

# Criminal Crime Policy against Child Pornography (Perspective Protection of the Rights of the Child Pornography Victims of Crime)

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## Abstract

At the UU. 44 Year 2008 on Pornography gives special attention to children who are prone to be involved in pornography a criminal offense. Given the current storm pornography carries a high crime escalation including its effect on children, it is necessary to study and carried out with the aim to: 1) understand the forms of legal protection that is applied to the crime of child pornography involved, 2) analyze the Criminal Policy against the crime of child pornography; 3) find the right model protection to ensure the implementation of children's rights involved the crime of pornography. The type of this research is a normative juridical study (legal research). This study examines the legislation and scientific opinion related criminal policy against child pornography, to realize the guaranteed protection of children's rights crime victims pornography. The results showed that in terms of policies to address the crime of pornography involving children have been accommodated in some particular legislation UU No. 44 of 2008 has set the crime of pornography that explicitly contain child pornography. Even also explicitly criminalize pornography involving children. Besides, in particular also for the protection of children from the influence of pornography and forth in Chapter III of the Child Protection section 15 and section 16, but related to other regulations governing child is UU No. 4 In 1979, UU no. 3 In 1997, UU no. 23 of 2002 .

**Keywords:** Criminal Policy, Children, Pornography

## 1. INTRODUCTION

It is recognized today development era rapidly increasing, in addition to a positive impact, it also brings many negative effects, one of which is currently rampant pornography that is the storm that has spawned the escalation of crime that must be handled seriously. Considerable impact on the proliferation of pornography especially dangerous for children, which involves the risk of health problems, psychological, educational and moral collapse of the various communities. If allowed to pornography can damage the brain and mental power of children with high addictive and able to build mental pornographic mode permanently.

It has been many cases of criminal offenses involving child pornography and various parties raised concerns about the situation of children into the future, so that if no immediate measures are appropriate to handle the crime of pornography involving children, it can be the next generation will be generation is brittle. With the promulgation of UU No. 44 Year 2008 on Pornography, as a policy response to the rampant spread of pornography in Indonesia, today in every entire community have to prevent the circulation of pornographic material, while law enforcement must perform appropriately and integrated response to the proliferation of pornography is a criminal offense, the victim that crime of pornography involving children.

In order to realize the quality of human resources, children as the next generation should be able to grow and develop in an atmosphere that provides facilities and infrastructure that can sustain continuance. Need attention also idea that children are the hope of the nation who will continue the existence the nation forever.<sup>5</sup> So it should be a shared responsibility and in order for them always made efforts to educate, care for, nurture, maintain and improve well-being, in short, needs effort to be continuously and united.

The international concern efforts to provide protection to children beginning with the Geneva Declaration on "Children's Rights in 1924" which was then confirmed in its resolution 1386 (XIV) of 20 November 1959 regarding the "Declaration of the Right of the Child",<sup>6</sup> and then there is also the Convention on the Rights of the Child ("the Convention on the Right of the Child") of 1989,<sup>7</sup> which was then poured in UN Resolution No. 44/25 dated December 5 19 893, of which states that: Bearing in mind that, as Indicated in the Declaration of the Right of the Child, "the child, by reason of his physical and mental Immaturity, needs special safeguards and care,

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<sup>5</sup> Arif Gosita, *Masalah Perlindungan Anak*, Akademika Presindo, Jakarta, 1989 hlm. 2.

<sup>6</sup> Muladi dan Barda Nawawi Arief, *Bunga Rampai Hukum Pidana*, Alumni Bandung, 1992, hlm. 108.

<sup>7</sup> Romli Atmasesmita, *Peradilan Anak di Indonesia*, Mandar Maju, Bandung, 1997, hlm. 8.

Including NAMAs legal protection, before as well as after birth".<sup>8</sup> These statements signaled, that attention to children should be a priority, especially in the current situation of the development of society very rapidly, and exploitation information taking place and globalization. In other words at this time, most important in Indonesia ongoing changes in socio-cultural values of society.<sup>9</sup>

In Indonesia, the attention of the child has been stated in the UU. 4 Year 1979 on Child Welfare, UU no. 3 of 1997 on the Juvenile Court has been revoked by the UU no. 11 of 2012 on the Criminal Justice System Children, UU no. 23 of 2002 on Child Protection, as well as on children's rights as part of human rights stated in UU no. 39 Year 1999 on Human Rights. With the understanding that every child has a right recognized by the law, then it becomes a legal basis and the power to require all parties to ensure the fulfillment of these rights and no room to refuse fulfillment. Letting children's rights violated by allowing the same offense greater will happen to other children. Presented by the Mabes Polri that cases of child pornography a criminal offense is pretty much in Indonesia and Indonesia itself been declared as the second country after Russia's most vulnerable to penetration of pornography to children. Many children become victims of sexual objects when their bodies are traded online in the form of pictures or video.<sup>10</sup>

Currently has enacted UU No. 44 Year 2008 on Pornography, as a policy prevention to the spread of rampant pornography in Indonesia. There in expressly criminalize pornography that explicitly contain child pornography (see section 4 subsection (1) letter f). Even also explicitly criminalize child pornography by banning involve children in activities and/or as an object of pornography (see Section 11), prohibits to invite, coax, exploit, let, abuse of power or force the child to use the products or services of pornography (vide Section 12). Based on the above, this study is important in order to obtain a clear picture and form appropriate criminal policy towards prevention of criminal acts involving child pornography, particularly in realizing the rights of children in conflict with the law, for of the realization of the child's best interests (the best interest of child).

To assess the accuracy of product legislative which arrange criminalize child pornography and protection such, it can be formulated several problems, which are as follows: (1) What form of protection for victims of child pornography a criminal offense which is used as the perpetrator? (2) What Is the Criminal Policy of guaranteed protection rights of the child pornography involved a criminal offense? (3) What kind of protection model that should be applied to guarantee the implementation of the rights of child victims of crime are made pornographic actor

## 2. RESEARCH METHODS

In this study the method used approach suitable to the type of research conducted, in which this research is a normative juridical study ( legal research)<sup>11</sup>, which is a library research is a study of secondary data, in the form of legal materials, both the provisions of the legislation. scientific opinion regarding criminal policy against the crime of child pornography, as consideration for the guarantee to realize the protection of the rights of the child pornography victims of crime. On the basis of the indicators contained in the title of this study, the approach in this study used a more focused approach to the law (statute approach) and the conceptual approach. Meanwhile, in order to complete a more comprehensive study that also used a comparative approach (comparative approach).<sup>12</sup> This study is a juridical - normative research to study the specifications of Standart the Horizontal Sync, the research aims to reveal the fact that a certain law is horizontal (equals and are included in the same field) has mismatched or not,<sup>13</sup> considering this study intends to test the accuracy (verification test) between the UU No. 4 Year 1979 on Child Welfare, UU. No. 3 1997 on Juvenile Justice and the UU. No.23 of 2002 on Child Protection.

