

The Case of the Extradition of Luis
Posada Carriles: Is the United States
Harboring a Terrorist?

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I. Introduction

A legal regime of several counter-terrorism conventions provides a legal framework for the international war on terror.¹ The most important aspect of this international legal regime is the commitment of states to bring terrorists to justice by prosecuting them or extraditing them to countries willing and able to prosecute.² As part of this commitment to extradite or prosecute terrorists, states have agreed to investigate and if appropriate arrest suspected terrorists found within their territory.³ If countries fail to investigate alleged terrorists, or fail to prosecute or extradite them when their investigations yield incriminating evidence, the counter-terrorism legal regime will become obsolete.⁴ The war on terror will lose an important international law ally, and distrust and lack of cooperation among states will likely take its place.⁵

The dispute between Venezuela and the United States over the extradition of alleged terrorist Luis Posada Carriles poses a challenge to the reliability and effectiveness of the counter-terrorism regime.⁶ Posada Carriles, a Cuban-born anti-Castro militant with a long history of violent acts against Cuban interests in Latin America, entered the United States illegally in March, 2005.⁷ On June 15, 2005, Venezuela filed a request for his extradition, citing as legal basis the 1923 United States-Venezuela Extradition Treaty, the 1971 Montreal Convention for

the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Montreal Convention"), and the 1998 Convention for the Suppression of Terrorist Bombings ("Terrorist Bombings Convention").⁸ Venezuela wants to try Posada Carriles, a naturalized Venezuelan, for the 1976 bombing of a Cuban civil aircraft over Barbados, which took the lives of 73 people.⁹

The Department of State forwarded Venezuela's extradition request to the Department of Justice's Office of International Affairs (OIA) as early as September 8, 2005.¹⁰ The OIA, however, has not yet acted on the request.¹¹ Neither the Department of State nor the Department of Justice (DOJ) has communicated with Venezuela regarding Posada Carriles' extradition, despite repeated claims by Venezuela that the United States is ignoring the request and harboring a terrorist.¹²

On May 17, 2005, officers of the Department of Homeland Security (DHS) detained Posada Carriles and initiated deportation proceedings against him.¹³ Posada Carriles accepted his deportability before an immigration court, but moved for deferral of removal to Venezuela, arguing that he would suffer torture in Venezuela if the DHS deported him to this country.¹⁴ On September 26, immigration judge William L. Abbott found that Posada Carriles more likely than not would face torture in Venezuela.¹⁵ The United States has an obligation under the Convention against Torture to refrain from deporting or

extraditing persons to countries where they may suffer torture or inhumane treatment.¹⁶ Judge Abbott granted Posada Carriles' motion.¹⁷ The DHS' Office of Immigration and Customs Enforcement is currently looking for a country other than Venezuela where to deport Posada Carriles.¹⁸

This comment explores the obligations of the United States under the Montreal Convention and Terrorist Bombings Convention in the case of Posada Carriles. Part II presents the relevant provisions of these conventions and summarizes the extradition law and procedure of the United States.¹⁹ Part III (a) argues that both the Montreal and Terrorist Bombings conventions apply in this case.²⁰ Part III (b) proposes that the United States has a duty to investigate expeditiously Venezuela's allegations that Posada Carriles masterminded the 1976 bombing of the Cuban aircraft, and to report promptly the results of the investigation to Venezuela.²¹ Part III (c) argues that the removal proceedings against Posada Carriles do not satisfy the United States' duty to investigate.²² Finally, part III (d) concludes that the United States has failed to conduct the expeditious investigation that the Montreal and Terrorist Bombings conventions require.²³

The United States should take prompt actions to investigate Venezuela's allegations and inform Venezuela of the results of the investigation.²⁴ This comment predicts that if the United

States fails to take these actions, it will also violate the duty to extradite or prosecute.²⁵ The United States should codify the duty to investigate and report to avoid future violations.²⁶ If the United States fails to investigate Venezuela's allegations and, if appropriate, extradite or prosecute Posada Carriles, the international community will lose confidence in the counter-terrorism regime, rendering it mostly ineffective.²⁷

II. Background

a. International Obligations

Both the United States and Venezuela are parties to the Montreal Convention and the Terrorist Bombings Convention.²⁸ The Montreal Convention became enforceable between the two states in November, 1983.²⁹ The Terrorist Bombings Convention became enforceable between them in September, 2003.³⁰

