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Another situation in which the notion of 'absolute' protection against torture or ill-treatment has been widely debated, is where a person is at risk of being returned to a country where he or she fears to be subjected to such treatment.

Consider, in this regard, the case of *Chahal v. the United Kingdom* [excerpts (/c4x/LouvainX/Louv2.01x/asset/_Materials_Deportation-Chahal_Final_.pdf)] which the European Court of Human Rights decided on 15 November 1996 (for the full text of the judgment, see here (<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004>)). Once you have read the case, try to answer the following questions before turning to the answers:

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CHAHAL EXERCISE (2/2 points)

1. In addition to its duty to respect human rights, the State has a duty to protect the rights of all individuals under its jurisdiction. If the presence on British territory of Chahal truly represents a threat to the national security of the United Kingdom and creates risks to the British population, then could it be said that the *Chahal* judgment in fact does not recognize the absolute character of the right to life, protected under Article 2 of the European Convention of Human Rights? Has the Court implicitly ranked the protection against the risk of torture above the right to life?

- ☐ The Court has established that protecting a suspected terrorist from the risk of ill-treatment is more important than protecting the lives of British citizens.
- ☐ The Court ruled that despite being an important right, the right to life was not absolute, and that the prohibition of torture and ill-treatment, which is an absolute right, should trump all other rights.
- ☒ The Court did not establish a hierarchy of rights: it simply established that a violation of the prohibition of torture, regardless of its alleged effectivity in the protection of other rights, may not be justified. ✓
- ☐ The Court ruled that there was no conflict between the right to life and the prohibition of torture, and therefore no need to balance these rights, in the *Chahal* case.

EXPLANATION

It has been written that: "It would be difficult to maintain that the State's positive obligation to *protect* the rights of its citizens is less important than its negative obligation to *respect* those rights. The former duty is as firmly grounded in human rights law as the latter: both stem from the same fundamental legal guarantees. To attach more weight to the State's negative obligation to respect than to its positive obligation to protect would boil down to introducing a hierarchy between the rights occurring on the different sides of the balance, and there is no place in modern human rights law for such a hierarchy. The conflict between liberty and security in the context of terrorism is not between

two equally significant human rights values, one of which cannot take precedence over the other. As Richard Posner ... noted, 'One is not to ask whether liberty is more or less important than safety. One is to ask whether a particular security measures harms liberty more or less than it promotes safety.'" (Stefan Sottiaux, *Terrorism and the Limitations of Rights. The European Convention on Human Rights and the United States Constitution*, Hart Publ., Oxford – Portland, Oregon, 2007, referring to R. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency*, Oxford University Press, 2006, at pp. 31-32). However, it may be misleading to present this conflict as having to be addressed through a "balancing" of the different rights at stake. Counter-terrorist measures should not be immune from being scrutinized in this respect simply because they purport to ensure 'security', i.e., to protect the right to life. States may legitimately argue, against the imposition of far-reaching obligations to protect, that the adoption of certain measures, even if they would contribute to combating terrorism, would constitute such a threat to civil liberties that they should be excluded; they may not adopt or maintain counterterrorist measures which do create such a threat, even though these measures might be effective in countering terrorism. The 'balancing' metaphor is more confusing than it is helpful, particularly insofar as it suggests that, where the interests in security are very important ones, any restriction to liberty should be in principle allowable. This is incorrect: there are certain measures which may not be adopted, even if they would almost certainly save lives, if such measures would violate the requirements of the Convention. This is what distinguishes a reasoning grounded in human rights from purely utilitarian calculations, in which, provided there are strong benefits in doing so, any restriction imposed to the rights of the individual would be acceptable.

2. Is the opinion expressed by the seven judges who filed a joint dissenting opinion in *Chahal* in fact contradicting the reasoning followed by the majority?

- ☒ Yes, the dissenting opinion contradicts the majority opinion, since it would allow an expulsion on national security grounds as long as the ill-treatment is carried out by a third state. ✓
- ☐ Yes, the dissenting opinion contradicts the majority opinion, since it would allow an expulsion on national security grounds as long as the risk of ill-treatment in the destination State is very low;
- ☐ No, the dissenting opinion is fully in line with the majority: the only difference is in the assessment of the facts presented to the Court.

EXPLANATION

The dissenting opinion in fact conflates two assertions. One is that there may be situations in which the risk of torture or ill-treatment that a person subject to deportation to his/her country would be facing, while not equal to zero, is, in fact, not very high. In such cases, the dissenting judges say, national security concerns may justify expelling a person to that country. Another assertion is that a "balancing" should take place between national security concerns, on the one hand, and the risks to the person facing expulsion, on the other hand. While the first assertion is correct, the second is not. In human rights law, if there is a real risk that a person will be facing torture or ill-treatment, or if his/her life is in danger, that person should not be expelled to a country where he/she would be exposed to that risk. And this remains true however important the threat that person represents for the national security of the expelling country. But of course, the prohibition does not apply when the risk of torture or ill-treatment in the country of destination is not real, but merely hypothetical. It is not that two rights are being put in balance, but rather that the probability of torture or ill-treatment is so minimal that the prohibition imposed by Article 3 ECHR (or other equivalent provisions) shall not apply.

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