This research is the study of normative law, so the basic law used in this study is library materials, that the variety of materials either in the form of primary legal materials, secondary legal material and tertiary legal materials. Thus the collection of legal materials used is the study of literature technique (library research) that will collect, study and review materials laws that have relevance to the issues required by both the primary legal materials, legal materials and secondary legal materials tertiary.<sup>14</sup> The primary legal materials that will be used in this study include the UUD 1945, legislation of criminal law relating to the protection of children's rights include, Criminal Code(KUHP), Criminal Procedure Code (KUHP), UU no. 39 Year 1999 on Human Rights, UU no. 4 In 1979, Child Welfare, UU no. 3 of 1997 on the Juvenile Court has been revoked by the UU no. 11 of 2012 on the Criminal Justice System Children, UU no. 23 of 2002 on Child Protection. While the secondary legal materials, will use a variety of materials such as research results, the results of scientific work of scholars,

<sup>8</sup> Konsideran Resolusi PBB Nomor 44/25, "Convention On The Right Of The Child", UNICEF, 05 Desember 1989.

<sup>9</sup> Paulus Hadisuprpto (I), *Juvenile Delinquency Pemahaman & Penanggulangannya*, Citra Aditya Bakti, Bandung, 1997, hlm. 1-2.

<sup>10</sup> <http://www.tempo.interaktif.com>, diposting pada Rabu, 03 Juni 2009.

<sup>11</sup> Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Ghalia Indonesia, cetakan Ketiga,ed. Revisi, 1998, hlm. 11.

<sup>12</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Prenada Media, Jakarta, 2005, hlm. 93.

<sup>13</sup> Ronny Hanitijo Soemitro, *Op.Cit*, hlm. 26-27.

<sup>14</sup> Soerjono Soekanto, dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Raja Grafindo Persada, Jakarta, 1995, hlm. 24.

the draft National Criminal Code (RUU KUHP), as well as various documents that are related to guarantee the protection of the rights of victims of child pornography a criminal offense, including international documents either in the form of resolutions and conventions.

### **3.1. RESULT AND DISCUSSION**

#### **3.1.1. The form Protection in Legislation which Governing Protection of Children to the Effects of Pornography**

To provide protection against criminal acts of a child or of the effects caused by the criminal acts including efforts to protect children from the influence of pornography. In Indonesia, there have been some laws that regulated the interests of children as the next generation in order to grow and develop in accordance with the best interests to grow and evolve, including in order to provide legal protection, since in the UUD Year 1945 ` and in other legislation.

Thus it can be understood, that in addition been recommended in several international Conventions, in Indonesia has made progress and has given greater attention to the interests of growth and development of children. Including attention to children who commit crimes or criminal acts, so be arrested, detained or sentenced for criminal sanctions do proper coaching and oriented to the interests of growth and development of the child.

Associated with the presence of children, special attention poured in some policies in the form of legislation that also provide direction in the development process of the child. As for some of these rules include:

##### **a. UU No. 4 of 1979 on Child Welfare.**

In general, these laws provide an adequate frame as a means to achieve the welfare of the child. Some of the main things to do is:

1. The child's right to obtain an order of life and livelihood of children who can ensure the growth and development in a narally, both physically and spiritually, even socially.
2. Children are also entitled to the services to develop abilities and social life.
3. Children are entitled to maintenance and protection, both during in embryo and after birth.
4. Children are entitled to protection of the environment that can harm or inhibit the growth and development with reasonable.
5. The responsibility of parents in an effort to realize the welfare of children, both physically and spiritually.

##### **b. UU No. 12 Year 1995 on Correctional**

In the provision provides implementation of guidance to the correctional system, with the purpose in addition to restore the prisoners (in particular also including children) as a good citizen, to protect the public against the possibility of repeated criminal acts, as well as an application and an integral part of the values contained in Pancasila. Therefore, the correctional system focused on aspects of coaching that have the characteristics of preventive, curative, rehabilitative and educative.

##### **c. UU No. 3 of 1997 on Juvenile Justice which has been repealed by UU No.11 of 2012 on the Criminal Justice System Children.**

This instrument is specifically giving attention to children who contact with the law. The treatment of these instruments should be distinguished by either of the procedures, the punishment and minimum age limit can be held accountable. Although this instrument is ambiguous at least give attention differently to children and adults. The spirit that built this instrument is legally give special treatment to allow the child can still live as a child.

##### **d. UU No. 39 Year 1999 on Human Rights**

This provision specifically governing the rights of children. Under the provisions of Section 52 through Section 66 contained various child rights include: the right to protection from their parents, the family, society and the state; rights to life and sustain life, the right to special care, education, training and special support the expense state to assure an existence worthy of dignity; rights to worship; custody by others; right to obtain legal protection; right not to be separated from their parents.

##### **e. UU No. 23 Year 2003 on Child Protection.**

This instrument specifically provides principles/fundamentals in order to protect children. The principles in the child protection include the principle of non -discrimination, the best principle interests to the child, the principle of the right to life and the principle of respect for the child's opinion.

Currently has enacted UU. No. 44 Year 2008 on Pornography, as a policy response to the spread of rampant pornography in Indonesia. In UU. No. 44 In 2008 this has been determined limitatively about pornography or the meaning of the notion of pornography, which is defined in Section 1 subsection 1 states that pornography is images, sketches, illustrations, photographs, text, voice, sound, moving pictures, animation, cartoons, conversation, gestures, or other forms of messages through various forms of communication media and/or performing in public, which contains obscenity or sexual exploitation that violate the moral norms of society.

Observing such arrangements if the crime of pornography involving children, both children as well as child actors as victims, then to enforce the concept of justice (concept of justice) in the resolution of criminal cases involving children, it should be emphasized on the application of justice toward restorative justice (restorative

justice/community-based justice) which emphasized the importance of restorative or healing for those who suffer from crime and avoid to apply the concept of justice on the basis of retaliation (retributive justice/prosecutorial justice), so that the primary focus should be directed to the victim in particular child who involved pornography criminal act. The process was not intended solely to punish or embarrass someone (pillorying ) or demanding, but rather in an attempt to obtain the truth that is ultimately beneficial to help restore the harmonious relationship between the offender, victim and community.

In connection with this, the crime of child pornography involved, both children who are victims of criminal acts of child pornography and criminal pornography because of their existing conditions are still unstable and immature both mentally and soul as well as their ignorance, therefore children either directly become victims of crime, including perpetrators a criminal be as well as victims of circumstances milieu. Thus, the relationship the perpetrator and the victim in a crime involving a child should be taken carefully in order to determine the appropriate steps both in the rehabilitation of children who become victims of crime or in imposing sanctions on children who become criminal, given the position and role in a crime, children who are victims have a clear position as a victim , as well as the position of children who are actual criminals is also a victim of circumstance and milieu.

