AMNESTY INTERNATIONAL

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Position Paper

THE PROPOSED CRISIS REGULATION

SUMMARY

On 23 September 2020, the European Commission presented a new Pact on Migration and Asylum which included a number of legislative proposals to change the way EU member state authorities should deal with people arriving irregularly at their external borders. Among the legislative measures proposed is a new Regulation that allows for derogations to the EU rules on asylum and return procedures in situations of crisis and cases of *force majeure*.[1] It also foresees the possibility to grant an immediate protection status, repeals the (never used) 2001 Temporary Protection Directive[2] and withdraws the 2015 proposal for a Regulation establishing a crisis relocation mechanism.[3]

Amnesty International has the following concerns about the proposed Crisis Regulation:

1. It risks having an adverse impact on the international protection regime
2. It includes vague and overlapping definitions
3. It lacks added value
4. It risks undermining existing obligations in the field of asylum, reception and return
5. It has a disproportionate and detrimental impact on the rights of individuals and will exacerbate humanitarian crisis at borders
6. It uses *force majeure* to give open-ended justification to States to disapply EU asylum law
7. It establishes an immediate and temporary protection status without adequate solidarity measures

1. General concern in relation to the impact on the international protection regime

Amnesty International considers the approach of the proposed Crisis Regulation deeply flawed, as it gives large room to member states to derogate from EU rules on asylum and return without ensuring sufficient safeguards for the rights of individuals. In the present climate where exceptions, security reasons and maintenance of law and order are frequently invoked by the States when confronted with the arrival of refugees and migrants, opening avenues for large-scale derogations risks making the Crisis Regulation an instrument to *de facto* exclude and deny protection *en masse*. This will also set a bad standard for non-EU countries which are prompted by the international community to keep open their borders in times of crisis. Countries in the global South face crisis situations and 'migratory pressures' on a much larger and frequent scale than Europe. The international protection regime demands international cooperation to preserve the asylum space and fully respect, protect and promote the rights of refugees and migrants, not suspension of asylum or reduction of international human rights safeguards.

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[1] Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum, COM(2020) 613 final, 23.9.2020.

[2] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[3] Proposal for a Regulation establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, COM(2015) 450 final, 9.9.2015.

Amnesty International has concerns about an EU instrument allowing large-scale and unnecessary derogations from general EU rules on asylum and return. These rules seek to uphold the right to asylum and protection from unlawful returns, in accordance with the EU Charter of Fundamental Rights and international human rights and refugee law. The regulation risks downgrading protection standards in the EU, and in doing so, it risks to further undermine the global protection regime.

Crisis situations warrant instruments to enhance practical cooperation and simplify recognition of protection needs. Any crisis instrument should focus on preserving asylum, ensuring protection and swift and equitable responsibility-sharing among EU States.

2. Vague and overlapping definitions

In the proposed Crisis Regulation, 'crisis situation' is defined in Article 1(2) as "an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion of the population and GDP of the member state concerned, and nature, that it renders the Member State's asylum, reception and return system non-functional and can have serious consequences for the functioning of the Common European Asylum System [...], or an imminent risk of such a situation."

Article 2(w) of the proposed Regulation on Asylum and Migration Management (RAMM) on the other hand defines 'migratory pressure' as a situation where there is a large number of arrivals of third-country nationals or stateless persons, or a risk of such arrivals, including where this stems from arrivals following search and rescue operations, as a result of the geographical location of a member state and the specific developments in third countries which generate migratory movements that place a burden even on well-prepared asylum and reception systems and requires immediate action.[4]

While both definitions refer to large number of arrivals of third-country nationals, or a risk of such arrivals, that place a burden on States' asylum and reception systems, they would lead to the application of different legal regimes. As the two definitions overlap, it is not clear what circumstances would be evaluated as a situation of 'migratory pressure', and which ones as a 'crisis situation'.

Both definitions also include the potential *risk* of a crisis situation or migratory pressure, which would allow EU states to lawfully derogate from their EU asylum obligations. Neither instrument sets out in clear terms the conditions necessary to determine when such a 'risk' arises, leaving that assessment largely to the discretion of the authorities of each member state. In the absence of clear guidelines, the simple geographical proximity to a country where political turmoil may risk generating some level of displacement of its population may allow EU countries to invoke derogations.

Furthermore, Amnesty International notes that Article 3(7) of the proposal suggests that some of the crisis powers can be actioned for 15 days even pending the Commission's assessment of the 'crisis' or risk thereof, thus in a situation where the country acts in pre-crisis mood (see further below).

