

Criminalization of Human Trafficking upon the Basis of International Criminal Court Status and its Related Challenges

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Abstract

Context and Objective: Considering that in the process of human trafficking the human rights of victims including children and women are ignored in different ways by human traffickers and even involving governments including source, transit, and destination and given that human trafficking for the purpose of sexual or asexual somehow mutilates human dignity of this organized crime victimization.

Research method: The current research is using description-analytic method as well as digital-library sources.

Findings: The findings of the present study indicates that investigating the possibility of persecution of violators in International Criminal Court from deemed trafficking in persons as an instance of crime against humanity and addresses the criminalization status of trafficking in persons regarding constitution of International Criminal Court capacities in the light of victim-oriented human rights doctrine and the challenges facing the protective criminal policy of the United Nations. Therefore, different perspectives have been critically reviewed and evaluated on this issue.

Conclusion: It can be argued that human trafficking together with the concrete subject composed of the victims of the crime had also a spiritual subject which is human dignity.

Keywords: Human Trafficking, International Criminal Court, Crimes against Humanity, Status of Rome.

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Introduction

Following the collapse of the former Soviet Union Republics and the formation of two international temporary courts in order to deal with committed crimes in both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), consequently at the end of last decade of twentieth century (i.e. from June 17th to July 17th, 1998); the United Nations' Food and Agriculture Organization (FAO) in Rome hosted 166 countries in diplomatic conference to sign an International Criminal Constitution, out of which 120 countries signed it. The constitution became enforceable with joining of 62 governments on April 11th, 2002. To this date, over 114 governments joined the constitution and met the 50-years dream of international society to

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form an international criminal authority.¹ Therefore, after this major evolution in the International law, international criminal law can be enforced. Even though the constitution of International Criminal Court (ICC) has not directly considered the prevention and suppression of organized crimes, by presenting and approval of ICC and ratification of United Nations convention against the transnational organized crimes in 2000, it has created the impression that these two documents reinforce the international criminalization of transnational organized crimes. ICC has also provided the possibility of criminal organizations' prosecution via international mechanisms, especially in the cases that domestic organizations are unable to prosecute the criminals in the international settings due to lack of qualification or political intention to. According to abovementioned issues, the question "Have the instances of human trafficking been covered by some mechanisms to address the serious violations of human rights or not?" should be answered. Hence, the present study investigates the qualification of the international authority in order to find an answer to this question and to examine how the criminalization of the human trafficking in this context as well as the possibility or impossibility to address some cases of human trafficking through resource to the new international mechanism.

1. Instances of Trafficking in Persons as Crime against Humanity

According to article 5 of the ICC constitution, the jurisdiction of this international organization is limited to the most serious international crimes, such as crimes against humanity, war crimes, genocide, and territorial trespass. According to the abovementioned issues, it should be maintained whether it is possible to improve the possibility of ICC authority in a way that it would be able to pursue some criminal forms of human trafficking or not. Thus, it should be investigated whether the current ICC jurisdiction can be interpreted in a way that includes some cases of human trafficking or not.

Genocide, territorial trespass, and war crimes have little resemblance to human trafficking among the crimes subject to ICC jurisdiction, except

1. The UN mandated international law commission to draft the above mentioned constitution in accordance with resolution NO. Ga Res 216 B (Iii) on December 9th, 1984.

for the cases stipulated in Articles (22), B (2) 8; thus, the study of these crimes is beyond the subject of this paper. Furthermore, it must be investigated whether human trafficking can be considered within the scope of crimes against humanity or not. To fully realize this issue, human trafficking should be analyzed in the context of fundamental elements of crimes against humanity.

The nature of crime against humanity is the act or its omission that is not only a part of a systematic or widespread campaign, but also involves the severe violation of people's human rights, or ultimately leads to it¹. According to Article (7) of the constitution (ICC), crimes against humanity is defined as a set of special acts that are parts of systematic or widespread attack that has been committed against civilian population with the knowledge of it. Systematic or widespread attack means that the criminal act should have coordination and regular planning and be committed in an extensive scope in a way that it contains a significant number of victims. In Article (a) (2) 7 of constitution, attack is defined as series of operational discipline that involve act or acts stipulated in Article 7 (1) (a) (k). Further crimes that will be transferred to International Criminal Court must be an extensive quantity and may make an attack against humanity. Conversely, accidental acts, distinct, and individual, are not sufficient for the truth of systematic and widespread attack².