Thus, the child victims of crime, including victims of crime should be made pornography policies to prevent casualties through prevention and assistance to victims (victim assistance), then if the child has become perpetrators or victims of crime and pornography must obtain advocacy services of the child, considering the child's condition so stay put as victims . Consequences for the people involved and reaction posed by the public, especially the police and the criminal justice system as well as social workers and professionals, partly responsible for the child's recovery efforts in order to grow and develop in accordance with the requirements that must be fulfilled. Some of the laws that govern the interests of the majority of children have provided protection, but such protection (especially against the victim) a lot more " abstract protection " or " indirect protection", meaning that in the presence of various criminal acts in the formulation of legislation for this has virtually no protection *in abstracto* indirectly to various legal interests and rights of victims.<sup>15</sup>

This is shown, in the formulation of sanctions contained in the formulation of various criminal offenses in the legislation, if applied to the offender is deemed a form of protection for the victim. It seems less appropriate when applied to offenses involving children, should have the form of protection should be concrete and immediate, or at least oriented and guarantee the fulfillment of the rights of the child, so if it is deemed necessary to the imposition of sanctions on children who commit criminal, then not only consider the severity of sanctions that should be imposed as contained in the formulation of a variety of criminal acts, but also have to be considered other regulations governing child. Thus, the imposition of sanctions against child pornography crimes, in addition to considering the existence of sanctions contained in the formulation of the Pornography Law, it must be considered also laws governing child.

In UU No. 44 of 2008, also arranged on the type of service and the media that can be used as a means of pornography, as defined in Section 1 subsection 2 that pornography services is all types of provided pornography services by the individual or corporation through live performances, cable television, terrestrial televisio, radio, telephone, internet, and other electronic communication as well as newspapers, magazines, and other printed matter. Expressly in the UU No. 44 Year 2008 on Pornography, which criminalize pornography prohibition measures to produce, create, reproduce, copy, distribute , broadcast , importing , exporting , offering , reselling, renting , or providing explicit pornography includes child pornography. (see Section 4 subsection (1) letter f). Even also explicitly criminalize child pornography by banning involve children in activities and/or as an object of pornography (see Section 11), prohibits to invite, entice, exploit, let, abuse of power or force the child to use the products or services of pornography (vide Section 12).

In terms of child protection against the effects of pornography has been limitedly also arranged and included in a separate chapter that is in Chapter III of the Child Protection consisted of two (2 ) sections, namely Section 15 and Section 16, as follows:

#### Section 15

Each person has a responsibility to protect children from the influence of pornography and prevent children's access to pornographic information.

#### Section 16

- (1) The Government, social organizations, educational institutions, religious institutions , families , and /or community shall provide coaching, mentoring, and social recovery, physical and mental health for all children who are victims or perpetrators of pornography.
- (2) Further provisions on coaching, mentoring, and social recovery, physical and mental health as referred to in subsection (1) is regulated by the government.

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<sup>15</sup> Barda Nawawi Arif (II), *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Badan Penerbit Universitas Diponegoro, Semarang, 1996, hlm. 54-55.

If the restrictions set forth in UU No. 44 Year 2008 on Pornography is violated, then in Chapter VII of the Criminal Provisions of Section 29 through Section 41, can be sentenced to pornography a criminal offense which is quite heavy criminal sanctions in the form of imprisonment and/or criminal penalties are quite high, even associated with prohibition-ban involving child pornography or child pornography a criminal offense if it violated the criminal sanction imposed is coupled with 1/3 of the maximum criminal threats.

The provisions in the UU No. 44 Year 2008 on Pornography, to then be identified from the existence of pornography contained in the law and its relationship with some legislative policies that govern the rights of the child (Child legislation) that has been enacted, both in UU No. 4 Year 1979 on Child Welfare, UU No. 3 1997 on Juvenile Justice and UU No. 23 of 2002 on Child Protection, including UU No. 36 Year 1999 on Human Rights, which will be obtained and form a clear picture of the existence of appropriate criminal policy towards prevention of criminal acts involving child pornography, particularly in realizing the rights of children in connect with the law, in order to realize the best interests of the child ( the best interest of Childs).

### **3.1.2. Criminal Policy against Legal Protection of the Rights Child Pornography Crime Victims**

To provide opportunities for children to grow and develop in accordance with their needs in the best interests of the child (the best interest of the child) it is necessary to guarantee legal protection of the rights of children in general and the rights of children in conflict with the law, either in a position as a resident offenders or as victims of crime, so that children in all conditions and all stages of development should be guaranteed protection of their rights to be able to grow and develop in the best interest and welfare of the child. In a broader context, international community have that extra attention to the interests of the child, has proven there are several international instruments which specifically discuss the sustainability of the children in the world, it can even be said that the international community has built a better building world for children (a better place for children). Globally, UNICEF campaign on the need to develop and serious attention to the presence of a child, by stating that it is time for the nation and the put the needs and rights of children in any development strategy, to ensure the upholding of the rights of children.

Likewise Indonesia, from the policy side has shown lack of attention to children and there has been some legislation that regulates and provides protection for the existence and development of children. In other words, there are some good policies contained in international instruments and regulated in the legislation that has set up a series of children's rights and freedoms as well as a variety of interests related to the growth, development and well-being of children. Indirectly to constructed efforts against child protection laws that provide secure for freedom and the rights of the child to be able to grow and develop in the best interests of the child and for the welfare of the child . Given the position of children as young generation that will continue the noble ideals of the nation, the nation's leaders in the future and as a source of hope for the older generation, whatever condition still need to get the widest opportunity to grow and evolve naturally with mental, physical and social.

Then, also explained that the protection of children's rights essentially involves direct by law. Policies, businesses and activities that ensure the protection of children's rights, first of all based on the consideration that children are vulnerable and dependent groups, in addition because of the group of children who experience barriers to growth and development, both spiritually, physical and social.<sup>16</sup> Based on explanation above, the same with Barda Nawawi Arif's opinion that 'Legal Protection' for children can be interpreted as a legal protection against various freedoms and rights of children (fundamental rights and freedom of children) as well as a variety of interests related to the interests of the child. Where child protection is an effort to protect the child in order to do the rights and obligations.<sup>17</sup>

In the legislation in Indonesia, including the laws that certain regulate to children, nowadays there is legislation that specifically regulates the protection of children, namely UU No. 23 of 2002 on Child Protection. In Section 1 subsection 2 provides insight and determine that child protection is to ensure all activities and protect children and their rights in order to live, grow, develop, and participate optimally in accordance with the dignity of humanity, as well as protection from violence and discrimination. In the general explanation asserts that the responsibility of parents, family, communities, governments and the state, is a series of activities carried out continuously for the sake of protection of children's rights. Related activities must be sustainable and effective to ensure the growth and development of children, both physically, mentally, spiritually and socially. This action is intended to achieve the best life for children who are expected as a potential successor to the nation, tough, has a nationalism that is inspired by the nobility and the values of Pancasila, as well as strong-willed maintain the unity and integrity of the nation and the state. Child protection efforts need to be implemented as early as possible, ie, since the fetus in the womb until the child is aged 18 (eighteen) years. Based on the conception of the whole child protection, thorough, and comprehensive, this law takes obligation to provide protection to the child based on the following principles:

a) Non-Discrimination;

<sup>16</sup> Maidin Gultom, *Perlindungan Hukum terhadap Anak*, PT. Refika Aditama, Bandung, 2008, hlm. 53.