Amnesty International recommends that the approach to adopt a Regulation setting out sweeping derogations to the EU *acquis* be questioned and rejected. If a clear case for derogations for exceptional situations can be made, these should be inscribed in the relevant instruments regulating asylum and return procedures. Derogations for an 'imminent risk' should in any instance be excluded.

[4] Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23.9.2020.

3. A derogatory mechanism for exceptional situations of mass influx would have no added value

Current EU rules governing the processing and reception of international protection applicants as well as returns of irregular migrants already give member state authorities flexibility to be able to deal with situations of large arrivals of migrants and refugees and a disproportionate number of simultaneous asylum applications. This begs the question if there is really need for a dedicated mechanism to address exceptional situations of mass arrivals, or an imminent risk of such a situation.

The Asylum Procedures Directive 2013/32 (APD) and corresponding articles in the proposed Asylum Procedures Regulation (APR)[5] give flexibility to:

- extend registration from three to max ten working days (APD Article 6(5), APR Article 27(3));
- have other authority than the determining authority conducting an asylum interview (APD Article 14(1), APR Article 12(4), which explicitly mentions support from the European Asylum Agency);
- extend examination procedure of six-month by another three months (APD Article 31(3)(b), APR Article 34(3)(a));
- continue the border procedures beyond the four-week period in proximity of borders or transit zones (APD Article 43(3), APR Article 41(1)(4)).[6]

In addition, the APR proposes that exceptionally the ten-day deadline for lodging of application after registration can be extended to one month (Article 28(3)).

Articles 10(1) and 18(9) of the Reception Conditions Directive 2013/33 (RCD) allow a partial derogation from the provisions of that directive where capacities for placement at detention facilities or accommodation capacities at reception centres are exhausted. The 2016 proposed recast Reception Conditions Directive[7] additionally requires member states resorting to those exceptional measures to inform the Commission and the EU Asylum Agency, which must also be informed as soon as the reasons for applying these measures have ceased to exist.

The Returns Directive 2008/115 also contains provisions for "situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff": judicial review can be allowed for longer periods and urgent measures can be taken in respect of the conditions of detention (see Article 18, also in the 2016 proposed recast Return Directive[8] Article 21).

Those rules seek to allow member states to opt for flexible solutions in case of emergency and to depart, to a certain extent, from the generally applicable rules. In 2018, in bringing the infringement case against Hungary to the Court of Justice of the EU for the country's asylum law derogating from several provisions of the EU asylum and return acquis, the Commission insisted that crisis situations can and must be resolved in the framework of EU law.[9] The Commission has not provided a clear-cut case as to why existing rules are not sufficient any longer and a separate legal framework is needed.

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[5] Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, 13.7.2016.

[6] While Article 43(3) of Directive 2013/32 does not authorise a member state to place applicants for international protection in detention at its borders or in one of its transit zones beyond the four-week period, it nonetheless authorises that member state to restrict their freedom of movement to an area in proximity to its borders or its transit zones, in accordance with Article 7 of Directive 2013/33. See, to that effect, judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 247.

[7] Proposal for a Directive laying down standards for the reception of applicants for international protection (recast) COM(2016) 465 final, 13.7.2016.

[8] Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM (2018) 634 final, 12.9.2018.

[9] *Commission v. Hungary*, C-808/18, Grand Chamber judgment of 17 December 2020, para.137.

Furthermore, crisis situations stemming from large arrivals of migrants and refugees can also be addressed via primary legislation based on Article 78(3) of the Treaty on the Functioning of the European Union (TFEU). This provision states that "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned." This was the legal basis for instance of the 2015 Council Decisions setting up a temporary relocation mechanism in support of Italy and Greece.[10]

Another Treaty article invoked in crisis situations is Article 72 TFEU. Pursuant to Article 72 TFEU, the provisions which appear under Title V of the Treaty, relating to the area of security, freedom and justice, are not to affect the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security. However, the jurisprudence of the Court of Justice of the EU makes it clear that Article 72 TFEU does not allow member states to refuse to apply EU law by invoking, in a general manner, the maintenance of law and order and internal security.[11] It should also be noted that EU asylum and return legislation already take account of the exercise of the member states' responsibilities under Article 72 TFEU, as numerous provisions allow member states to derogate from a number of rules laid down by that legislation if required for the protection of public order or public or national security.[12]

Amnesty International questions the need for a specific legal derogatory regime, as wide-ranging derogations in cases of large arrivals of migrants and refugees and a disproportionate number of simultaneous asylum applications are already foreseen in the EU *acquis* and emergency situations can be addressed within the legal framework of the EU Treaties.