The Montreal Convention makes it an international crime to destroy or attempt to destroy civil aircrafts in service.³¹ The Terrorist Bombings Convention criminalizes violent attacks against places of public use, including public transportation systems.³² Public transportation systems include places, conveyances and instrumentalities used to deliver transportation services to the public.³³

Both the Montreal Convention and the Terrorist Bombings Convention require states to establish jurisdiction over the

covered offences when the alleged perpetrator is present in their territory.³⁴ They also obligate states to investigate allegations that an offender is present in their territory, and to report the results of the investigation to states with jurisdiction over the offender.³⁵

Offences under these conventions constitute extraditable crimes.³⁶ Both instruments direct states to consider the offences incorporated into all existing extradition agreements among them, and to include the offences as extraditable crimes in all of their future extradition agreements.³⁷ The conventions require states to extradite alleged offenders or submit their cases to domestic authorities for the purpose of prosecution.³⁸ The Montreal and Terrorist Bombings conventions also impose a duty upon the parties to provide one another "the greatest measure of assistance" in investigations and proceedings against suspected offenders.³⁹

The United States and Venezuela are also parties to the Inter-American Convention against Terrorism ("Inter-American Convention").⁴⁰ The Inter-American Convention became enforceable between them on November 2, 2005.⁴¹ The Inter-American Convention obligates states "to afford one another the greatest measure of expeditious mutual legal assistance" in the investigation and prosecution of offences under the Montreal Convention and Terrorist Bombings Convention.⁴²

b. United States Law

Federal courts have jurisdiction to try terrorists who commit acts of violence against civil aircrafts, regardless of the terrorist's nationality and where the offence takes place.⁴³ The United States, however, does not have to exercise jurisdiction in every case.⁴⁴ The United States may extradite the suspect to a country with stronger relations to the suspect or the crime.⁴⁵

The United States receives extradition requests through the Department of State.⁴⁶ The Department of State determines whether a legal basis exists for the extradition and whether the documents submitted meet all applicable formalities.⁴⁷ The Department of State then forwards the request to the OIA.⁴⁸ The OIA reviews the request to determine whether the evidence supports probable cause to believe that the person subject to the request committed the offence for which the requesting state seeks extradition.⁴⁹ If the OIA considers that enough evidence exists to support a probable cause finding, it brings extradition proceedings before a United States magistrate in the district where the person subject to the extradition request is present.⁵⁰ The magistrate conducts a probable cause inquiry and revises any pertinent provisions of the relevant extradition agreement to decide whether the person is extraditable.⁵¹ If the magistrate finds the person extraditable, she certifies the

decision to the Department of State.⁵² The Department of State makes the final determination whether to extradite the person.⁵³

Countries can raise allegations that a person who has committed an offence under the Montreal Convention or the Terrorist Bombings Convention is present in the United States by means other than a formal request for extradition.⁵⁴ Thus, in different situations other government offices may be in charge of conducting the investigation and providing the report that the conventions require.⁵⁵ However, when a request for extradition is the conduit that a foreign country chooses to raise an allegation that a terrorist is in the United States, the OIA is the body which domestic law charges with the investigation of the allegations raised.⁵⁶ The OIA must inquire into the substance of the allegations and determine whether to honor the extradition request by bringing extradition proceedings before a United States magistrate.⁵⁷

The law does not impose an obligation on the OIA to process extradition requests in an expeditious manner or within a specific time period.⁵⁸ The OIA may process an extradition request within days of having received the request from the Department of State or may take years to initiate extradition proceedings.⁵⁹

III. Analysis

a. The Montreal and Terrorist Bombings Conventions Apply to the Case of the Extradition of Posada Carriles

The 1976 bombing of the Cuban airplane falls within the scope of the Montreal Convention.⁶⁰ Violent attacks against civil aircrafts constitute the specific object of this instrument.⁶¹ The downing of the Cuban airplane also falls within the scope of the Terrorist Bombings Convention.⁶² The Terrorist Bombings Convention covers violent attacks against public transportation systems.⁶³ A public transportation system includes conveyances and instrumentalities used in transportation services available to the public.⁶⁴ A civil airplane engaged in the transportation of members of the public, as was the Cuban airplane in this case, is an instrumentality and thus part of a public transportation system.⁶⁵

