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RESEARCH ARTICLE

SEXUAL SLAVERY OF CHILDREN AS A WAR CRIME IN INTERNATIONAL CRIMINAL PERSPECTIVE

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Abstract

Child is a creature from God Almighty who needs to be protected by self-esteem and his dignity and is guaranteed for the right of his life to grow and develop according to his natural fate. Any form of treatment that interferes and impairs the fundamental rights in various forms of unauthorized utilization and exploitation must be discontinued without exception. This is a normative juridical research. The method of the research is statute approaches, that is analyzing sexual slavery in children as war crime, because many cases of completion can be done through international criminal court. The results showed that child is vulnerable to any crime of its form at his age, and one of the war crimes is child sexual slavery, which are not a few children became victims. In international criminal law is known the term of individual responsibility, which means that the perpetrators of criminals either commander or soldier can be tried in "the International Criminal Court" established by "Rome Statute of 1998".

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Introduction:-

"The term crime is part of social life, and inseparable from daily human activities. It is defined as the result of social disorganization due to various factors, such as industrialization, rapid social change, and modernization".¹

Children are creatures created by God Almighty, therefore, their dignity, self-respect and right to live and develop in accordance with the surrounding environment need to be protected. Therefore, all forms of inhumane treatments that mentally and physically destroy their fundamental human rights, thereby making them weak and helpless need to be stopped with immediate effect, without exception.

The term sexual slavery is similar to all forms of unpleasant treatment, such as harassment, rape, torture, etc. It is defined as a war crime because it tends to occur in conflict conditions, such as the case of the 18 year old Indonesian woman that sued the Netherlands Kingdom for sexual slavery by several Dutch soldiers in February 1949. A court in The Hague convicted the Dutch kingdom as the party responsible for war crimes committed their soldiers on Indonesian soil. This incident is similar to countries currently undergoing conflict all over the world. Case in point: Sex by the Dutch soldier

¹Mien Rukmini, "Aspek Hukum Pidana Dan Kriminologi (Sebuah Bunga Rampai)", Bandung: Alumni, 2009, hal. 101.

"Thousands of children were born from relationships with indigenous women," write Wietsma and StefScagliola in *Liefde in Tijden van Oorlog* (Love in the time of war).

As a former "Dutch soldier" sent to Indonesia, J.C. Princen did not think the biological needs of young soldiers were great in the tropical country. However, there are times when they are on duty, moving around corners and alleys just to look for women, which is an habit strictly prohibited by their union. "According to the man born in Hague in the year 1920, he Stated that everything is done in their our own way, some are a bit pushy, consensual, or go to prostitutes". Furthermore, Princen remembered being with a local woman during his military service in Bogor, called Asmuna, that lived just behind the market close to the Bogor Botanical Gardens, and there was day she came looking for Princen at his headquarters located right in front of the Bogor Palace (now Hotel Salak), and instead of being escorted to meet Princen, the woman was shot dead for resisting while being harassed by the officers on duty, and according to "the Dutch Soldier" that was later transferred to the Indonesian Army (TNI), there was a gunshot, and I ran forward immediately with a sten but I was shocked and angry when I saw Asmuna lying in the guard room with a body full of bullet holes and blood.

Sexual violence, especially against women, is not a new phenomenon and occurs all over the world. According to the United Nations, "35 percent of women worldwide have experienced physical or sexual violence at some point in their lives". Sexual violence is rampant and victims are always reluctant to report these violent acts due to societal stigmatization, and discrimination.²"Sexual violence" is "a form of sexual" and "gender-based violence", which is harmful and committed based on gender.³

The occurrence of sexual slavery on both women and children in war prone areas is inevitable. Therefore, when ignored, there is a possibility that many children will become victims, resulting in stress, disability, and even death. Furthermore, when the perpetrator is left unpunished, there is a possibility of a lot of victims emerging in future. Therefore, Criminal Court was set up to protect individual responsibility and prosecute perpetrators.

Research Methods:-

This is a normative and juridical research, with the Statute's approach method used to analyze child sexual slavery as "a war crime", resolvable through "international criminal" justice. In addition, secondary data is applied with primary and secondary legal materials. The primary legal materials were obtained from "Rome Statute 1998", "Convention on the Rights of the Child", as well as legal materials. Then the secondary legal materials are such as journals, expert works, books, and analyzed in a qualitative juridical manner.

Discussion:-

Children are social creatures that need the assistance of others to develop their abilities. This is because they are born with various degrees of weaknesses, therefore without additional assistance, it is virtually impossible for them to reach a normal ability level. JuheLacke stated that children have innocent personality and are sensitive to stimuli from the environment. Augustine reported that children are not the same as adults, because they derive pleasure from deviating from orderliness due to limited knowledge and understanding of the realities of life. They also learn more easily from the example they receive from coercive rules.⁴ Based on "the Convention on the Rights of the Child", "the United Nations", defined "children" as a human beings under 18 years old. The Convention still provides different age limits applicable in national legislation.⁵

²Josse, E., 2010. 'They Came With Two Guns': The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflict. *International Review of the Red Cross*, March, 92(877), pp. 177-195.