4. Risks of undermining existing obligations in the field of asylum, reception and return

There is a clear risk that derogatory rules could disincentivise member states from complying with their obligation to ensure that normal procedures under the EU *acquis* are operable or otherwise efficient, including to regularly review their needs in order to maintain an efficient asylum system. Particularly given the ongoing flagrant violations of EU law at several borders of the EU, focus should be on the effective monitoring and better enforcement of current rules, rather than adding a complex and opaque set of legal exceptions which are difficult to scrutinise and shield against abuse.

Moreover, more needs to be done to prevent crisis situations. Various EU instruments establish and further seek to ensure a well-functioning crisis preparedness system which precisely serves the purpose of monitoring the migratory situation and make current migration management systems more responsive in case of sudden events. To this effect, a significant amount of information is to be pooled by the Commission, involving member states and EU agencies, under a variety of instruments, including the proposed Regulation on Asylum and Migration management (RAMM), and the Commission Recommendation on an EU Mechanism for Preparedness and Management of Crisis related to migration (Migration Preparedness and Crisis Blueprint).[13]

Member states are already required to adopt contingency plans pursuant to the European Border and Coast Guard (Frontex) Regulation 2019/1896 and Regulation 439/2010 establishing the European Asylum Support office. Article 28 of the recast Reception Conditions Directive would further require

[10] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.
[11] See on Article 72 TFEU, C-808/18 paras.212-264, and judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, para. 143-147.
[12] Inter alia, Article 6(2), Article 7(4), Article 11(2) and (3) and the second subparagraph of Article 12(1) of Directive 2008/115.
[13] COM(2020) 6469 final, 23.9.2020

Member States to draw up, and regularly update, contingency plans setting out the planned measures to ensure adequate reception of applicants in cases where the member state is confronted with a disproportionate number of applicants.

When member states' asylum systems come or risk coming under strain, the strengthened mandate envisaged in the reform of the EU Asylum Agency will also give them the possibility to rely on operational and technical assistance from the Agency, other member states or international organisations.[14]

Amnesty International is concerned that member states could misinterpret the provisions of the Crisis Regulation to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their ordinary obligations under the EU *acquis*.

While the Commission, including through its Asylum Agency, should continue to ensure that the legislation and operational standards on asylum are fully and correctly applied by member states, instances of disproportionate pressure (or risk thereof) on member states' asylum and reception systems should be addressed though the designed crisis preparedness mechanisms and effective contingency planning.

5.Disproportionate and detrimental impact on the rights of individuals and exacerbation of humanitarian crisis at borders

Under the proposed Regulation, a 'crisis situation' allows for the derogation of asylum, return and registration procedures, extending deadlines and broadening the application of border procedures to applicants belonging to nationalities whose EU-wide first instance asylum recognition rate is 75% or below (Articles 4-6). In 'crisis situations', derogations to the asylum and return procedures can be applied for up to 6 months, and further extended for up to one year. The crisis mechanism must be invoked via a reasoned request to the Commission, which by means of an implementing decision authorises the application of derogatory rules and specifies the period, which in any case cannot exceed six months, extendable to a maximum of one year for asylum and return crisis management, and a maximum of 12 weeks for registration (Article 3). However, according to Article 3(7), upon submitting a request to apply the derogatory rules provided for crisis situations, the State can also notify the Commission that it considers necessary to apply the rules on the delayed registration of asylum applications from the day after the request, before the Commission completes its examination. The proposal clarifies that these can be applied for up to 15 days, after which the Commission can authorise their extension or not. The provision fails to address the implications on individuals of situations where the Commission does not authorise the extension of these rules, and registrations are nonetheless delayed by 15 days without good cause.

Amnesty International is concerned that EU countries can delay the registration of asylum applications for four weeks and up to 12 weeks in total. This is a disproportionate and unnecessary amount of time and can have serious consequences for people seeking protection. While in principle even such a long delay in the registration of an asylum claim does not put into question that applicants should enjoy rights under the asylum acquis – since these are to be granted from the moment an intention to seek protection is expressed – with their claims not registered for weeks, people can be at risk of detention, deportation, *refoulement* and their rights to adequate reception, information, legal assistance and basic services can be severely affected.

