tempo.co/read/news/2012/10/20>. Article by Tito Sianipar. Access on Friday, November 30th 2012 at 5.22pm.

²²*ibid.* (the statement of Memey in United nation Convention that impact of become the human trafficking she got HIV/AIDS and she also divorce with her husband).

the less attention. In fact, they are just victims who need the protection from the Laws Regarding to this issue, the protection for the victims of Trafficking under Indonesian Law and also International Law is needed.

Basically, the victim of crime is a party who was suffered in a crime scene and they do not get the protection as much as the protection that is granted to perpetrators.²³ As a result, after the offender gets sanctioned by the court, the condition of victim is ignored. Principally, justice and respect of human rights are not only applicable to the offender, but also to the victim of a crime that may suffer for the rest of their lifetime.²⁴

In handling a criminal case, the law often takes, priority over the right of the defendant and the victims is not provided with enough concern, as stated by Andi Hamzah:²⁵

"In discussing the criminal law, particularly, that related to human rights, there is a tendency to peel matters relating to the rights of suspects without notice the rights of the victims."

²³The protection for perpetrators here means the rights that got by offender which given by KUHAP (Criminal Code Procedures) Article 50 until 68. Such as:

- a. Rights to investigate, bring to the court, and trial process quickly (Article 50 (1,2,3))
- b. Rights to get legal aid in every investigate (Article 54)
- c. Rights to visiting by families or the other person to get the legal aid or the guarantee (Article 59,60)
- d. Rights to be in contact to communication with their legal advisor (Article 62)
- e. Rights to contact and receive visit from churchman/rohaniawan (Article 63)
- f. Rights to present the witness and expert in the court (Article 65)
- g. Rights to prosecute the compensation (Article 68).

As quoted by Andi hamzah, 2008, *Hukum Acara Pidana Indonesia*, Sinar Grafika, Jakarta, p. 69-70. See also KUHAP (Criminal Code Procedure Article 50 until 68).

²⁴Andi Hamzah, 1986, *Perlindungan Hak-Hak Asasi Manusia dalam Kitab Undang-Undang Hukum Acara Pidana*, Binacipta, Bandung, p.33. As quoted by Farhana, *Loc.cit.*

²⁵*ibid*

The Protection based on the Act about Witnesses and Victims is the fulfillment of the Rights of victims and the provisions to provide security to the victim that must be implemented by the Protection for the Witnesses and victims Agency (LPSK) or other agencies in accordance with the provisions.²⁶ Besides, there is also the international instrument that has aim to protect the Rights of citizens in the world. Universal Declaration of Human Rights on December 10, 1948 is a declaration that aims to protect the Human Rights. There is also effort to eliminate the practice of human trafficking through several international convention, especially the convention on the trafficking of women or “trafficking in women” which was held in Paris 1895.²⁷

Based on the case which mentioned previously, almost all victims suffered and never got the attention from the government and the society. The victims should get the more concern and protection from the government, Non-Government Organization, and agencies (LSM)²⁸, and also the participation from the society.

The trafficking victims who are illegal migrant make them to be arrested by police and accuse as prostitute. For example the case which happened when the young girl offered as maid without legal immigration document. Finally she force to work as prostitute and she arrested by the police as prostitute also.²⁹ Actually, she is the victims of human trafficking who need the protection.

²⁶Rena Yulia, *op.cit.*, p.58, (see also Art 1 (6) Act of Protection for the witnesses and victims, ‘LPSK’ means that *Lembaga Perlindungan Saksi dan Korban*).

²⁷Henny Nuraeny, *op.cit.*, p.25-26.

²⁸LSM means (*Lembaga Sosial Masyarakat*).

²⁹Cherish Adams, *loc.cit.*

Actually, the victims of Trafficking should get the protection but, in the reality, it is not fair for the victims who suffer mentally, and physically to live without protection, counseling, and the restitution from the defendant.

Since the victims are the weak parties that need the protection under the Indonesian Law and the International Law also, the research about the protection for the victims of human trafficking is important to be conducted.

Therefore, the case of Human Trafficking must be overcome because the victims needs for protection, and also active participation from the society to prevent and to protect the victim from human trafficking.³⁰

B. Problem statement

After outlining the background of the issue, then the problem can be formulated as follows:

1. How does Indonesian law protect the victims of Human Trafficking?
2. Does the protection which is given by Indonesian Law comply with International Human Rights Law?

C. Research Objectives

The purposes of the research are, as follows:

1. To find out the protection of the Victims of human trafficking which is provided by Indonesian law.
2. To know the protection which is given by Indonesian Law comply with International Human Rights Law.

