1. INTRODUCTION

Under international human rights law, Switzerland is responsible for preventing and prosecuting gender-based violence, including sexual violence, by state actors. It also has a ‘due diligence’ obligation ‘to take all appropriate measures to prevent, as well as investigate, prosecute, punish and provide reparation for acts or omissions by non-state actors which result in gender-based violence against women’. ¹

In December 2017, Switzerland ratified the Council of Europe (CoE) Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), the most far-reaching international treaty to tackle violence against women. The Convention entered into force in Switzerland on 1 April 2018.

Under the Istanbul Convention, 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.² They should be defined as crimes against a person’s bodily integrity and sexual autonomy as opposed to crimes against morality, public decency, honour or the family and society.³

On 25 April 2018, the Federal Council (Federal government) presented a bill to harmonise penalties in the Swiss Criminal Code.⁴ The bill was then sent to the Legal Affairs Committee of the Council of State (upper parliamentary chamber) who subsequently appointed a sub-committee to revise the offences against a person’s sexual integrity in the Criminal Code.⁵ As it stands, the proposed reforms in the area of sexual violence are mainly intended to review the penalties.⁶ While the reform also serves to expand a narrow definition of rape under the Swiss law, Amnesty International is concerned that contrary to the opinion of the Swiss authorities⁷, the proposed changes fail to address some pressing shortcomings in line with the standards set out in the Istanbul Convention and other human rights standards around sexual violence.

This analysis presents Amnesty’s views on some areas of greatest concern, with special attention to the failure of the law and the proposed bill to incorporate a consent-based definition of rape.

¹ CEDAW, General Recommendation 19. See also General Recommendation 35, para. 24 (b)
² See Istanbul Convention, Article 36 (1) (a), (b) and (c).
⁶ Among other changes, the bill includes plans to double the minimum penalty for rape from one year to two years.
⁷ In response to an interpellation, filed by Martina Munz at the National Council (18.3889), the Federal Council reiterated the position it had defended in its message concerning the approval of the Istanbul Convention (FF 2017 163), namely that, in its opinion, Swiss law meets the requirements of Article 36 of the Convention. The Federal Council does not consider it necessary to evaluate at this stage whether it is necessary to define a new general offence punishing sexual acts committed against the victim's consent.
2. **KEY AREAS OF CONCERN**

Amnesty International believes that the current definition of rape falls short of international standards. The main concerns are as follows:

**Force-based definition of rape as opposed to a consent-based definition**

The legal definition of rape is to be found in Article 190 (1) of the Swiss Criminal Code. The article 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 (original: Beischlaf) is liable to a custodial sentence of from one to ten years.

A key concern of the current definition of rape is its focus on resistance and violence rather than sexual autonomy and lack of freely given consent as required by international law and standards, including the Istanbul Convention. In other words, the current legal definition fosters an approach where evidence of violence is key to whether the justice system pursues a rape investigation and prosecution.

Article 189 (indecent assault) which criminalises ‘sexual act similar to intercourse or any other sexual act’ such as forced oral and anal penetration currently not covered under the Swiss definition of rape follows the same logic as Article 190 and keeps the inherent link between violence and rape or other sexual assault as opposed to lack of consent.

Amnesty International stresses that according to international human rights law with regard to sexual violence, there should be no assumption in law or in practice that a victim consented because they did not physically resist the unwanted sexual conduct. For instance, in 2003, the European Court of Human Rights made it clear that: “Member States’ positive obligations under Articles 3 and 8 of the [European] Convention [on Human Rights] must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.”

Failure to incorporate a consent-based definition of rape means that rape cases where physical force, threat of physical force or proof of resistance are not shown are at risk of falling through the cracks of the legal system. For instance, despite the expectation that a “model” rape victim will fight the attacker back, “freezing” when confronted with a sexual attack has been recognized as a common physiological and psychological response, leaving the person unable to oppose the assault, often to the point of immobility.

Further, the Swiss law has a separate offence that criminalises acts of a sexual nature, including sexual intercourse, against persons incapable of judgment or resistance (Article 191). Under the proposed bill the

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8 See Istanbul Convention, art 36(1). See also Committee of Ministers of the Council of Europe Recommendation No R (2002) 5 adopted by the Committee of Ministers on 30 April 2002 and Explanatory Memorandum H/Inf (2004), para 35, which urges states to punish all non-consensual acts, including where the victim doesn’t show resistance.