The events in Greece illustrate these concerns in practice: on 2 March, Greek suspended the registration of asylum claims for a month for all irregular entries from 1 March. As a result, asylum seekers arriving to the Greek islands were not transferred to reception facilities and were detained arbitrarily on a ship in Lesvos and in various other facilities on the other islands, in inadequate conditions and often without

[14] COM(2016) 271 final, 4.5.2016, see Chapter VI.

adequate access to legal assistance.[15] In addition, during the same period charges for irregular entry have been brought in various cases against people who arrived after 1 March and who were barred from claiming asylum, in a departure from previous practice where Greek courts refrained from prosecuting such crime in cases involving asylum seekers.

Amnesty International is also concerned that the crisis mechanism allows a generalised application of border procedures, which can lead to a decision on the merits of an application, to asylum seekers who are of a nationality with EU-wide recognition rates of 75% or lower. This would lead most asylum seekers to be channelled into procedures carried out at the EU's external borders, with in-merit examination of their claims being conducted under reduced procedural safeguards.[16]

In addition, the duration of the border procedure for examination of asylum applications or carrying out returns can be extended for an additional period of eight weeks (bringing it to a total maximum of 20 weeks for either procedure). In relation to the return crisis management procedure, this extension would apply also to people who had a decision on the merit before the crisis situation was declared and whose application was rejected. Given that detention and other restrictions on liberty and freedom of movement are instrumental in carrying out border procedures (one of the reasons Amnesty International is opposed to them), the combined duration of the asylum and return crisis management procedures could involve detaining people at the border for nearly one year. It is not difficult to see how both the larger scope of application and extended time limits of the border procedures will exacerbate, rather than address, a crisis situation and provoke a humanitarian emergency at the external borders of the EU.

Detention practices are likely to be reinforced by the provision of Article 5(1)(c), according to which, in operating the return crisis management procedure, member states must presume a risk of absconding of third-country nationals in addition to the four cases already listed in the recast Return Directive (Article 6(2))[17], when there is an "explicit expression of intent of non-compliance with return-related measures" and the person concerned is manifestly and persistently not fulfilling the obligation to cooperate with authorities at all stages of the return procedures. Amnesty International strongly opposes that risk of absconding can be presumed as it imposes a disproportionate burden of proof on returnees, which is difficult to rebut, and leads to systematic detention, in violation of EU and international human rights law. The burden of proof must in all circumstances rest on the authorities to demonstrate that the presumption in favour of liberty should be displaced, based on a case-by-case assessment of the specific circumstances of each individual.[18]

Finally, the proposed Regulation is not accompanied by solidarity measures commensurate to the need to mitigate the crisis situation, which the extended and expanded border procedure is likely to exacerbate both for the individuals and member states concerned. The scope of solidarity is widened as compared to that provided for in situations of migratory pressure in the RAMM, where relocation of asylum seekers in the border procedure remains optional in cases of migratory pressure. In 'crisis situations' it will also apply to applicants for international protection in the border procedure, irregular migrants and persons granted immediate protection. Transfer of those subject to 'return sponsorship'[19] would intervene if return has

[15] See Amnesty International, Europe: Caught in a political game: asylum-seekers and migrants on the Greece/Turkey border pay the price for Europe's failures , 3 April 2020; RSA, Analysis: Rights denied during Greek asylum procedure suspension, https://rsaegean.org/en/analysis-rights-denied-during-greek-asylum-procedure-suspension/.

[16] For an analysis of the risks inherent in reduced procedural safeguards, see Amnesty International's position paper on the proposed Asylum Procedures Regulation, 5 April 2017. By way of illustration, in Q3 2020, the 75% threshold was surpassed only by asylum applicants from Syria and Eritrea. Venezuelans were also above this threshold but mainly due to national-based humanitarian protection status. See https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report#Decisions_on_asylum_applications.

[17] The grounds in the recast Returns Directive for which risk of absconding must be presumed are: 1. using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law; 2. opposing violently or fraudulently the return procedures; 3. not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3); 4. not complying with an existing entry ban.

[18] See also Amnesty International's position paper on the European Commission proposal for recasting the Returns Directive, 19 November 2018.

[19] 'Return sponsorship' is a new solidarity measure proposed by the Commission in the Regulation on Asylum and Migration

not been successfully completed within four months (instead of the eight months set in the RAMM).

Amnesty International is concerned that the solidarity mechanism triggered by a crisis situation, while mandatory in law, will present logistical and administrative challenges given the considerable number of people involved, which will make timely relocation in sufficient numbers an unachievable goal. The practice of relocation from Greece, both in accordance with the 2015 Council Decisions and further to subsequent ad hoc initiatives, demonstrates that pledges from European countries are hardly ever sufficient and take a considerable amount of time to translate into actual transfer of people to help the member state 'in crisis' and offer a prospect of decent livelihood to people involved.