<sup>17</sup> Barda Nawawi Arief (I), *Op.Cit.* hlm. 153.

- b) The Best Interests Of The Child;
- c) The Right To Life, Survival And Development, And
- d) Respect For The Child's Opinion.

In doing coaching , development and protection of children, the role of community needs, either through child protection agencies, religious institutions, non-governmental organizations, community organizations, social organizations, businesses, the media, or educational institution. As a participating country (state party) that have ratified the Konvensi Hak Anak into national law, the Indonesian government is obliged to ensure the enforcement of the rights of children.<sup>18</sup> Konvensi Hak Anak is an international law which binds member states to implement the policies set out in the practice of the state, nation and society.

In Indonesia, in its constitution, namely the UUD Year 1945, has also been set up and stated that children's rights are part of human rights, as the foundation for the policy to be implemented, to be followed up with a set of laws and formulate it in and regulations. For it in the UUD Year 1945 , the rights of children was included in Chapter XA of Human Rights on Section 28 B of subsection (2) which states that every child has the right to live, grow, and evolve, and is entitled to protection from violence and discrimination.

In line with these thoughts, in Indonesia attention to children (especially children in conflict with the law) has got more and more obvious forms and embodied in legislative policy, as set forth in UU No. 4 Year 1979 on Child Welfare and the UU No. 3 1997 on Juvenile Justice, and which specifically regulates the protection of children is as stipulated in UU No. 23 of 2002 on Child Protection, as well as the set of human rights where the rights of children are also part of human rights as stipulated in UU No. 39 Year 1999 on Human Rights.

### **3.1.3. Criminal Policy Against Crime Prevention Pornography involving Children In Model Protection of Victims of Crime Child Pornography**

The term crime of child, in the study of criminal law is actually a term that is not known in general, but only a specific matter of criminal law matter. While commonly known in the literature only the term criminal law is criminal act. Where the term refers to the act of violation committed by a person, whether done by a person who has a child or adult. There are several terms that describe *strafbaarfeit*, such as criminal acts,<sup>19</sup> criminal incidents,<sup>20</sup> a criminal act.<sup>21</sup> The current agreement has emerged among scholars to use the term Crime, besides it has been widely used in a variety of laws and regulations of criminal law, also has been included explicitly in the draft of KUHP. The reason given by, among others, that the Indonesian criminal law is based on the action (Daad) and the maker (Dader), thus pointing to the crime of prohibited acts are performed by people, either actively or acts passive act, including the negligent act (nalaten).

Thus normatively, reviewing criminal offense, then it means paradigm focused on external issues, in the sense that only focuses on the real act (actus reus). Although widely range of criminal law also covers the issue of the attitude of mind (mens rea), especially regarding the issue of accountability, but it involves a criminal offense focuses on the key issues over moral issues/ethics is closely associated with personality problems/mental (psychological). If the problem is connected with the crime of child, then the key issues to focus more behavioral problems are more closely related to psychological aspects. Because in general criminal offenses committed by children is not based on bad motives, then if there are children whose behavior deviates from social norms, the child such communities often termed as bad boy, bad boy, the child socially, children offenders or *Juvenile Delinquency*. With the term, it can avoid the faction which is categorized as a criminal.

In Indonesia, based on the formulation of the Tim Kerja Hukum Pidana and the Acara Pidana in 1970 has recommended in its report that: "The definition the crime of child/adolescent delinquency are all actions defined in criminal law and other acts essentially detrimental to the child's development as well as detrimental to society".<sup>22</sup> Inside the UU No. 3 year 1997 on Juvenile Justice, which turned out to be none section that regulates criminal acts of children, and only provide an understanding of the bad boy, as stipulated in Section 1 of UU No. 2 No. 3 year 1997, therefore it can be interpreted that the offense child as stipulated in the KUHP committed by a child, as it also includes acts that are prohibited for children, either by legislation or by other laws live and act in society.

Understanding of that theory are necessary given the fact that many criminal cases a child or a criminal offense involving a child or children are victims and handled through the judicial process with a variety of treatments that are consistent with the perception of judicial procedural, it seems there is a need to review the rules-regulations up to now used as an operational basis in the handling and settlement of children who have committed criminal acts. Moreover this time has enacted UU No. 3 of 1997 on Juvenile Justice, on the other hand also has enacted UU No. 4 of 1979 and the Child Welfare UU No. 23 of 2002 on Child Protection, which is

<sup>18</sup> Muhammad Joni dan Zulchaina Z.Tanamas, *Aspek Hukum Perlindungan Anak dalam Perspektif Konvensi Hak Anak*, PT. Citra Aditya Bakti, Bandung, 1999, hlm. 96.

<sup>19</sup> Sudarto, *Hukum Pidana I*, Yayasan Sudarto, Semarang, 1990, hlm. 39.

<sup>20</sup> Utrecht, *Hukum Pidana I*, Universitas, Bandung, 1968, hlm. 18.

<sup>21</sup> Moeljatno, *Asas-Asas Hukum Pidana*, Bina Aksara, Jakarta, 1987, hlm. 54-55.

<sup>22</sup> Sri Widoyati Wiratmo Soekito, *Anak Dan Wanita Dalam Hukum*, LP3ES, Jakarta, 1983, hlm. 17.

expected to provide protection of the rights of children to reach maturity, maturity and well-being. On the other hand, the existence of cases involving children, realize that in fact the behavior is performed wrong that child committed is legally criminal. So, in an effort to provide protection to children in the judicial process Sudarto, said: Any activity that is carried out in the framework of the juvenile justice, whether it is done by the police, prosecutors or other officials, should be based on a principle, is for the sake of welfare of children, for the child interests. So is the judge would impose criminal? or actions should be based on the criterion of what is best for the welfare of the child in question, of course, without prejudice to the attention of the public interest".<sup>23</sup>

Furthermore, expressly disclosed that the interests of the child should not be sacrificed for the sake of the community, as expressed by Arief Gosita which states that: "Barrier' procurement' welfare of the child with the perspective of national interest, fair and prosperous society spiritual and material, is an aberration that contains *kriminogen* factors (cause of crime) and *Viktimogen* (causing casualties)".<sup>24</sup> The commitment of the international community to provide specific guarantees for the children of future generations in the field of law and justice, can be seen in the United Nations Congresses which is continuously giving special attention to child protection issues. As in the UN Congress on the Prevention of Crime and Treatment of Offenders to IX (Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders) held on April 29-May 8, 1995 in Cairo, Egypt. The congress also stressed the need to note three international instruments on the Protection of the Rights of the Child Problematic in law. One of the most important instruments is the *UN Minimum Standards Rules for the Administration of Juvenile Justice* which is the UN Resolution No. 40/33 or better known as the *Beijing Rules*.