³⁰Farhana, *loc.cit.*

D. Definition of Technical term

Human trafficking shall mean that the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other form of coercion, of abduction, of fraud, of deception, of the abuse power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.³¹

The Victims are people who are suffered mentally, physically, sexually, economically, and/or socially, and such sufferings are caused by the crime of Human Trafficking.³²

Legal Protection means the protection which is provided for the subject of law preventively and repressively, both written and unwritten. In the other words, legal protection is a description of the function of the law. The concept of the law is to be able to provide a justice, order, certainty, expediency and peace.³³

International Human Rights Law refers to the body of International Law which is designed to promote and protect human rights at the international, regional and domestic levels. As a form of International law, international human

³¹Protocol to Prevent and Suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime about human trafficking.

³²See Act No.21 years 2007 about Elimination of human trafficking (PTPPPO means *Pemberantasan Tindak Pidana Perdagangan Orang*).

³³<http://www.prasko.com/2011/02/pengertian-perlindungan-hukum.html>.

rights law is primarily made up of treaties, agreements between states intended to have binding legal effect between the parties that have agreed to them; and customary international law, rules of law derived from the consistent conduct of state acting out of the belief that the law required them to act that way.³⁴

In this research, the scope of International Human Rights Law is the Universal Declarations of Human Rights (UDHR) and Protocol to prevent, suppress, and punish trafficking in persons.

E. Theoretical review

UNODC, United Nations Office on Drugs and Crime (part of the United Nations in charge of Crime and Drug Enforcement) defines human trafficking in accordance with Annex II, General Provisions, Article 3, Paragraph (a) [1] of the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Protocol to Prevent, Suppress and Punish Trafficking in Persons) human trafficking as "the recruitment, transportation, transfer, or receive capture the man, by the threat or use of force or other forms of violence, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".³⁵

Human exploitation includes forcing people into prostitution or other forms of sexual exploitation, forced labor, slavery or any practice that similar to slavery and forced labor.³⁶

³⁴<http://encyclopedia.thefreedictionary.com/international+human+rights+law>.

³⁵See Protocol to Prevent, Suppress and Punish Trafficking in Persons.

³⁶<http://bangaip.org/2009/08/perdagangan-manusia/>

Declaration of Basic Principles of Justice for Victim of Crime and Abuse of Power 1985 point 1 stated that “Victims means person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental right, through acts or omissions that are in violations of criminal laws operative within member state, including those laws proscribing criminal abuse of power”.³⁷

While according to Arif Gosita, the term of victim is defined as ‘Those who suffer physically and mentally as the result of one party who obtains benefit by violating the rights of injured party’. They might be individual or the groups from private or the government agency.³⁸

Meanwhile according to Muladi, ‘victims are people who either individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic, or substantial disruption of the fundamental right, through acts or omissions that are categorized as violations of criminal law in each country, including abuse of power.’³⁹

According to Government regulation No.2 of 2002 on procedure for the protection of Victims and Witnesses of Human Rights Violations: The victims are individually or groups of people who are suffering as a result of violations of human rights that require heavy physical and psychological protection from threats, harassment, terror, and violence of other party. The word protection is an

³⁷United Nation, Declaration of Basic Principles of Justice Victims of Crime and Abuse of Power Department of Public Information, 1985.

³⁸Arif Gosita, 2004, *Masalah korban kejahatan*, Bhuana Ilmu Populer, Jakarta, Third editions, p.64, As quoted by Farhana, *op.cit.*, p.18.

³⁹Muladi, 2009, *Hak Asasi Manusia- Hakekat, Konsep, & Implikasinya dalam Perspektif Hukum & Masyarakat*, Refika Aditama, Bandung, Third Editions, p.108.

effort to put a person given special status. In the context of the protection of victims of crime, the preventive and repressive action from both society and government, such as the protection/surveillance from various threats that can endanger the lives of the victims, medical assistance, and inadequate law, due process and fair trial against the perpetrators of the crime, are basically the form of the protection of human rights and balance instruments. It is the basic philosophy behind the importance of protection over crime victims.⁴⁰

There are many Factors that cause the Human Trafficking in Indonesia, such as:⁴¹

1. Poverty

High percentage of poverty cause there are many immigration, either domestic or to foreign country because there is not enough job vacancies.

2. Birth Certificate Issue

The lack of birth certification especially in the small village can expose to risky exploitation human trafficking.

3. Education

Poor skill and weak education contributes difficulty to find job.

4. The Young Marriage

Young marriage contributes high rate of divorce and it may lead to human trafficking.

⁴⁰<http://pembaharuan-hukum.blogspot.com/2008/12/oleh-oktarinaz-maulidi-bab-i.html>

⁴¹Fransiska Novita Eleanora, 2011, "Perdagangan Orang (Trafficking in Persons) under Criminal Code and Human Rights Prospective", *ADIL, Law Journal*, Vol.2 No.3,December 2011, p.308-309.