Amnesty International recommends that delays in registration of asylum claims be kept as short as possible as in practice they jeopardise the effectiveness of the right to asylum guaranteed by the Asylum Procedures Directive and Article 18 of the EU Charter of Fundamental Rights. The need for an individual applicant to have legal certainty and evidence as regards his or her situation should remain a primary concern of EU asylum law.

Amnesty International has also serious concerns with regard to the proposal to extend the scope of eligibility and time limit of border procedures. The proposed asylum and return crisis management procedures involve potentially prolonged detention or restriction of movement and increase risks of unsafe removal and violations of the right to an effective remedy. These measures have a disproportionate and devastating impact on the rights of individuals while doing nothing to mitigate a crisis situation as they are not accompanied by adequate and effective solidarity measures which would help the crisis situation at the border.

Amnesty International recommends the deletion of Articles 4 to 6.

6. *Force majeure* as open-ended justification to States to disapply EU asylum law

Under the proposed Regulation, States can also notify the Commission of the existence of a situation of *force majeure*. This will allow them to extend deadlines to register asylum applications (to four weeks maximum – Article 4), submit and reply to take charge requests under the Dublin procedure (Article 8), and transfer people to other countries in application of solidarity measures (Article 9). This also means that a country can delay compliance of their obligation to relocate or undertake return sponsorship by extending the deadline for the implementation of solidarity measures for six additional months.

With regard to delaying registration, it is not clear why invocation of *force majeure* is regulated differently without any type of Commission oversight, given that States can invoke a similar extension by notifying the Commission as a matter of urgency in Article 3(7) dealing with the procedures in situations of crisis. There is also no clear indication that *force majeure* and crisis situation cannot be invoked simultaneously, which would enable for instance States to circumvent the rules on maximum extension of registration deadlines, by invoking further extensions under *force majeure.* In addition, all extension of deadlines in cases of urgency or particular challenges should be dealt with in the relevant instruments dealing with Dublin arrangements and solidarity measures.

Although generally understood to relate to unforeseen and unforeseeable events, *force majeure* is not defined in the proposed regulation. The explanatory memorandum makes the example of events such as the Covid-19 pandemic and "the political crisis witnessed at the Greek-Turkish border in March 2020".[20] The latter illustrates how this concept can lead to the abusive interpretation of circumstances permitting

Management (RAMM). Under 'return sponsorship', a member state commits to returning irregular migrants with no right to stay on behalf of another member state, doing this directly from the territory of the beneficiary member state. If these persons have not returned within eight months (or four months in a situation of crisis), they will be transferred to the territory of the sponsoring member state to finish the return procedure from there.

[20] COM(2020) 613 final, p.9.

derogations from EU law rules. The events of March 2020 were neither unforeseen nor unforeseeable given Greece's tense relations with Turkey and Turkey's Prime Minister Erdogan repeated threats to no longer stopping migration headed to Europe.[21]

However, even a pandemic, while objectively posing challenges for States, can be abused to disapply EU law, as happened in some cases where authorities used it as a pretext to deny access to protection, reject asylum seekers at the borders (or deny disembarkation), suspend registration of asylum claims, and hindering basic access to services.[22] The COVID-19 pandemic demonstrated that it was possible for States to adopt measures to protect the public health of the population without hampering access to their territory or access to asylum and countries such as Sweden, Denmark, and Norway maintained their borders open for refugees. While acknowledging that in cases of *force majeure* deadlines may need to be extended, the COVID-19 pandemic demonstrated there is no need to derogate general rules but rather find practical solutions to facilitate registration. Basic registration procedures can be maintained, and modalities of registration and documentation adapted and simplified to ensure proof of legal stay and access to services.

Unlike the invocation of a 'crisis situation', which is approved and managed by the Commission, *force majeure* only requires 'notification' to the Commission, without any EU supervision. Lack of clarity regarding the triggering of *force majeure* means that the Commission would not be able to launch infringement against a State abusing these provisions. It provides a *carte blanche* to all member states to circumvent EU obligations.

Amnesty International recommends the deletion of Chapter IV relating to *force majeure* as this notion is open to being applied in order to avoid responsibilities and obligations in the absence of any oversight from the EU.