In relation to child protection efforts in order to be developed adequately, in the *Beijing Rules* specify that the child after going through the adjudication process, in the end can be placed inside or perhaps outside of the Institute for the Institute fostered. Coaching children outside the institution in, its implementation needs to be carefully in a way that involves an independent agency, such as *Parole, Probation, Child Welfare* agencies with qualified personnel, supported by support with facilities in terms of rehabilitation of the child (Rule 23-25). While coaching the child in the Institute is directed, in order coaching is not general, but pay attention to the social, economic and cultural child concerned (individualized coaching) the provision of medical personnel, psychologists, special for children drug addicts. One important point on this case is parents intervention/families in coaching for children during in Institutions (Rule 26).

The provisions contained in the *UN Standard Minimum Rules for the treatment of Prisoners* which requires the fulfillment of the special needs to the child according to the child's age, gender, child psychiatric conditions, must still be considered in the implementation of child development in the Institute, the institute *Pelepasan Bersyarat* for children should be prioritized. As the final part of discussion about the need for children rehabilitation is provided a means of semi - institution well coordinated within the framework of the integration of the child child in society (Rule 27-29).<sup>25</sup> Several provisions in Rule Beijing hinted above, that the transfer of the case to the judicial path to non-judicial path becomes a priority. In the development of these problems are increasingly gaining the attention of the international community, especially with the birth of *UN Resolution 45/110-UN Standard Minimum Rules for Non-Custodial Measure (SMRNCM)* or commonly called *The Tokyo Rules*.

UN Resolution 45/110-The Tokyo Rules, established the principal guidelines relating to the types of actions that can be imposed on the offender (child) a criminal offense, either at the stage of pre-trial (pre-trial stage) trial and sentencing stage (post - Sentencing stage). Based on the principle that the selection of non-custodial measures on offenders should be based on assessment criteria defined on (a) the essence and weight of a criminal offense, (b) personality, background offender, (c) the purpose of punishment and (d) the rights victims (rule 3.2), then the non-custodial act at the stage before the judicial process, among the police, others prosecutors or other officials relating to a criminal case must be authorized freeing criminals. (Rule 5.1)

On non-custodial actions sentencing stage of the proceedings and are (a) verbal sanctions (verbal sanction), admonition (warning/advice either), reprimand (warning loud/derision and warning ; (b) parole (conditional release), (c) relating to criminal status (status penalties); (d); economic sanctions (economic sanction ) and the criminal nature of money (monetary penalties); (e) forfeiture (confiscatio) or expropriation orders ; (f) compensation (restitution) compensation to the victim or command; (g) criminal conditional/pending (suspended/deferred sentence), (h) supervision (probation and judicial supervision); (i) social work orders (a community service order); (j) submission to the attendance center (referral to attendance centers); (k) home detention (house arrest), (l) non-custodial care of others and (m) some combination of the above actions. (Rule 8). measures non-custodial sentencing phase after, either (a) leave (furlough) and the placement of the 'half-way houses' (an institution designed to rehabilitate people who have been out of jail or help the transition from life in

<sup>23</sup> Sudarto, *kapita Selektia Hukum Pidana*, Alumni, Bandung, 1981, hlm. 140.

<sup>24</sup> Arief Gosita, *Masalah Perlindungan Anak*, Akademika Presindo, Jakarta, 1989, hlm. 33.

<sup>25</sup> Paulus Hadisuprpto (I), *Op. Cit.*, hlm. 112-113.

the penitentiary for life are free (b) the distribution of work/education. (work/education release), (c) various forms of parole, (d) remission, and (e) forgiveness (pardon). (Rule 9).

Nowdays, In Indonesia there is a legal basis governing the construction effort against child criminals, as stated in UU No.12 of 1995 on the "Correctional" and UU No. 3 of 1997 on Juvenile Justice. Juridical which is the legislative policy, establishes that the criminal child who had been made subject to sanctions,<sup>26</sup> such as imprisonment, against coaching process will be conducted in the correctional system and specifically placed in the Penitentiary Centre (LPA). Placement of child criminals (child prisoners) will be conducted in a separate prison Kids from adult convicts. Children are placed in Child Penitentiary, the right to education and training, both formal and informal according to their talents and abilities, and acquire other rights (Section 60 of UU no. 3 of 1997).

It should be noted that in the implementation of the criminal justice process there is a condition of ambivalence as a consequence development of modern legal formal, bureaucratic and rational. In modern legal systems and procedures have been integrated into a single substance, so that procedural errors also resulted in the substantial failure. Modern society work through organizations to optimally arranged in decision-making and operating efficiency starts automatically.<sup>27</sup> The criminal law is a system of negative sanctions, in the application, criminal sanctions are suffering felt bad for the subject, in addition to the criminal consequences in the form of "stemp" (stigma)<sup>28</sup> is given by the society to former inmates. If the stamp cannot be removed, then they shall be punished as for life. Because it is not really necessary if a criminal should not be dropped and a new applied when other means have been insufficient (ultimum Remedium).<sup>29</sup> So in the imposition of criminal child, it is because the child who committed the crime is not that he has a wicked talent, but because the child is in a state as well as the environment that surrounds it.<sup>30</sup> New ideas that emerged in the criminal law on the subject of which is the punishment and treatment, the application of the treatment of both the science and humanity based on the class of juvenile offenders and the mentally abnormal.<sup>31</sup> Besides, the presence of the specific implementation of Juvenile Justice whose purpose can be described as an effort to protect and rehabilitate children in lieu of an effort launched accusations and criminal punishment.<sup>32</sup> In fact, as stated in the general principles of the Beijing Rule has hinted that the children involved in the criminal act should be avoided as far as possible from the criminal justice process. Starting from the idea that the potential negative impact on the child as a result of the judicial process is very large.

The negative impact of the criminal justice process as prisonisasi, dehumanization and stigmatization of a child would interfere with the growth of the soul. In the context of such an attempt to divert the path of judicial handling of child towards a non-judicial (diversion) becomes very urgent, or through the diversion efforts, the child's deviant behavior or commit a crime would do a better settlement, without ignoring the interests and child welfare, and appropriate action can be carried out in accordance with the needs and interests of the child.<sup>33</sup> Thus, a rational policy required to implement and realize these conditions as a policy to deal with offenses involving children or takes appropriate criminal policy.

Understanding of the criminal policy beginning from the understanding that a criminal act or a crime and a humanitarian problem and also social problems which is always dynamic, always growing and associated with symptoms and other civic structures that are very complex, which is a social - political problems.<sup>34</sup> Criminal policy against child involved criminal acts must be based on the absence of prevention efforts must be distinguished from the policy pursued towards adults. So it must be done in an integrated (unified) and precisely determined based on its urgent in implementing the penal and non-penal efforts in accordance with social policy (social policy) is expected by society. In the context of criminal policy against the crime of child involved is necessary to adjust to the political well-being of society (social welfare) and political protection of the general public. Specifically directed at child welfare policies and political protection of the rights of children, both children in general and children who are victims of adult crime (neglected children) and child victims of juvenile offenders (delinquent children), which can be seen in the following picture.<sup>35</sup>

<sup>26</sup> Undang-Undang Nomor 3 tahun 1997 tidak mengikuti ketentuan Pidana pokok yang diatur dalam Pasal 10 KUHP, dan menentukan sanksi secara tersendiri yang dituangkan dalam Pasal 23 ayat (2) UU No. 3 tahun 1997, bahwa pidana pokok yang dapat dijatuhkan kepada anak nakal ialah : a. pidana penjara (maksimum 10 tahun); b. pidana kurungan; c. pidana denda; atau d. pidana pengawasan.