Both the Montreal Convention and the Terrorist Bombings Convention apply to the case of Posada Carriles even though the offence for which Venezuela wants to try Posada Carriles occurred before the conventions became enforceable between the United States and Venezuela.⁶⁶ Extradition treaties generally apply retroactively.⁶⁷ The Montreal and Terrorist Bombings conventions focus on extradition as a means of bringing terrorists to justice.⁶⁸ The central provisions of the conventions focus on making the covered offences extraditable crimes and facilitating the extradition of offenders.⁶⁹ States

must consider the covered offences incorporated in all extradition treaties in force between them and must include the offences as extraditable crimes in all of their future extradition agreements.⁷⁰ States must also extradite or prosecute alleged offenders.⁷¹ Because the conventions' main objective and central provisions deal with extradition as a means of fighting terrorism, and extradition agreements generally apply to offences which took place before the agreements' date of entry into force, the Montreal Convention and Terrorist Bombings Convention apply to Venezuela's extradition request.⁷²

b. The Duty to Investigate and Report Requires the United States to Undertake an Expediousness Investigation and Make a Prompt Report in the Case of Posada Carriles

The Vienna Convention on the Law of Treaties provides that treaty interpretation should focus on the plain meaning of the treaty's terms in light of the treaty's objectives, and should take into account other rules of international law binding upon the parties in dispute.⁷³ The objective of the Montreal Convention and Terrorist Bombings Convention is to deter terrorism by bringing terrorists to justice.⁷⁴ The Inter-American Convention obliges the United States and Venezuela to provide one another expeditious assistance in the investigation of offences under the Montreal and Terrorist Bombings

conventions.⁷⁵ The language of the Montreal and Terrorist Bombings conventions, read in light of the conventions' objective and the United States' duty of expeditious assistance under the Inter-American Convention, supports the interpretation that the United States must conduct an expeditious investigation of Venezuela's charges against Posada Carriles and promptly inform Venezuela of the investigation's results.⁷⁶

The objective of the Montreal Convention and Terrorist Bombings Convention is to deter and prevent future acts of terrorism by bringing terrorists to justice.⁷⁷ An expeditious investigation of Venezuela's charges against Posada Carriles is necessary to further this objective.⁷⁸ Failure by the United States to conduct an expeditious investigation would show lack of resolve in bringing terrorists to justice.⁷⁹ Such a failure would run afoul the objective of the conventions.⁸⁰

The Inter-American Convention requires the United States and Venezuela to extend one another "the greatest measure of expeditious mutual legal assistance" in connection with investigations of offences under the Montreal and Terrorist Bombings conventions.⁸¹ This obligation, as a rule of international law binding upon the United States and Venezuela, informs the interpretation of the Montreal and Terrorist Bombings conventions as they apply between Venezuela and the United States.⁸² The duty to afford one another expeditious

assistance in bringing terrorists to justice effectively adds a requirement of expeditiousness to the duty to investigate and report of the Montreal and Terrorist Bombings conventions.⁸³

The language of the Montreal Convention supports the conclusion that the duty to investigate and report requires the United States to conduct an expeditious investigation and make a prompt report in the case of Posada Carriles.⁸⁴ The Montreal Convention directs states to "immediately make a preliminary enquiry into the facts" whenever they have reasons to believe that a terrorist may be present within their territory.⁸⁵ The provisions also mandate that the state conducting the investigation "promptly report its findings" to states with jurisdiction over the alleged terrorist.⁸⁶ The use of the terms "immediately" and "promptly" to qualify the actions that states must take strongly suggests a duty to undertake these actions expeditiously.⁸⁷ When read with the objective of the convention in mind, and considering the obligation of the United States to afford Venezuela expeditious assistance under the Inter-American Convention, this language supports the interpretation that the duty to investigate and report requires the United States to conduct an expeditious investigation and make a prompt report to Venezuela.⁸⁸

The Terrorist Bombings Convention provides that upon obtaining information that an alleged terrorist is within their

territory, states must "take such measures as may be necessary under its domestic law" to investigate the information.⁸⁹ This language does not contain specific terms suggesting an obligation to investigate expeditiously.⁹⁰ However, unless the duty to investigate contains a requirement of expeditiousness, the United States could unnecessarily prolong the conclusion of the investigation.⁹¹ This would show unwillingness to bring terrorists to justice, thus defeating the objective of the convention.⁹² With this in mind, and considering the United States' duty of expeditious assistance under the Inter-American Convention, it is reasonable to interpret the Terrorist Bombings Convention's duty to investigate as requiring the United States to undertake an expeditious investigation of Venezuela's charges against Posada Carriles.⁹³