³Adinda Ayu Shabrina, Peran United Nations High Commissioner for Refugee (UNHCR) dalam Menangani Pengungsi Suriah Korban Sexual and Gender-based Violence (SGBV) di Lebanon, *Journal of International Relations*, Volume 4, Nomor 1, 2018, hal. 81-89 Online di <http://ejournal-s1.undip.ac.id/index.php/jihi>

⁴Evi Yulianti, "Psikologi Perkembangan Remaja", Minggu, 29 Maret 2009, <<http://psikonseling.blogspot.com/2009/03/psikologi-perkembangan-pada-remaja.html>>, [tg. 25 Nopember 2010].

Parents' need to give their children special attention during development, this is because the process significantly affect their lives in future. When children grow up without parental guidance and assistance, they tend to adapt to whatever their surrounding environment offers. They also have rights that need to be considered, as regulated in the Convention on the Rights of the Child, as follows:⁶

1. Right to survive which includes adequate and standard health care. Decent living standards, such as: housing, clothing, nutritious food, health services, and income.
2. Right to growth and develop physically, mentally, spiritually, morally and socially in accordance with their potential. Furthermore, they have the right to formal and non-formal education, playing and using free time, socio-cultural activities, access to information, etc.
3. Right to protection from anything that hinders their growth and development, such as discrimination, exploitation, mistreatment, and neglect. In addition, shelter need to be provided to those without parents.
4. Right to participate and express their views as well as feelings towards situations.

During conflicts, "women" and children are "more vulnerable" to criminal acts, and less protected.

"Sexual slavery" as a war crime is an event that frequently occurs during conflict conditions. The slavery elements in children during conflict are as follows:⁷

1. Perpetrators have the authority to buy, sell, borrow or exchange them, thereby, taking away their freedom.
2. Perpetrators commit sexual acts with one or more children.
3. This action is related to "international conflict".
4. "The perpetrator" is "aware of the factual situation", thereby defining it an armed conflict.

The elements of sexual slavery contradict the rights of the child. For example:

KimikoKaeneda, a South Korean woman was a victim of sexual slavery by the Japanese military. Kaeneda's mother and father originated from Japan and South Korea, respectively. At a very young age, Kaeneda had to endure the pain of being Jugunlanfu, a term for prisoners of sex slaves for Japanese soldiers in Korea. According to Kaeneda they were made to sleep with the soldiers' at night, and in the morning, they were sent back to their rooms. She further stated that when the first soldier came to sleep with her, she refused with all her strength. However, another drunk soldier came with a knife and "threatened to kill her if she failed to grant him access to her body". According to Kaeneda,"I did not give in and did not care if I had to die, and in the end, he stabbed me." Kaeneda spoke while showing the wound on her chest. After being treated at the military police for the injury on her chest, Kaeneda was again sent to the room. "A soldier who had just returned from fighting came and saw that my treated wound was getting better and even though it was still covered with a plaster, he started attacking me, and when I refused, he kicked me, grabbed my wrist and threw me out of the room. My wrist was broken and I am still very weak today" Kaeneda stated. Kaeneda was born in Tokyo on October 22, 1921 and passed away in 2005. She represents many women with same or even worse fate.

The 1998 Rome Statute outlines the meaning of several key terms contained in the definition and details "crimes acts against humanity".⁸ The terms described in Article 7.2 include: "(c) Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in person, particular woman and children; (e) Torture means the international infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; (g) Persecution means the international and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. The fear and suffering are inherent in, incidental to solely arises from the imposition lawful of sanction that cannot be categorized as torture. The provision is parallel to the concept of justification that known in the criminal law".⁹

⁵Harla Sara Octana, Indra Nurpatria, Laurike Moeliono, Seluk Beluk Hak-hak Anak Berdasarkan Konvensi Hak-hak Anak dan kaitannya dengan Undang-undang Perlindungan Anak, Jakarta: Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2010, hal. 37.

⁶Ibid, hal. 51-54

⁷Tim Komnas Perempuan, Hukum Pidana Internasional dan Perempuan-Buku II, Jakarta: Publikasi Komnas Perempuan, 2010, hal. 34.

⁸"Arie Siswanto, Yurisdiksi Material-Mahkamah Kejahatan Internasional, Bogor Ghalia Indonesia, 2005", hal. 63.

⁹The 1998 Rome Statute, Article 7 (2), c, e, g.