<sup>27</sup> Satjipto Rahardjo, *Hukum dan Masyarakat*, Angkasa, Bandung, 1980, hlm. 74

<sup>28</sup> Sudarto, *Hukum dan Hukum Pidana*, Alumni, Bandung, 1977, hlm. 32.

<sup>29</sup> *Ibid.*

<sup>30</sup> Loebby Loqman, "*Perkembangan Kebijakan Legislatif tentang Peradilan Anak di Indonesia*", Makalah Penataran Nasional Hukum Pidana dan Kriminologi, Fakultas Hukum UNDIP, 1995, hlm. 1-2.

<sup>31</sup> Andi Hamzah, *Sistem Pidana dan Pemidanaan dari Retribusi Kereformasi*, Edisi Pertama, PT. Pradnya Paramita, Jakarta, 1975, hlm. 8-9.

<sup>32</sup> Mulyana W.Kusumah, Penyunting, *Hukum dan Hak-Hak Anak*, CV.Rajawali, Jakarta, 1984, hlm. 33.

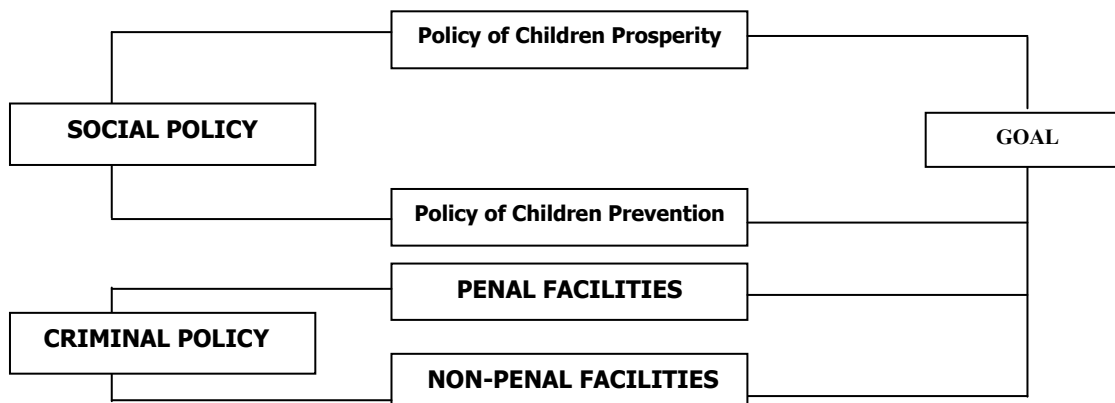
<sup>33</sup> Koesno Adi, *Diversi Sebagai Upaya Alternatif Penanggulangan Tindak Pidana Narkotika oleh Anak*, UMM Press, Malang, 2009, hlm. 54.

<sup>34</sup> Bandingkan dengan Muladi, *Kapita Selekta Sistem Peradilan Pidana*, BP-UNDIP, Semarang, 1995, hlm. 7

<sup>35</sup> Paulus Hadisuprpto (I), *Op.Cit.*, hlm. 76-77



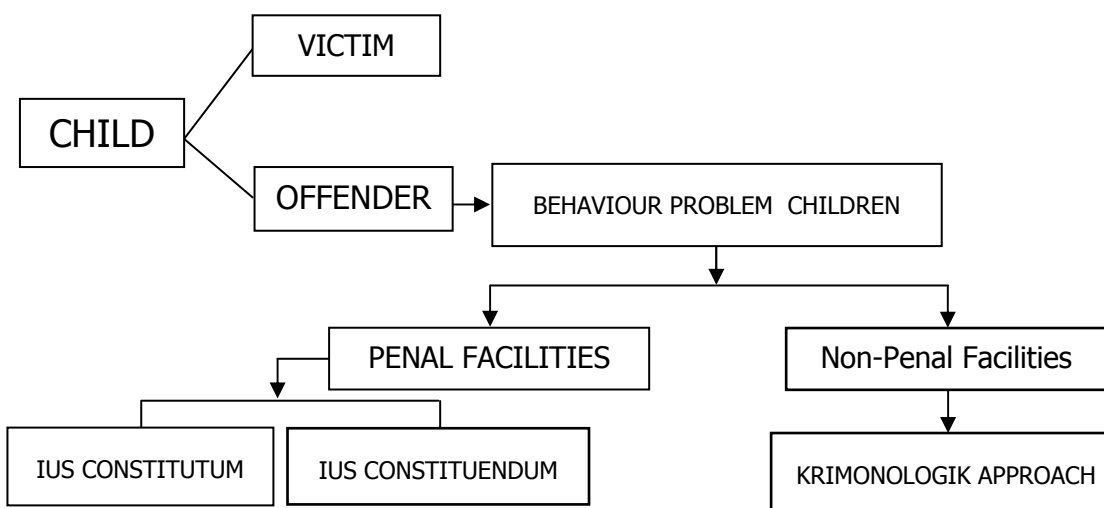
Picture II is Criminal Political Relations with Political and Social Politics Child Welfare



In an effort to realize the welfare of a child and an effort to realize the protection of the guarantee of the protection of children, both of these are integrated as part of the goal to be achieved in social policy. So, the consequences should be done in the implementation of mitigation policies as criminal policy can be used either by means of penal and non – penal facilities. However, the criminal policy in relation to children who committed crimes and the children in a position as victims or as a offender, then the response should receive attention are different from adults, particularly in the use of means penal and non - penal facilities. Where in characteristic that is different in children with an adult considering the condition of his soul immature and tend unstable, then the use of a non - penal facilities should be given a larger portion and or should be a priority of the use of penal facilities.

The way of thinking, it seems same with a study conducted by the Criminology, considering the role of criminology through research to understand the nature and background of the child 's involvement in a crime, as well as browse and find a means of non - penal, though not disregard the use of penal facilitie . This study seems particularly relevant in an effort to guarantee the protection of the rights of children involved in a crime or children in conflict with the law.

The policy can be seen in the following picture: Picture III<sup>36</sup>:  
 Scope of Study on Child Behavior Delinkuensi



Looking at the picture above, it is understood that in dealing with child behavior problems in children as well in the position of children as perpetrators or victims, then it means that the mitigation can be used to refer either the penal norms and criminal law or statutory provisions and regulations that are positive law (ius constitutum), on the other hand should be given a lot portion or made a priority use of non - penal suggestion that a study of the *crimonilogic* approach so that the nature and background of the child or the child's behavior problems in dealing with law can be understood comprehensively. The results obtained in the study *crimonologik* approach as well as a reference to the correction and weaknesses or deficiencies in the provisions of the legislation which is the positive law and the norms of criminal law that arrange implementation and application in society in order to be accommodated to the norms of criminal law which must be poured and criminal law in the future or aspired (ius

<sup>36</sup> *Ibid.*, hlm. 77-79.