This precise and stringent condition will remove many human trafficking cases from the scope of ICC jurisdiction but not all of them, since many human trafficking organizations act in small and local scales and their actions as well as structures can hardly be placed in a very high level of coordination. Nevertheless, there are a number of trafficking networks that are in high level of complexity and extensively, and choose their victims systemically from special zones and often resort to use extreme violence, rape, kidnapping and sexual slavery.

Thus, this type of actions will exceed undeniably from minimum functions required in Article 7 of the constitution and there are little doubts in the existence of coordination in these attacks. Consequently, these cases can be involved in this section of the International Criminal Court constitution.

1. Than, Claire de & Shorts, Edwin, 2003, *International Criminal Law and Human Rights Law*, Thomason publications, Par. 5-30.

2. Cassese, Antonio, 2003, *International criminal law*, Oxford University Press, pp. 65-66.

In addition to the abovementioned condition, the fulfillment of the physical element of a crime against humanity is necessary when the systematic and widespread attack is committed in the form of murder, annihilation, enslavement, deportation or forced migration, sexual rape, sexual slavery, forced prostitution, and etc.

Prosecutors must prove committing a specific criminal act that is a certain part of a systematic and widespread attack against a civilian population. Article 7 (1) (a) - (k) of ICC constitution contains a list of eleven specific actions that encompass murder and offences such as rape, apartheid, torture, and other in-humane acts with similar characteristics. Also, this list contains a number of major crimes such as enslavement, rape, sexual slavery, forced prostitution, and other relatively extreme forms of sexual violence associated with human trafficking.

1-1. Enslavement

Article 7 (C) (2) of ICC constitution prohibits enslavement as a crime against humanity that includes trafficking in persons especially women and children¹. The ICC constitution defines enslavement as "the exercise of the ownership rights over a person in authority such as trafficking in persons especially women and children." This definition is based on customary international law and 1926² Slavery Convention that has been enforced. The ownership of a person or restricting the scope of his or her freedom or freedom of movement or revenue collection for perpetrator can be pointed out as some criteria for these crimes. It should be noted that although the time course of committing these acts should be considered, the Tribunal Appellate Court of the former Yugoslavia asserted that "neither length of time nor victims objections are not the conditions that assumed for enslavement"³.

Thus, according to the ICC constitution, trafficking in persons and

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1. Vahedy, Godratoollah , *International Criminal Law*, first edition, Tehran, Jungle publications, p.48.
 2. Article (1) of contract of prohibition of slave trade and slavery approved on Sept. 25th, 1926 and supplemental contract prohibits slavery and slave trade and arrangements similar institution ,1956, defines slavery as behavior or position of a person to exercise any or all of authorities resulting from ownership over another person
 3. Verle, Gerhard, 2008, "*Crime against humanity in contemporary international law*", translated by Amir Saed Vakili, Journal of international law, Vol. 39, p. 78.

forced labor as the new forms of slavery are known as crime against humanity¹ under the title of enslavement. Forced labor may comprise involuntary labor working in brothels as a dancer or in other places as sex profession. However, Article (G) (1) 7 of the constitution, defined human trafficking for sexual purpose as "sexual servitude" not "enslavement". This distinction as a crime against humanity is perhaps to highlight sexual slavery. However, "enslavement" and "sexual slavery" covers an extensive range of ways and aims of human trafficking, so that in each case that a person is sold, rented, or otherwise traded as goods can be regarded as a crime against humanity². Therefore, the methods used by traffickers to gain control over women and sexually abuse them, leave no doubt that their treatment with victims is similar to the definition of "sexual slavery"³. Since the procedure of their action causes a decline in element of will in choosing lifestyle and freedom of action of victims, and that this situation is the result of an exercise of ownership rights over the victims, sexual slavery is similar to slavery in conditions and the exercise of such power especially over women and children. Ultimately, traffickers in persons are on trial at the International Criminal Court⁴.