According to studies, there is an understanding of International Humanitarian Law in a narrow and broad sense. A. Mansyur Effendi stated that in a narrow sense, "international humanitarian law" comprises of the principles, rules and legal provisions governing the protection of victims of war as regulated in the 1949 Geneva Convention. Meanwhile, in a broad sense, it is the whole principles, rules and provisions of written and unwritten law, with the aim of ensuring that human dignity is protected and respected. A. Mansyur Effendi further stated that humanitarian law and human rights law cannot be separated, especially when linked to the Rome Statute of July 17, 1998 which includes genocide, rape and other war related crimes against humanity, which are regulated in Article 8 of the International Criminal Court on War Crimes.¹⁰

Article 8:

1. "The court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes".
2. For the purpose of this Statute, "war crimes"
 - 1) "Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against person or property protected under the provisions of the relevant Geneva Convention";
 - 2) "Other serious violations of the law and customs applicable in international armed conflict, within the established framework of international law";
 - 3) "In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause";
 - 4) "Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature";
 - 5) "Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law";
 - 6) "Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups".
1. "Nothing in paragraph 2 (c) and (e) shall effect the responsibility of a Government to maintain or reestablish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means".

Sexual slavery on children is a war crime when committed during conflict and a crime against humanity when committed in peaceful conditions. However, these crimes in conditions of war or peace fall under "the jurisdiction of International Criminal Court". As for the full Article 5 (1) of "the International Criminal Court jurisdiction" are:¹¹

"The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes":

1. "The crimes of genocide";
2. "Crimes against humanity";
3. "War crimes";
4. "The Crimes of aggression".

Therefore, based on the jurisdiction above, sexual slavery to children is a crime that tries the perpetrators in International Criminal Court.

"Of all international crimes", "war crimes" has the largest number of pertinent and specific instruments covering a wide range of prohibitions, regulations and other penal characteristics. A violation in this area requires prosecution and punishment. Many of these instruments specifically embody, codify or evidence customary international law (e.g., Convention with respect to "the laws and customs of War and Land (First Hague, III)"; "Regulations Respecting the Laws and Customs of the War and Land"; "Convention "Respecting the Laws and Customs of the War and Land (Second Hague, IV)"; "Regulations Respecting the Laws and Customs of the War and Land").

¹⁰A. Masyhur Effendi dan Taufani Sukmana Evandri, HAM Dalam Dimensi/Dinamika Yuridis, Sosial, Politik dan Proses Penyusunan/Aplikasi HA-KHAM (Hukum Hak Asasi Manusia) Dalam Masyarakat, Bogor: Ghalia Indonesia", hal. 214-216.

¹¹Romli Atmasasmita, Pengantar Hukum Pidana Internasional, Bandung: Refika, 2000, hal. 83.

Enforcement of these prohibitions, though not always consistent or uniform, has nonetheless constituted the most persistent and reliable record of prosecution and punishment of “its violators in the history of international criminal law.”¹²

International criminal law recognizes individual responsibility, which is a crime or actions committed by subordinates as regulated “in Article 28 of the 1998 Rome Statute”.

“Article 28 about Responsibility of commanders and other superiors;

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within jurisdiction of the Court committed by force under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 2. That military commander or person either knew or, owing to the circumstance at the time, should have known that the forces were committing or about to commit such crimes; and
 3. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
4. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 5. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 6. The crimes concerned activities that were within the effective responsibility and control of the superior; and
 7. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”.

The ad hoc court statute also stated that the responsibility of superior or commander is the same. In reality, according to “Articles 2 to 5 of the Rome Statute 1998”, crimes committed by subordinates irrespective of their superior’s knowledge or not, are punishable by law. In this case, the superior or commander has failed to take steps to prevent its occurrence.¹³

The responsibility of superior or commander for sexual slavery acts has the following elements:¹⁴

1. There is a superior and subordinate relationship,
2. The supervisor knows that a crime has been committed, and
3. Superiors fail to take the necessary steps to prevent or punish the perpetrators of such crimes.

The authority of “a superior can be de jure or de facto”, and the responsibility applies equally to the military and civilians. De jure authority alone is not sufficient to establish the responsibility of a superior or commander, it also requires effective control.

A superior or subordinate that commits sexual slavery to children, is individually liable before the International Criminal Court. However, in situations where the perpetrator's country has carried out justice with its national law, the commander or subordinate cannot be tried at the ICC because of its complementary nature.

Conclusion:-

In conclusion, sexual slavery to women and children is a war crime because it occurs in conflict conditions, and perpetrators need to be tried in “the International Criminal Court” as long as their home country is unwilling or

¹²M. Cherif Bassiouni, *International Criminal Law, Volume I Crimes*, Transnational Publishers, Inc. Dobbs Ferry, New York, 1986, pg. 206.

¹³Statuta peradilan ad hoc ICTY

¹⁴Hukum Pidana Internasional dan Perempuan-Buku Referensi, Jakarta: Publikasi Komnas Perempuan, 2010, hal. 65

unable to carry out necessary actions. International Criminal Law recognizes individual responsibility, which means that the commander or perpetrator in the field can be held accountable.

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