Chapter 3

RAPE AS A UNIQUE CRIME UNDER DOMESTIC LAW

The importance of analyzing the offense of rape under domestic law is based not only on the fact that women’s historic inferiority was not born on the battlefield. As explained above in chapter one, and as I explain further in this chapter, international law was shaped in light of national legal values, and vice versa. This chapter presents the complexities of the domestic offense of rape with respect to its development and the remnants of patriarchy still embedded in it, which have been preserved in many countries.

I first discuss the symbiotic relationship between international law and domestic law. This connection explains the significance of the study that I undertake in the remainder of the chapter about the way in which domestic law, first, chose to exclude rape, and subsequently, decided how to include sex and gender crimes. Domestic law will be examined from the social perspective and then from the legal perspective. Particular focus will be given to those crimes for which the domestic law has adopted a presumption that I have termed “the presumption of nonconsent”.

3.1 THE NEXUS BETWEEN INTERNATIONAL LAW AND NATIONAL LAW

National law is both the background to and a source of international law in cases of lacunae in international law. For example, Article 21(1)(c) of the Rome Statute, the treaty that established the ICC, refers the ICC to national laws when the ICC’s own governing documents and international law do not provide a solution:

21. The Court shall apply:
   (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute
and with international law and internationally recognized norms and standards.

[Emphasis added by the author]

In this context, note that Article 38 of the Statute of the International Court of Justice (ICJ) also provides the sources of international law. It enumerates the following sources – international conventions, international custom, and “the general principles of law recognized by civilized nations.” Because parties can set conditions to the applicability of customary law (unlike the principles of jus cogens), in order to identify the law applicable to a given event, one must first determine whether the specific issue is subject to an agreement among the relevant states. In the absence of an agreement, one must look to the customary law and the principles of general law. Article 38(1)(d) specifies that certain subsidiary sources are also applicable, specifically “judicial decisions” and the “teachings of the most highly qualified publicists.” The expression “judicial decisions” includes the decisions of other international courts, but it also includes decisions of national courts related to international law. Significantly, as opposed to the first three sources of law, these subsidiary sources do not create international law, although the line distinguishing between the sources is not always clear.

Another nexus between national and international law is found in Article 8(2)(e)(vi) of the Rome Statute, which subjects certain crimes of sexual violence to the ICC’s jurisdiction if they are deemed “war crimes”, even if the crimes are perpetrated in local or non-international armed conflicts:

2. For the purpose of this Statute, “war crimes” means: …
   (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: ….