1-2. Sexual Slavery

Pursuant to section 6, paragraph 1, Article 7 of the ICC constitution, sexual slavery is a crime against humanity. Sexual slavery has not been defined in Article 7 (1) (g) and there is no convention or law in this case. According to the provisions regarding the constituent elements of crimes, sexual slavery means that offender committed acts such as purchase, sale, rent, exchange, and similar acts against other persons and considers an ownership for the victim and abuses them sexually⁵.

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1. Sock Kitty Shiyayezry, Keryang, 2016, *International Criminal Law*, translated by Behnam Yosefiyan & Mohammad Esmaeli, Fifth edition, Samt publications, p. 203.
 2. Matter, Mohamed y., "the International Criminal Court (ICC) becomes a reality: when will the court prosecute the first trafficking in persons case", July 9th, 2002 available at: www.protectionproject.org/main.htm (Nov 4th, 2005).
 3. Potrowicz, R., 2004, "preempting the protocol: Protecting the victims and punishing the perpetrators of trafficking in persons", in Christine kreuzer (Ed), *Frauenhandel-menschenhandel- organizer tekriminalitaet*, Nomos, pp. 21-22.
 4. Mattar, Mohamed Y., 2005, "State responsibilities in combating trafficking in persons in central Asia", *Loy .L .A. Intl & Comp.L.Rev.* Vol.27:145, P.166.
 5. Hbibzadeh, Mohammad Jafar & Mogaddasi Roein, Mohammad Bagger, 2006, "Beginning on criminal protection of juvenile's victim in Iran law with attention to international document", *Magazine of Muffed*, Vol. 55, p. 70.

Based on this definition, the persecutor indictment of ICTY of the Foca case as well as alleged crimes in Rwanda may be considered as sexual slavery, since victims of the Foca case claimed that they confined in a house that looked like a prostitute center where they were treated like personal property and were under rape and sexual attacks repeatedly. Furthermore, several female victims of the events in Rwanda, were forced to compulsory marriage and gave sexual services to their so-called "husbands" in order to save their children's lives¹.

Therefore, in order to try the sexual slavery crime as a crime against humanity, it is needed to prove that the perpetrator was aware of the fact that the action is part of an extensive or organized aggression in which the victim was forced into doing actions with sexual nature. On this basis, many cases of human trafficking can be considered as sexual slavery, especially when individuals are forced to serve in the sex industry or be employed for sexual aims, due to the fact that the victims who are raped and imprisoned in prostitute centers are seen as personal property. Meanwhile, unlike the prevention protocol, in any act that constitutes a crime against humanity, it is not necessary to prove that the defendant has earned profit² in addition to committing the trafficking in the prohibition and punishment of human traffickers, especially the traffickers of women and children.

1-3. Forced Prostitution

As mentioned above, the constitution does not define the term and there is no precedent or contract for this case. Therefore, it is not clear what actions constitute forced prostitution and what is its difference with sexual slavery. Generally, the term "forced prostitution" is used to describe the situation where women and girls were sold or raped by husbands or parents or other persons who gain the ownership of them through legal procedures.

In addition, forced prostitution is when a person abuses his/her right and forces or coerces someone to do sexual service³. In forced prostitution, the motivation of the defendant is not important and it is

1. Mir Mohammad Sadegi, Hossin, 2016, *International Criminal court*, Ninth edition, Tehran: Dadgostar publications, p. 118.

2. Sock Kitty Shiyayezry, Keryang, op.cit, pp. 213-214.

3. Potrowicz, R., op.cit, p. 22-23.

not necessary that the victim is attacked physically. Any use of force or threat of power by the defendant is sufficient; for example, fear of violence, detention, psychological pressure, violent behavior, and abusing someone who is in a helpless situation or abuse of victim's lack of qualification to consent announcement. In general, differential aspect of this crime from sexual slavery is financial profit or non-financial advantage for the defendant or other person gained in sexual slavery or it is expected during the exchange process of the victim the third parties obtain through a person's sexual actions¹.

Regarding human trafficking, when women are imprisoned and have no identity documents or are kept in place that they do not recognize the location, this broad definition for human trafficking is useful since not only it includes instances that physical compulsion may be used for sexual abuse, but also it will include some cases that the victims were so demoralized that he/she can't announce his/her consent effectively to work as a prostitute².