7. Immediate but temporary protection without adequate solidarity

Under Article 10 of the proposed Regulation, member states can grant immediate protection to groups of people on the basis of a high risk of being subject to indiscriminate violence, in exceptional situations of armed conflict in the country of origin or in certain areas of the country of origin. Although this can temporarily relieve pressure from individual asylum processing systems and ensure access to rights for beneficiaries of immediate protection, people granted immediate protection will be still considered applicants of international protection whose claims will need to be examined by the State responsible after one year maximum.

Amnesty International welcomes the proposal to recognise that certain groups at risk must be immediately granted protection and benefit from equivalent economic and social rights that subsidiary protection beneficiaries enjoy, such as access to employment, education, healthcare, and social security. Unfortunately, similarly to beneficiaries of subsidiary protection, they would not benefit from a right to family reunification. It is also to be seen if and how national administrative systems would make these rights readily accessible given the confusion created by a new temporary status, which would coexist alongside the refugee and subsidiary protection statuses regulated by EU law and transposed into national provisions. It would be administratively easier and responding better to individual needs if these groups would be granted full protection status as it is likely that groups considered for immediate protection

[21] See for instance media reports in the months leading up to the March 2020 events: Turkey's Erdogan threatens to 'open the gates' for migrants to Europe, *Euronews*, 5.9.2019; France to send warships to support Greece in Turkish standoff, *The Guardian*, 29.1.2020.

[22] For human rights violations, including against people on the move, in the context of anti-COVID measures, see: Europe: Policing the Pandemic – Human rights violations in the enforcement of COVID-19 measures in Europe, 24 June 2020, EUR 01/2511/2020, and a report concerning Malta: Waves of Impunity: Malta's human rights violations and Europe's responsibilities in the Central Mediterranean, 7 September 2020, EUR 33/2967/2020.

would be *prima facie* refugees and/or meet a high threshold of recognition rate in Europe.

The bigger question however is whether these provisions are any more likely to be triggered than the equivalent provisions in the 2001 Temporary Protection Directive (TPD), which to date has remained unused.[23] Unlike the TPD where the Council was to initiate the temporary protection mechanism by a qualified majority vote, this instrument places the Commission in charge of triggering the granting of immediate protection status (Article 11(2)). But simplifying its activation may not by itself make a decision to activate this mechanism any easier. First, eligibility for immediate protection status is narrowly defined by reference to the existence of an armed conflict, thus would not encompass those fleeing for instance systematic human rights violations from oppressive regimes. Secondly, although there are a certain number of objective criteria that must be met for establishing that there is a crisis situation, there is considerable leeway for the Commission to consider whether there is a need to suspend the examination of asylum claims. Thirdly, activation of the immediate protection framework does not guarantee prompt and effective relocation to ensure timely and efficient responsibility sharing.

In summary, Amnesty International's views are that:

- there is no need to create a specific legal regime to operate in times of crisis given the extensive provisions in primary and secondary legislation already allowing specific derogations and establishing extensive EU crisis preparedness mechanisms;

- recourse to this derogatory regime would be open to abuse due to vague and overlapping definitions. It risks becoming a tool to suspend asylum and deny protection;

- the derogations in this instrument have a disproportionate impact on individuals as they unduly and disproportionally limit rights, such the right to liberty and freedom of movement, put individuals at risk of *refoulement* and generally delay access to the rights afforded to them during the ordinary asylum procedure;

- the measures envisaged are not adequate as they not only do not mitigate a crisis situation but are likely to exacerbate the situation and lead to a humanitarian emergency;

- there is need to build upon the framework for granting immediate protection if this is to replace the Temporary Protection Directive, particularly by defining eligibility more widely, by giving quick access to *prima facie* refugee status, and establishing timely and efficient responsibility-sharing arrangements.

Amnesty International recommends that EU legislators reject the sweeping derogations set out in this instrument and request an in-dept assessment as to the need for further derogatory rules, in addition to the flexibility already given to authorities within relevant EU instruments governing asylum and return procedures. In the meantime, EU legislators should build upon Article 10 of this instrument to construe a new, effective and actionable immediate protection regime in the event of the arrival to the EU of a large number of displaced persons.

[23] The Directive regulates temporary protection as an exceptional procedure that can be introduced in the event of a mass influx or imminent mass influx. Mass influx is defined as: "arrival in the community of a large number of displaced persons, who came from a specific country or geographical area, whether the arrival in the Community was spontaneous or aided, for example through an evacuation programme" (Art. 2(d)). The existence of a mass influx is to be established by a Council Decision adopted by qualified majority upon a proposal by the Commission (Art. 5).