

SWITZERLAND

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 76TH PRE-SESSIONAL WORKING GROUP, 11-15 NOVEMBER 2019 LIST OF ISSUES

Amnesty International submits this briefing in advance of the adoption of the List of Issues for Switzerland's sixth periodic report under the Convention on the Elimination of All Forms of Discrimination against Women.

In this document, Amnesty International sets out its concerns about the legislation on rape in Switzerland. It is not an exhaustive account of all of the organization's concerns with regard to the implementation of the Convention.

LEGISLATIVE GAPS IN THE DEFINITION OF RAPE

As elaborated by the Committee in its General Recommendation (GR) No. 35, gender-based violence "constitutes discrimination against women under 1 and therefore engages all of the obligations in the Convention."¹ Amnesty International has concerns about violations of the Convention on the Elimination of Discrimination against Women in Switzerland (the Convention) with regard to the legal framework that defines the crime of rape.²

Under international human rights law, Switzerland is responsible for preventing and prosecuting gender-based violence, including sexual violence, by state actors.³ It also has a "due diligence" obligation "to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-state actors which result in gender-based violence against women".⁴

Under the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) ratified by Switzerland in December 2017, a comprehensive definition of rape should include all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object. According to the Convention, rape and all other non-consensual acts of sexual nature must be classified as sexual offences.⁵ The Convention entered into force in Switzerland on 1 April 2018.

The Swiss Criminal Code, however, defines rape (Art. 190) on the basis of the force used by the perpetrator or the resistance by the victim, rather than on the basis of a lack of freely given consent. Indeed, Article 190 (rape) of the Swiss Criminal Code reads as follows:

Any person who forces a person of the female sex by threats or violence, psychological pressure or by being made incapable of resistance to submit to sexual intercourse is liable to a custodial sentence of from one to ten years.

¹ CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, para 21.

² Switzerland: legislation on rape. A human rights analysis. Available here: <https://www.amnesty.ch/de/themen/frauenrechte/sexuelle-gewalt/dok/2019/sexuelle-gewalt-in-der-schweiz/switzerland-legislation-on-rape-a-human-rights-analysis.pdf>

³ CEDAW, General Recommendation 35, paras 21 and 22.

⁴ CEDAW, General Recommendation 19, para. 9. See also General Recommendation 35, para. 24(b).

⁵ Istanbul Convention, Article 5(2).

Article 189 (indecent assault) which criminalises ‘*sexual acts similar to intercourse or any other sexual act*’ such as forced oral and anal penetration follows the same logic as Article 190 and keeps the inherent link between violence and rape or other sexual assault as opposed to being based on the lack of consent.

This focus on resistance and violence in the law rather than on consent may have an impact on the reporting of rape and affects wider awareness of sexual violence, both of which are key aspects in preventing rape and tackling impunity. According to a survey commissioned by Amnesty International in 2019, which involves interviews with 4,495 women and girls aged 16 and over in Switzerland, one in five women surveyed has been subjected to sexual violence, and more than 10 percent of women surveyed had been raped. Only eight percent of women surveyed who experienced sexual violence reported the assault to the police.⁶

Other legislative gaps that contravene international human rights law and standards include a narrow definition of rape that envisages that only “persons of the female sex” can be victims of rape and only via forced vaginal intercourse⁷ as well as non-compliance in the law with some provisions on aggravating circumstances as set out in the Istanbul Convention.⁸ Furthermore, Amnesty International is concerned that several offences covering acts of a sexual nature considered a lesser offence than rape under Swiss law allow for judges to consider a reduction in the penalty or an exemption from prosecution if the perpetrator is the husband or the partner of the victim.⁹

On 25 April 2018, the Federal Council (Federal government) presented a bill to harmonise penalties in the Swiss Criminal Code. As it stands, the proposed reforms in the area of sexual violence are mainly intended to review the penalties. While Amnesty International welcomes that the reform also serves to expand the narrow definition of rape, we are concerned about the repeated position of the Swiss Federal Council (Executive body) against a reform to incorporate a consent-based definition of rape in line with international human rights law and standards. On 21 of August 2019, the Federal Council reiterated this position in response to an interpellation made by a Member of Parliament.¹⁰

Amnesty International calls on the Swiss authorities to:

- Amend the definition of rape in the Criminal Code so that it is based on the absence of consent, bringing it in line with international human rights law such as the Istanbul Convention.
- Adopt a definition of rape that is gender neutral and ensure that all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object are included explicitly in it;
- Provide for a range of aggravating circumstances, including among others, sexual violence committed against a current or former partner; by perpetrators abusing their authority over the victim; and when the offence was committed against a person made vulnerable by particular circumstances;
- Ensure that the law does not consider marriage or other relationship as a factor to avoid prosecution for offences of sexual nature.

⁶ See <https://cockpit.gfsbern.ch/fr/cockpit/violence-sexuelles-en-suisse/>

⁷ Istanbul Convention, Article 36 (1). Similarly, the International Criminal Court regime’s definition of rape refers to the non-consensual “[invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body to include all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.”. See also UN Handbook for Legislation on Violence against Women, http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?la=en&vs=1502 Page 12

⁸ Article 46 (a) of the Istanbul Convention requires that State parties amend their legislation to ensure among others that when perpetrators of rape and other forms of sexual violence abused their authority or committed the offence against a person made vulnerable by particular circumstances, these are considered aggravating circumstances. The provision also requires that sexual violence, including rape, perpetrated by partners or former partners be considered aggravating circumstances.

⁹ See Article 192 (2); Article 193 (2); Article 187 (3) and Article 188 (2) of the Swiss Penal Code

¹⁰ *Interpellation 19.3585 « L’ampleur des violences sexuelles envers les femmes est choquante ! Il est temps d’agir !, Arslan Sibel*. Available here : <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20193585>