1-4. Rape

ICC constitution and regulations upon criminal elements don't state elements of rape, but judicial procedure was created by ICTR and later by ICTY on this issue. In judicial practice, rape is interpreted as a "physical aggression along with a sexual nature under coercive circumstances". This is not necessarily limited to rape with sexual organs or physical coercion³. According to the abovementioned definition, some believe that victim's gender is not a condition to this crime, therefore men can be victims as well⁴. Trafficking victims are also raped because the traffickers and other people who control the victims including brothel owners and even customers, commit the crime in many cases to break the resistance of victims. Thus, many cases of human trafficking are covered by the definition of rape which can be regarded as crimes against humanity. Therefore, it is necessary to prove that rape has been committed as a part of a widespread and

1. ICC Doc ICC- ASP/1/3, 3-10 Sept. 2002, p. 116.

2. Than, Claire de & Shorts, Edwin, op.cit, par. 5-007/ Cassese, Antonio, op.cit, p. 82/ Coomaraswamy, Radhika, 2009, "*the six grave violation against children during armed conflict: the legal foundation*", October 2009, p.17, available at: www.un.org/Children/Conflict.

3. Potrowicz, R., op.cit.

4. ICC Doc ICC- ASP/1/3, 3-10 Sept. 2002, p. 116.

organized attack, to accomplish a trial for crime against humanity through rape. This condition destroys the criminal liability of customer's intercourse with victims of human trafficking because customers are rarely aware that their actions are parts of an extensive and harmonic attack (Article 7 of ICC Constitution)¹.

For achieving the culpability of a defendant for committing a crime covered by Article 7 of the ICC constitution, the prosecution must prove that the defendant has been aware of the attack. Therefore, it is necessary for the defendant to be aware that the attack is perpetrated to create guilt for accuser for commission of crime, but it is not necessary to prove that the defendant was aware of the exact details of the plan or policy or the organization². Furthermore, the prosecutor is not required to prove that the defendant agreed with the policy or planning of the attack or that he/she was going to obtain a particular result during the attack³. In summary, it must necessarily be proved that the particular act has been committed deliberately and the defendant committed it with the knowledge that his or her act is a part of broad and harmonic attack against a civilian population.

It is remarkable that upon the new legal systems, committing crime during armed conflicts causes the perpetrator to be on trial in international criminal court based on the system of international criminal law in addition to national laws and regulations governing system⁴.

Regarding human trafficking and perhaps other forms of organized crimes, there are possibilities of conviction of a group of perpetrators who committed the crime intentionally knowing that it was a part of an organized crime as well as attempting to organize, assistance, facilitating or participate in perpetration actions such as rape, enslavement, sexual slavery, forced prostitution, or trafficking. As it can be seen, the actions that committed through trafficking process precisely conform *actus reus* of many crimes against humanity. Practices such as slavery (if committed according to the conditions of the constitution of the ICC) are considered crimes against humanity

1. Than, Claire de & Shorts, Edwin, op.cit, par. 5-007/ Cassese, Antonio, op.cit, p. 82/ Coomaraswamy, Radhika, 2009, op.cit, p.17.

2. Ibid, p.17.

3. Taheri, Alireza, 2009, *Human rights in judicial system, (human rights guidelines for judges and lawyers)*, Vol. 2, First edition, Tehran: The defense organizations of violence victims.

4. Prosecutor V. Tadic, case NO. IT-94-1-T.

and war crimes in war conditions (international or domestic armed conflicts)¹. On this basis, the interpretation of the rules in relation to court jurisdiction is not far from the fact such that includes widespread and severe human trafficking cases.

2. Conditions for Considering Trafficking in Persons as Crime against Humanity

In order to try a crime against humanity, special conditions are needed for both the perpetrator and the victim. Also, special conditions must exist simultaneously with the committed violent act. Now, it should be understood that whether the conditions exist in human trafficking crimes?