The obligation to report appears in the Terrorist Bombings Convention in almost the same terms as the equivalent provision in the Montreal Convention.⁹⁴ The Terrorist Bombings Convention provides that states must "promptly inform" other interested parties about the results of the investigation.⁹⁵ The convention therefore obligates the United States to report promptly the findings of the investigation to Venezuela.⁹⁶

c. The Removal Proceedings against Posada Carriles Do Not Satisfy The Duty to Investigate and Report in the Case of Posada Carriles

The immigration proceedings which the DHS brought against Posada Carriles do not satisfy the duty to investigate and report.⁹⁷ In the removal proceedings against Posada Carriles the immigration court considered only whether Posada Carriles would suffer torture in Venezuela.⁹⁸ The court did not investigate Venezuela's allegations that Posada Carriles masterminded the 1976 terrorist attack, as the Montreal and Terrorist Bombings conventions require.⁹⁹

The immigration court's decision that the Torture Convention prevented Posada Carriles' deportation to Venezuela has no binding effect on the pending extradition request.¹⁰⁰ The immigration court's decision does not prevent the OIA from investigating Venezuela's allegations and processing the extradition request.¹⁰¹

d. The United States is in Violation of the Duty to Investigate and Report

The OIA is in charge of investigating the allegations that Venezuela raised in the request for the extradition of Posada Carriles.¹⁰² However, the broad discretion that the OIA enjoys in processing extradition requests is causing the United States to violate its duty to investigate and report in an expeditious manner.¹⁰³ Venezuela's extradition request is pending at the OIA while the DHS is looking for a country other than Venezuela where to send Posada Carriles.¹⁰⁴ If the DHS deports Posada

Carriles, the United States will lose jurisdiction over him.¹⁰⁵ This means that the United States will lose the opportunity to prosecute or extradite Posada Carriles to a country willing and able to prosecute.¹⁰⁶ Since the objective of investigating Venezuela's allegations is to decide whether Posada Carriles should face justice in Venezuela, undergo prosecution in the United States, or go free, investigating Venezuela's allegations after Posada Carriles' deportation will not serve the purpose of the duty to investigate and report.¹⁰⁷ The fact that the United States may lose jurisdiction over Posada Carriles while the extradition request is pending at the OIA shows that the OIA's timing in investigating Venezuela's allegations is at odds with the duty to investigate and report in an expeditious manner.¹⁰⁸

IV. Recommendations

The United States needs to take prompt action to investigate the allegations that Venezuela raised in the request for the extradition of Posada Carriles.¹⁰⁹ The OIA should immediately undertake to process Venezuela's extradition request.¹¹⁰ The DOJ or the Department of State needs to communicate with Venezuela and give Venezuela assurances that the OIA is investigating the allegations.¹¹¹ Failure to take these actions may result in violation of the duty to extradite or prosecute under both the Montreal Convention and Terrorist Bombings Convention.¹¹² United States law should require the OIA

to process extradition requests in an expeditious manner when the requesting country raises the Montreal Convention or the Terrorist Bombings Convention as legal grounds for the extradition.¹¹³

a. The United States Should Immediately Investigate Venezuela's allegations and Communicate to Venezuela the Results of the Investigation

The OIA needs to take prompt action to process Venezuela's extradition request. Processing Venezuela's request will necessarily involve investigating the allegations that Posada Carriles participated in the 1976 bombing of the Cuban airplane.¹¹⁴ This action will bring the United States into compliance with the duty to investigate Venezuela's charges against Posada Carriles.¹¹⁵

The DOJ or the Department of State should promptly communicate with Venezuela and give Venezuela assurances that the OIA is investigating the allegations raised in the extradition request.¹¹⁶ The DOJ or the Department of State should also inform Venezuela of the results of the investigation as soon as the OIA completes the investigation.¹¹⁷ Moreover, if the OIA brings extradition proceedings in court, the DOJ or the Department of State should promptly communicate to Venezuela the extradition magistrate's decision whether or not to certify Posada Carriles as extraditable.¹¹⁸ This series of

communications, along with the OIA's actual investigation of the extradition request, would bring the United States back into compliance with the duty to investigate and report under the Montreal and Terrorist Bombings conventions.¹¹⁹

b. Failure to Take Prompt Action May Cause the United States to be in Violation of the Duty to Extradite or Prosecute