9 Article 189 (1) of Swiss Criminal Code reads as follows: ’Any person who uses threats, force or psychological pressure on another person or makes that other person incapable of resistance in order to compel him or her to tolerate a sexual act similar to intercourse or any other sexual act is liable to a custodial sentence not exceeding ten years or to a monetary penalty’


12 For example, a 2017 Swedish clinical study found that 70% of the 298 women rape survivors assessed experienced “involuntary paralysis” during the assault. For more details see www.obgyn.onlinelibrary.wiley.com/doi/abs/10.1111/aogs.13174

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13 Article 191(1) of the Swiss Criminal Codes reads as follows: “Any person who, in the knowledge that another person is incapable of judgement or resistance, has sexual intercourse with, or commits an act similar to sexual intercourse or any other sexual act on that person is liable to a custodial sentence not exceeding ten years or to a monetary penalty”.
offence would have the same penalties as rape (Article 190). This provision captures a limited set of circumstances in which violence or resistance may not occur, thus the law still falls short of the requirements of a definition of rape under international human rights law grounded on the violation of sexual autonomy and the lack of freely given consent. Indeed, what permeates the Swiss Code is the idea that if there is not physical violence it means there is consent by default unless the victim is incapable of consenting as in the terms described in Article 191.

The notion of consent

No international or regional human rights instrument provides an exact definition of consent and Switzerland can decide on the specific wording of the legislation and the factors to be considered to preclude freely given consent. Nevertheless, Article 36 paragraph 2 of the Istanbul Convention specifies that consent “must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances”.

The Explanatory Report to the Istanbul Convention further clarifies that prosecutions “will require a context-sensitive assessment of the evidence to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognize the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.”

In addition, consent is a voluntary and ongoing agreement to engage in a particular sexual activity, can be rescinded at any time and can be given freely and genuinely only where the free will of one of the consenting parties is not overpowered by coercive circumstances and when the person is capable of consenting.

Narrow definition of rape that contravenes international standards

The Istanbul Convention requires that States criminalise non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object. 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.”

International law and standards also require laws criminalizing rape to be gender-neutral, that is, reflect crimes

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14 Explanatory Report, para. 192

15 This has been affirmed in national court judgments, for example, by the High Court of Justice of England and Wales in R v. DPP and 'A' [2013] EWHC 945 (Admin) and in the USA, the Supreme Court of California, 29 Cal. 4th 756, 60 P.3d 183, 128 Cal. Rptr. 2d 783, 2003 Cal.

16 International Criminal Court, “Elements of Crimes” (2011), Elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under Article 7(1)(g)-1, p. 8, and the war crime of rape in international and non-international armed conflicts under Article 8(2)(b)(xxi)-1 (p. 28) and Article 8(2)(e)(vi)-1, pp. 36-37. See also International Criminal Court, “Rules of Procedure and Evidence”, UN Doc ICC-ASP/1/3 (2002), Rule 70(a), (b) and (c)

17 Istanbul Convention, Article 36 (1)

18 Article 7(1)-(g)1(1): International Criminal Court, Elements of Crimes, PCNI(CC/2000/1/Add.2 (2000). The International Criminal Court’s Elements of Crimes further refer to such an invasion having been “committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” (Article 7(1)-(g)1(2))
committed against all individuals, irrespective of their gender or gender identity but without being gender-blind.  

Contrary to the above, as per the current Swiss definition of rape only “persons of the female sex” can be victims of rape, via forced vaginal intercourse. Other forms of forms of penetration are supposed to be covered by Article 189 (‘indecent assault’) defined as “acts similar to intercourse”. These are also considered serious crimes but the fact that they involve different penalties and are not characterised as rape is problematic as it is sends a wrong message of what constitutes rape.

Amnesty International welcomes that the revised wording of Article 190 in the proposed bill acknowledges the different forms of penetration as rape and is gender neutral. The legislature should consider the proposed bill and adopt a gender-neutral definition of rape that explicitly includes all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object in line with the Istanbul Convention and other international standards.