The Criminal Code (KUHP) Art 297 and 298 regulates Human Trafficking. Both of the articles are considered invalid and they are replaced with the Act No. Act No. 21 years 2007 on Elimination of Human Trafficking, because Criminal Code only regulated the protection to the women and child victims.

While in Indonesian law have the Act No.21 of 2007 about elimination of human trafficking, in International Law also have the regulation to elimination of human trafficking namely Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime.

It is inevitable that law enforcement becomes the main instrument which is mostly expected to overcome the issue of human trafficking. According to Lawrence M.Friedman, pursuant to this matter, there are three important factors in law enforcement, which are:⁴²

1. Structure
2. Substance, and
3. Legal Culture.⁴³

The rights of the victims based on Art 44 jo 33 and 24 on Act No.21 year 2007 about Elimination of Human Trafficking that permits the witnesses and/or victims of the crimes human trafficking to hide their identity. Article 5 Act No.13

⁴²Natalina Naibaho, 2011, "Human trafficking in Indonesia : Law Enforcement Problem", *Indonesia Law review*, year I Vol 1, January – April 2011, p.86, Djokosoetono Research Center Faculty of law, University of Indonesia.

⁴³Lawrence M friedman (1984). *American Law*. London: WW Norton and Company., page 5-7. Friedman describes the three factors as follows : the structure of a legal system consist of elements of this kind; the number and size of courts, their jurisdiction, and modes of appeal from one court to another, how the legislature is organized, what procedure that police department follows, and so on; substances, by this meant the actual rules, norms and behavior pattern of people inside the system; legal culture, by this we mean people's attitude toward law and legal system, their beliefs, values, ideas, and expectations. As quoted by Natalina Naibaho, *ibid*.

year 2006 about witnesses and victims point (1) stated that the rights of victims and the witnesses are to get the feel secured over themselves, their family, and the property.⁴⁴ States have duty to give the protection, to do the prevention, making legislation, handling the case, and to provide mental therapy for the victims. It is important since government only focuses the sanction for the defendant without paying concern over condition of the victims.

There are many Organizations to prevent the human trafficking. The organization such as IOM (International Organization for Migration) which was established in 1951 is the leading inter-governmental organization in the field of migration and works closely with governmental, intergovernmental, and non-governmental partners. IOM works to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in need, including refugees and internally displaced people.⁴⁵ IOM also gives contributions to settle the case of trafficking such as help the victims to return from the place where are being they exploited. Many victims also prefer to complaint in the IOM than to report to the police because they are afraid of the defendant's threat.

Also have the agencies namely Witness and Victims Protection Agencies (LPSK)⁴⁶, which responsible to the president. This agency has the duty to giving protection for the victims and witness who report the case or become the witness in court.

⁴⁴See Act No.13 year 2006 about protection for the witnesses and victims Art 5 (1).

⁴⁵<http://www.iom.int/jahia/Jahia/about-iom/lang/en>

⁴⁶LPSK means that *Lembaga Perlindungan Saksi dan Korban*.

F. Research method

The research method that was used for this thesis is:

1. Object of research

The legal protection for the victims of Human Trafficking in Indonesia.

2. Method of Gathering Legal Materials

The method of obtaining legal materials was by using library research. The data were collected from regulations, legal decisions, books, journals that relevant to the issue of this thesis.

3. Legal materials

a. Primary Legal Material

Primary Legal Material is obtained from the regulation or the Act which regulated to the case, they are:

1. Act No. 21 years 2007 about Elimination of Trafficking in Persons;
2. Protocol to Prevent and Suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime about human trafficking, which ratified in Indonesian Act No.14 of 2009;
3. UN Convention Against Transnational Organized Crime;
4. Universal Declaration of Human Rights.

b. Secondary Legal Materials

The secondary legal material includes literature, article, law journals, newspaper, news report, and internet access.

c. Tertiary Legal Materials

This legal material is from the dictionary.

4. Method of approach

The method of approach which was used in this research was in the juridical approach/Statute Approach in accordance to the relevant regulations such as Act No. 21 years 2007 about Eradication Criminal Acts of Trafficking in Persons, Act No.7 of 1984 on Ratification of Convention on the Elimination of all form Discrimination Against Women, Act no.14 of 2009 about ratification of Protocol to Prevent, Suppress, and punish Trafficking in Persons, UN Convention Against Transnational Organized Crime, and Universal Declaration of Human Rights.

5. Method of legal material analyze

The obtained data were presented and analyzed descriptively. The data were elaborated and correlated in accordance with books, journals, and regulations that relevant to the issue of human trafficking in Indonesia.