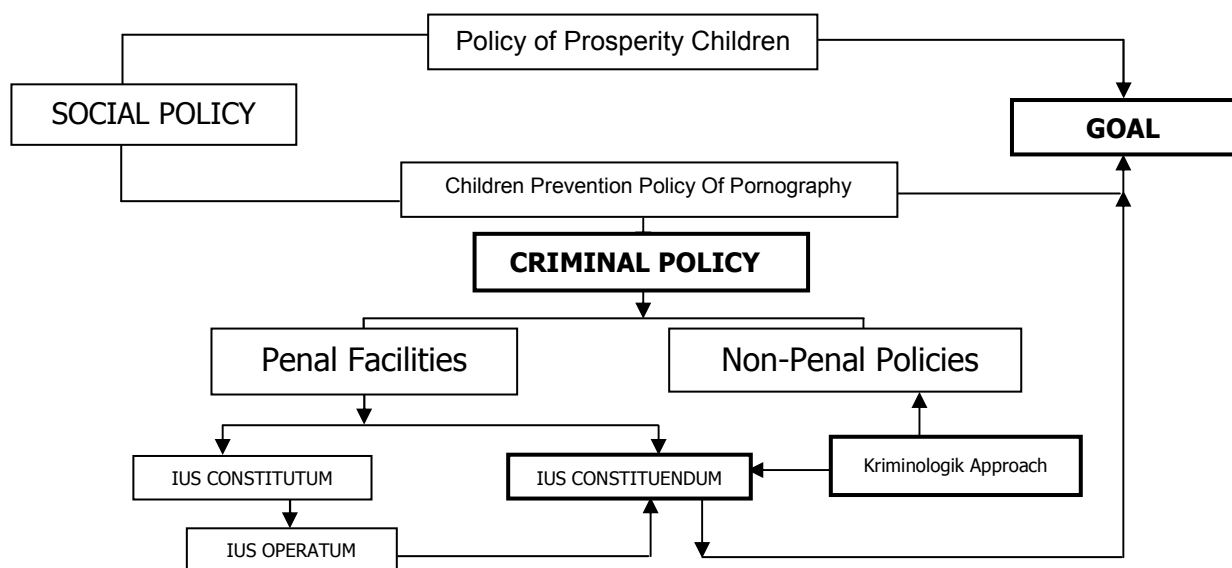
constituendum).

Criminal policy against the troubled child in such behavior do, in light of the limitations and weaknesses of penal policy as a means of crime prevention (are symptomatic, even kriminogen as a social stigma), emphasized the need to encourage non - penal policy in the context of crime prevention in the community.<sup>37</sup> Seen from the side of the non - penal policy means need to be explored, developed and exploited the full potential in the support and participation of the community in an effort to improve the effectiveness and development of " extra legal system" or " informal and traditional systems " that exist in society. In addition, by means of criminal penal policy in effect also focus on preventive measures (prevention), this means, in a non - penal facilities therein covers the macro social policy efforts directed at improving the welfare of children and child protection on the parties, and on the other hand there are reduction kriminogen factors in the onset of problematic child behavior.

Such policies turned out to have compatibility with some formulations of the UN Congress on the *Prevention of Crime and the Treatment of Offender*. 7th Congress in Milan, Italy, in 1985, which confirmed the document A/CONF. 121/L/9 that "the basic crime prevention must seek to eliminate the causes and conditions that favor crime". Meanwhile, at the 4th congress of the United Nations to discuss the issue of Non - Judicial forms of social control, confirmed "it was important that traditional primary forms of social control should be revived and developed". In the 'Guiding Principle', UN 7th congress confirmed also, " When new crime prevention measure are Introduced, Necessary precautions should be taken not to disturb the smooth and effective functioning of traditional systems, full attention being paid to the preservation of the culture identities and the protection of human rights."<sup>38</sup> In connection with this, in the implementation of criminal policy implemented in the criminal law policy (penal policy) as an integral part of the criminal policy. Political policy or criminal law can be seen from political law, which is: "The effort to create good regulations in accordance with the circumstances and the situation at some point, or is the policy of the state through the competent bodies to adopt legislation desired are expected to be used to express what is contained in the community and to achieve what is aspired".<sup>39</sup>

In the implementation of the Criminal Justice Policy (Penal Policy) comprehensively covers policy formulation/legislation, policy application/judication and Execution policy/administration. Each of the policy as a whole in the implementation of the criminal law, in the early part of the policy formulation as a policy formulating norms of criminal law legislation, this is the stage where the lines formulated policies and conviction of the criminal system as well as the foundation legality for the next stages, both on stage and the application of criminal punishment by a court of law as applicable policies/judicial branches, as well as at the implementation stage and criminal sentencing by law enforcement officers or criminal executing as the execution policy/administration.<sup>40</sup> Understanding patterns of criminal policies against the troubled child (in this case the crime of child pornography victim who made the perpetrator), then we obtain a model for the protection of child victims of crime as potential pornography. The picture flow models such protection, have constructed as follows:

Picture IV : Chronology of Criminal Policy Models Such protective Children As Victims  
 Crime Pornography is used Performers



<sup>37</sup> Barda Nawawi Arif (II), *Op.cit.*, hlm. 57.

<sup>38</sup> Barda Nawawi Arief (I), *Op.Cit.*, hlm. 51, 57, 58.

<sup>39</sup> *Ibid.*, hlm. 4.

<sup>40</sup> Barda Nawawi Arief (II), *Op.Cit.* , hlm. 3-4

Based on the construction picture protection model above shows, as understood in criminal policies that the offense or crime and a humanitarian problem and also social problems which is always dynamic, always growing and associated with symptoms and other civic structures that are very complex, which is a social - political problems. Likewise, the criminal policy against child being perpetrators or victims of crime must be based on the existence of pornography prevention efforts must be distinguished from the policy pursued towards adults. So it must be done in an integrated (unified) and precisely determined based on urgency in implementing the penal and non- penal efforts in accordance with social policy are expected by society to adapt to the political well-being of society and political protection in general.

Specifically directed at child welfare policies and political protection to the rights of the child in this case the rights of children in conflict with the law, both children in general and children who are perpetrators or victims of crime pornography. As a consequence of the criminal policy in relation to children who become perpetrators or victims of crime pornography, so that the mitigation can be done through the use of means of penal or criminal law policy through (penal policy) as well as non - penal facility or outside the criminal law policy. In the early part of the central problems of fundamental and strategic policy of the criminal law should be referred to both norms and criminal law or the provisions of law which is a positive law (*ius constitutum*), such as the KUHP, UU No. 4 of 1979 on Child welfare, UU No. 3 of 1997 on Juvenile Justice, UU No. 39 Year 1999 on Human Rights , UU No. 23 Year 2002 on Child Protection , UU No. 13 of 2006 on the Protection of Witnesses and Victims and UU No. 44 Year 2008 on Pornography .