2-1. Perpetrator

Crimes of the ICC constitution, Article 7 may be committed by an individual, a group or an organization with the governmental jurisdiction; therefore, the attack is not necessarily by government or a governmental organ. From the viewpoint of judicial procedure in the context of crime against humanity, in the Tadic case that was introduced in the International Tribunal for the Former Yugoslavia (ICTY), it was introduced whether crimes against humanity can be committed by private individuals and non-governmental organizations. Finally, it was announced that these crimes can be committed by terrorist organizations and ordinary people with informal authority or organized groups. Thus, crimes against humanity committed by criminal organizations and even ordinary people are capable of being tried².

Furthermore, criminal liability is applied for committing these crimes against the person who organizes or directs attack, and for someone who assists or helps in committing the crime. In human trafficking, there is possibility to prosecute traffickers such as organizers and investors who attempted to hire, transfer, and harbor people, and forcing them into prostitution, sales and other cases of exploitation of trafficking victims, because these crimes are often committed by ordinary people³.

1. Piotrowicz, R., op.cit.

2. Ibid.

3. Sock Kitty Shiyayezry, Keryang, op.cit, p. 134.

2-2. Victim

Article (2) 7 of the ICC constitution introduces victims of crimes against humanity in every civilian population. The population in this document does not include the entire population of a country, but the intention is to show the collective nature of crimes against humanity¹. On this basis, an attack should not be planned only randomly against a group of people or separate individuals, but the victim of a crime against humanity must be a member of an identifiable group that is usually a religious, national, ethnic, and linguistic one. Before the ratification of the Rome Constitution, the provisions of the constitution of the International Criminal Tribunal for Rwanda, found attacks against any civilian population on considerations of political, racial, ethnic, and religious, discriminatory. Interim Tribunal for the former Yugoslavia Statute also considered these issues necessary for the persecution of crimes against humanity. Constitution of the International Criminal Court in recent court procedure, considers these concerns necessary against criminal harassment².

However, paragraph (H) of Article 7 of the Constitution drew up the influences of these discriminatory considerations to all crimes against humanity. Assuming acceptance of this condition, most of the transnational organized crimes including many cases of human trafficking which were committed because of economic incentives and do not target specific groups outside of the scope of crimes against humanity. Therefore, there are cases of human trafficking that are committed by state agents and criminal organizations and in these cases, groups of victims that have certain commonalities are being targeted, including residents in certain Geographical areas, social and economic situations or particular gender³.

2-3. Special Circumstances

Article (a) (2) 7 of the constitution writes about how much action should be taken by government agents. In addition, it states that at

1. Mir Mohammad Sadegi, Hossien, *International Criminal Court*, op.cit, p.106.

2. Shabs. A., Viliam, 2017, *Introduction on international criminal tribunal*, translated by Seiyed Bagger Mir Abas & Hamid Alhoe Nazari, second edition, Tehran: Jungle Publications, p. 55.

3. Piotrowicz, R., op.cit, p.25.

least the rate of tacit agreement to do so to realize a crime against humanity, requires the attack to occur "pursuant to or regarding the government policy of promoting an organizational or governmental policy to commit attacks". According to this Article, it can be inferred that the criminal act must be permitted by government or be a part of an official or unofficial policy. In this regard, according to the regulations governing the crime, an attack should be committed to advance or subsequent state or organizational policy. Also, it is possible that the government ignores the attack¹. According to the element of the crimes, in an exceptional situation, governmental policy can be implemented by the government through deliberate negligence. However, the existence of such policy cannot be inferred merely from the absence of governmental or organizational action².

There are some cases in the subject of trafficking in persons in which governments are reluctant to take actions against traffickers; for example, where corrupt officials cooperated with traffickers or where governments directly or indirectly have encouraged employing foreign prostitutes or selling and kidnapping, especially children and young girls.

Thus, according to some experts³, some cases of trafficking in persons are well-organized and in the abovementioned way can be regarded as crimes against humanity⁴. However, with regard to this point that trafficking in persons is not supported by government explicitly or implicitly, slavery is also similar in this way but perhaps it is not required by international position of any country that such a policy should be conducted. The countries may experience negligence for some economic gain⁵ or due to inability in combating some cases of trafficking in persons, making the acceptance of this opinion with a broad interpretation of international rules difficult. This causes the idea of a relationship between some cases of trafficking in persons and

1. ICC doc ICC-ASP/1/3, 3-10, Sept. 2002, P.116.

2. Ibid.

3. Khaleghi, Ali, 2013, *Research of international criminal law*, Fifth edition, Tehran: the Shahr-e-Danesh Institute of law (research and Study), p. 23.