Finally, criminal law should define rape and other sexual violence as crimes against the physical and mental integrity, and sexual autonomy of the victim, rather than as crimes against morality, public decency or honour. While the Criminal Code places offences of a sexual nature under the title of “Sexual integrity” it keeps references to “offences against sexual liberty and honour” under the crime of rape and other forms of sexual violence.

Inadequate aggravating circumstances

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.

The Swiss Penal Code provides for aggravating circumstances of rape if the perpetrator “acts with cruelty” or “makes use of an offensive weapon or any dangerous object. However, the law does not specify other aggravating factors in which rape may occur. Instead the law provides for two separate offences to cover for “sexual acts with persons in institutional care, prisoners and persons on remand” and “sexual acts” in the context of

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20 Current Article 190 (1) in the German original uses the term "Beischlaf". Swiss lawyer’s expert in the application of the law have told Amnesty International that according to both legal scholars and the courts this means vaginal intercourse only. All other (forced) acts similar to vaginal penetration are therefore covered by Article 189.

21 Article 189 () involves penalties of up to 10 years of custodial sentence or monetary penalty while Article 190 (rape) carries penalties of prison from one to 10 years.


24 See Articles 189 to 194 of the Swiss Criminal Code. In the German version of the CC, Article 191 includes the term "Schändung" that refers to -dishonour to "dishonour somebody"

25 Note that courts could treat abuse of power or other factors as an aggravating circumstance when it comes to the determination of sentence as per Article 47 of the Criminal Code.

26 Article 192 (1) Reads as follows: “Any person who, by abusing a dependent relationship with a person in institutional care, an inmate of an institution, a prisoner, a detainee or a person on remand, induces the dependent person to commit or submit to a sexual act, is liable to a custodial sentence not exceeding three years or to a monetary penalty".

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exploitation of a person in a position of need or dependency 27 which do not refer to ‘sexual intercourse’ and carry lesser penalties than rape. As mentioned before, Swiss law does not criminalize non-consensual sex in itself but requires the presence of other factors such as the use of violence and resistance.

Furthermore, several offences covering acts of a sexual nature considered a lesser offence than rape under Swiss law allow 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:

*If the person harmed is the spouse or registered partner of the offender, the responsible authority may dispense with prosecution, referral to the court or the imposition of a penalty.* 28

Amnesty International welcomes the removal of these provisions in the proposed reform of the Criminal Code and reminds the Swiss Authorities that under international standards only consensual sex between adolescents of similar age should be exempted from criminalisation. The Swiss authorities should also consider a revision of the Criminal Code to make sexual violence, including rape, against a current or former partner an aggravating circumstance reflecting the seriousness of the offence as required by the Istanbul Convention.

### 3. RECOMMENDATIONS

The following recommendations are intended to address the shortcomings of the provisions dealing with rape and other forms of sexual violence in the Swiss law (Criminal Code) in order to comply with international human rights law. The proposed bill by the Federal Council falls short of addressing the current limitations of the law.

Amnesty International acknowledges that while it is paramount that legislation meets international human rights standards, even the best legislation and guidance will not prevent or address rape on its own. It needs to be accompanied by robust policies and practices ensuring proper implementation as well as capacity building among the police and judiciary. Widespread prejudice, victim blaming and stereotypes and myths around rape, often amongst those tasked with preventing it and enabling victims’ access to justice, must also be adequately addressed in line with international standards.

Amnesty International recommends Switzerland to:

- Amend the definition of rape in the Swiss Criminal Code so that it is based on the absence of consent, bringing it in line with Switzerland’s obligations under international human rights law and standards, 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 as per Article 46 of the Istanbul Convention, 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;
- Repeal references to crime against ‘honour’ in the Swiss Criminal Code to ensure that rape and other forms of sexual violence are defined as crimes against a person’s bodily integrity and sexual autonomy.

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27 Article 193 (1) Reads as follows: *Any person who induces another to commit or submit to a sexual act by exploiting a position of need or a dependent relationship based on employment or another dependent relationship is liable to a custodial sentence not exceeding three years or to a monetary penalty.*

28 Articles 192 (2) and 193 (2). Articles 187 (3) and 188 (2) have a similar clause.