While a review of the procedural provisions of the Criminal Procedure Code and is based both Law No. 3 of 1997 on Juvenile Justice, ranging from the level of investigation, prosecution and examination before the court verdict implementation as the implementation of norms and criminal law or the provisions of legislation technical in applying criminal law in society (*ius operatum*) . Use of this penal facility if there are weaknesses or deficiencies and and or have a negative impact on the next stage will be taken into consideration in accommodating the norms of criminal law in the future or be aspired law (*Ius constituendum*) . On the other hand the use of non - penal suggestions kriminologik approach will be found and understood the nature and background of the child pornography involved in a comprehensive manner . For then the results of the study as well as a reference kriminologik approach the correction of weaknesses or deficiencies and the provisions of the legislation which is the positive law and the norms of criminal law mengtur implementation and application in society in order to be accommodated to the norms of criminal law which must be poured and criminal law in the future or aspired (*ius constituendum*) , so that appropriate measures can be used in accordance with the best interests of the child (the best interest of the child) .

Picture model above as a reference, that in providing protection to victims of child pornography will be oriented to the policies contained in the *IUS constitutum* and *IUS operatum*, in a sense based on a variety of existing positive law to note that the legislation applicable criminal laws and regulations implementation can be utilized to combat pornography involving children, so known weaknesses or deficiencies and to be taken into consideration in formulating legal norms in the legislation in the future (*Ius constituendum*), this study collaborated more (priority) with the findings of criminological findings are supported by trends in the history of the formulation of norms (historical) and trends in the international community association either through international instruments or practice in other countries (comparison) to be used as an alternative and improvement in developing norms - norms of criminal law in the legislation in the future (*Ius constituendum*) governing the guarantee of protection of the rights of children who are perpetrators or victims of pornography.

The chronology are intended to identify specific measures or alternative means to implement other forms of legal protection of children who are perpetrators or victims of crime pornography, so that the child will be able to grow and develop in the best interest for them, and at the same time can be used basic considerations in criminal policies that they deem appropriate concerning the guarantee of protection of children's rights to be implemented in response to the crime of pornography involving children. Thus, it is reasonable if it is the ideal model and appropriate protection to be applied in the provision of guarantees for the implementation of the protection of the rights of children who are perpetrators or victims of crime pornography. Given the condition of any child is the next generation of national struggle as a potential human resource for national development.

#### **4. CONCLUSION AND RECOMMENDATION**

##### **4.1. Conclusion**

Based on the description in the research and discussion, it can be obtained several conclusions, as follows :

- 4.1.1. That form of protection in Regulation of Legislation governing the protection of children to the influence of pornography, as stated in the UUD 1945, legislation of criminal law relating to the protection of children's rights include, KUHP, KUHAP, UU No. 39 Year 1999 On Human Rights, UU No. 4 In 1979, Child Welfare, UU No. 3 Of 1997 On The Juvenile Court Has Been Revoked By The UU No. 11 Of 2012 On The Criminal Justice System Children, UU No. 23 Of 2002 On Child Protection And The UU No. 44

Year 2008 On Pornography. Some of the laws that govern the interests of the majority of children have provided protection, but such protection (especially against the victim) is more "abstract protection" or "indirect protection", meaning that in the presence of various criminal acts in the formulation of laws and invitation has been virtually no protection *in abstracto* indirectly to various legal interests and rights of victims.

- 4.1.2. That the criminal policies of the legal protection of the rights victims pornography, should be directed to the guarantee of legal protection of the rights of children in general and the rights of victims of child pornography a criminal offense, either in the position as pornography and criminal serves as pornography crime victims, so that children in all conditions and all stages of development should be guaranteed protection of their rights to be able to grow and develop in the best interest and welfare as the child.
- 4.1.3. That the criminal policy of the prevention of criminal acts involving pornography Child Protection Model For Children As Victims of Crime Pornography, should be based on the absence of prevention efforts must be distinguished from the policy pursued towards adults. As the model mean, in the early part of the response to the crime of pornography involving children should be referred to both norms and criminal law or the provisions of law which is a positive law (*ius constitutum*), which directly or indirectly regulate the and child pornography as the KUHP, UU No. 4 Of 1979 On Child Welfare, UU No. 3 Of 1997 On Juvenile Justice, UU No. 39 Year 1999 On Human Rights, UU No. 23 Year 2002 On Child Protection, UU No. 13 Of 2006 On The Protection Of Witnesses And Victims And UU No. 44 Year 2008 On Pornography. While A Review Of The Procedural Provisions Of The Criminal Procedure Code And Is Based Both UU No. 3 Of 1997 On Juvenile Justice, ranging from the level of investigation, prosecution and examination before the court verdict implementation as the implementation of norms and criminal law or the provisions of legislation technical in applying criminal law in society (*ius operatum*). Use of this penal facility if there are weaknesses or deficiencies and or have a negative impact on the next stage will be taken into consideration in accommodating the norms of criminal law in the future or be aspired law (*ius constituendum*). On the other hand the use of non - penal suggestions *kriminologik* approach will be found and understood the nature and background of the child pornography involved in a comprehensive manner. For then the results of the study as well as a reference *kriminologik* approach the correction of weaknesses or deficiencies and the provisions of the legislation which is the positive law and the norms of criminal law governing the implementation and application in society in order to be accommodated to the norms of criminal law which must be poured and criminal law in the future or aspired (*ius constituendum*), so that appropriate measures can be used in accordance with the best interests of the child (the best interest of the child).

#### 4.2. Recommendation

Reminding the importance of the protection of the rights of children involved in pornography a criminal offense, even children as perpetrators or as victims of the crime of pornography, it still needs attention and the assurance of protection. On this occasion the author sees the need to pass on some recommendations, among others:

- 4.2.1. Implementation of legislative policy should be coupled with proper realization at the policy level judicial and executive policy, so the policy is not only an ivory tower.
- 4.2.2. A child, its character different to adults, both physically, spiritually and socially, yet have the ability to stand alone, as well as rudimentary minds, Can not distinguish between right and wrong, good and bad, he is not yet mature and stable. Therefore, if a person involved in the crime of child pornography is not only seen from the nature of evil and its consequences, but also noted the conditions and background of why he was involved in the crime of pornography.
- 4.2.3. Whatever and however the child's condition, he still needs to improve the protection and care, developed itself as the next generation and become a quality human being. Although children have been involved in criminal acts, protection and attention pornography against him as well as the construction effort must be shared responsibility is an integral and not just as if the responsibility of the government. Therefore, socialization and dissemination of information should continue to be done in order to increase the participation of all parties in implementing and ensuring the protection of the rights of children involved in criminal acts of pornography, especially child pornography victims. Finally, not excessive considering the importance of the position of the child, especially the study of child -related criminal offenses should be carried out continuously, in order to obtain a comprehensive understanding.

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