4. Piotrowicz, R., op.cit, p. 25.

5. Perhaps some examples of these benefits are traced in a number of Persian Gulf countries that strive to attract as much foreign investment. Trafficking in persons as crime against humanity, furthermore, to prove authority the international reference jurisdiction to deal with it, there are other results that lack of comprisal Time-barred and competence world, nation courts for prosecute and trial of perpetrators and trafficking in persons.

formal or informal policy of a government. On the other hand, since in our age the approach of human rights tends to abandon some traditional doctrines of criminal law, the principals and traditional achievements to support human rights completely. Therefore, the extended interpretation of certain provisions is acceptable to the extent that these documents do not harm the fundamental rights of the accused one.

Conclusion & Recommendation

In conclusion, it seems possible that the current interpretation of the ICC jurisdiction is to the extent that involves some instances of trafficking in persons. Since the concepts of slavery, the slave trade, forced labor, sexual violence against women, and human trafficking are interwoven and very complex issues, from the view point of the United Nations, some instances of trafficking in persons are crimes against humanity which require the interference of highest International Criminal authority¹.

In this sense, the basis of criminalization of human trafficking in international documents under the title "Crime against Humanity" is the serious violations of human rights and for this reason, it is necessary that the International Criminal Court engages in this issue. Although some believe that any type of crime in the process of human trafficking including beatings, inflicted trafficked persons, especially women and children is criminal crimes that set forth in Vol. C of Article 7 of Constitution of International Criminal Court. Concepts and phrases have been selected in order to cover the topic of crimes against humanity which has been traditionally applied to massive military states like Yugoslavia and Rwanda, and hereafter, based on the evidence in the Article, it covers any particular civil status related to violations of human rights². However, this fact should be neglected that according to the current regulations and political atmosphere, it seems unlikely that the committed trafficking by criminal organizations come forward to deal with ICC, due to the idea that the current member states of the ICC

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1. Asadi, Seiyed Hassan, 2011, *Transnational organized offences*, second edition, Tehran: Mizan publications, p. 252.
 2. Allay, Mostafa, 1999, "*International criminal tribunal, Human right and surveying problem of attachment*", p. 401, International criminal tribunal and Islamic Republic of Iran, by effort of Eshag Al Habib, First edition, Tehran: Center of publication ministry of foreign affairs.

imagine the instance of human trafficking to be very severe such that demand to involve the ICC prosecutor. Furthermore, the conditions stipulated in Article 7 of the Statute are so difficult that they are not easily traceable in many cases due to the difficulty of gathering evidence to prove the essential elements of crimes against humanity. Therefore, the modification of the constitution of ICC and the development of jurisdiction of this international reference to cover the organized transnational crimes including trafficking in persons, along with the criminalized instances of the crime in domestic law of countries is an appropriate solution to deal with trafficking in persons¹.

1. With farther studding look at: Zagoli, Abas, 2009, "*Survey capacity international criminal tribunal for investigation to crime of human trafficking*", Research Magazine Law and Political, Vol. 26, pp. 196-197/ Beigi, Jamal, 2011, *Criminal policy of United Nations and Iran about trafficking in persons*, dissertation of Ph.D, criminal law and criminology, Islamic Azad university, Science and Research Branch, Tehran, Iran, pp. 43-59.

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6. *Complementary contract slavery prohibition dealing in slaves and similar institutions slavery*, 1956.
7. *Contract of prohibition salve trade and enslavement*, Sept. 25th, 1926.
8. Coomaraswamy, Radhika, "*The six grave violation against children during armed conflict: the legal foundation*", Retrieved October 2009, Available from <http://www.un.org/Children/Conflict>
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16. Mir Mohammad Sadegi, Hossin, 2016, *International Criminal court*, Ninth edition, Tehran: Dadgostar Publication.

17. Nobahar, Rahem, 2006, "Woman trafficking for prostitute aspect of Islamic training takes a look at international regulations and Iran law", Modares Journal of Science and Research, Vol. 47.
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