Chapter 32  Control of Irregular Migration and EU Law and Policy:  
A Human Rights Deficit

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1 Introduction

[T]he life of entrants and residents without regular migration status is usually a rightless existence without the basic protections of criminal and civil law and with no legal avenues by which to assert an entitlement to just and humane treatment. Irregular migrants in Europe typically find themselves in a position where they reside and work in a European country, but are without the basic protections associated with regular residence. They are … the ‘civic dead’. … [M]igrants with irregular status are frequently prey – and always vulnerable – to exploitation and deception by: employers (who often refuse to pay them for work done); traffickers and irregular migration networkers (who often exploit

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or deceive them); and even members of their own ethnic communities (who often take advantage of their enfeebled market position in the area of housing or medical care). All immigrants are, of course, vulnerable in the process of adjusting to a new society. For people with irregular status, however, this state of vulnerability is permanent and dictated by the need to avoid the attention of the authorities if they are to remain in the country.¹

The human vulnerability of irregular migrants is self-evident and must not be overlooked or ignored in the adoption of legal norms to control irregular migration. In its landmark Communication on immigration and asylum policies in 1994, the European Commission argued that restrictive policies to control irregular migration can only be justified within the context of a framework of protecting the human rights of irregular migrants:

Although a generally firm and effective action against illegal immigration is essential . . . it should not be forgotten that the persons concerned can be subject to exploitation and be in an extremely vulnerable position. It should therefore be taken into account that they are entitled to a fair procedure ensuring full protection of the human rights and fundamental freedoms as provided by international law. To this effect, defining minimum standards will be a necessary step which will equally help ensure the credibility of restrictive policies concerning illegal immigration.²

This sensible and humanitarian approach recognising that the protection of human rights must play a significant role in the adoption of common European Union (EU) policies in respect of the complex phenomenon of irregular migration has been neglected in the Commission’s most comprehensive statement on the subject. In its Communication on a common policy on illegal immigration, published in November 2001,³ only one small part is wholly devoted to human rights under the promising heading, “Compliance with International Obligations and Human Rights”.⁴ According to this section, however, the rights that would appear to matter are those that are accorded to irregular migrants as refugees, namely protection from refoulement under Article 33 of the Geneva

⁴ Ibid. at 7.