Undertaking to process Venezuela's extradition request without delay will not only bring the United States into compliance with the duty to investigate and report but may also avoid causing the United States to be in violation of the duty to extradite or prosecute under the Montreal and Terrorist Bombings conventions.¹²⁰ If the DHS deports Posada Carriles in the absence of a finding by the OIA that the charges against him lack evidentiary support, the United States would have let an alleged terrorist go free without first establishing that the allegations against him are unfounded.¹²¹ This is precisely what the duty to extradite or prosecute, together with the duty to investigate and report, seeks to avoid.¹²² If the DHS deports Posada Carriles in the absence of an investigation confirming that the allegations against him lack merit, the United States will violate the duty to prosecute or extradite.¹²³

c. The United States Should Codify the Duty to Investigate and Report to Prevent Future Violations

The United States should implement legislation that requires the OIA to investigate expeditiously allegations raised in extradition requests when the requesting country invokes the Montreal Convention or the Terrorist Bombings Convention as legal grounds.¹²⁴ Such legislation should also require the OIA to communicate promptly the results of the investigation to the requesting state.¹²⁵ In the alternative, the United States may charge a federal office other than the OIA with undertaking the required investigation and report in an expeditious manner.¹²⁶ The implementation of legislation in either form would likely expedite the investigation and report of terror suspects and eliminate unnecessary delays that may cause the United States to violate its obligation to investigate and report in the future.¹²⁷

V. Conclusion

The case of the extradition of Posada Carriles could undermine the effectiveness of the international counter-terrorism regime.¹²⁸ The United States has failed to act expeditiously to investigate Venezuela's allegations of terrorism against Posada Carriles.¹²⁹ If the United States, which has emerged as a leader in the worldwide struggle against terrorism, fails to investigate these allegations, the international community may lose confidence in the legitimacy of the United States' efforts to bring terrorists to justice.¹³⁰

This could create a state of distrust and lack of cooperation detrimental to the success of the war on terror.¹³¹

¹ See generally Convention for the Suppression of Unlawful Seizure of Aircraft, art. I, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (making the unlawful seizure of aircraft an international crime); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [hereinafter Montreal Convention], art. I, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 (proscribing violent attacks against civil aircrafts or persons within with the intent to cause death, bodily harm or destruction); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, art. II, Dec. 14, 1973, 28 U.S.T. 1975, 13 I.L.M 41 (criminalizing killings, kidnappings, assaults and other forms of violence against internationally protected persons and their official premises, private accommodations and means of transportation); International Convention against the Taking of Hostages, art. I, Dec. 17, 1979, T.I.A.S. No. 11081, 18 I.L.M 1456 (prohibiting the seizure of persons with the intent to compel a third party, particularly a state or international organization, to do or abstain from doing any acts); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, art. II, Feb. 24, 1988, S.

Treaty Doc. No. 100-19, 27 I.L.M 627 (criminalizing acts of violence against facilities of airports serving international civil aviation or persons within); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. III, Mar. 10, 1988, 27 I.L.M. 668 (making unlawful seizures or attacks against ships an international crime); Convention for the Suppression of the Financing of Terrorism, art. II, Dec. 9, 1999, U.N. Doc. A/54/109, 39 I.L.M. 270 (making financing of terrorism an international crime); Convention for the Suppression of Terrorist Bombings [hereinafter Terrorist Bombings Convention], art. II, Jan. 9, 1998, 1998 U.S.T. Lexis 204, U.N. Doc. A/Res/52/164 (criminalizing unlawful use of explosive or lethal substances against places of public use or persons within); Inter-American Convention against Terrorism [hereinafter Inter-American Convention], art. I and II, June 3, 2002, AG Res. 1840, OAS AG, 32nd Sess., OAS Doc. XXXII-O/02 (providing a comprehensive framework for regional cooperation in combating terrorism). See also Christopher C. Joyner, International Extradition and Global Terrorism: Bringing International Criminals to Justice, 25 **Loy. L.A. Int'l & Comp. L. Rev.** 493,539 (2003) (contending that while there is not an integrated counter-terrorism legal system, the existing counter-terrorism conventions form a framework for

international cooperation in the suppression and prosecution of terrorism).

² See Ayaz R. Shaikh, A Theoretic Approach to Transnational Terrorism, 80 **Geo. L.J.** 2131, 2159 (1992) (arguing that because the goal of the counter-terrorism conventions is the prosecution of terrorists, a central tenet of the conventions is the principle aut dedere aut judicare (extradite or prosecute)); John P. Grant, Terrorism on Trial: Beyond the Montreal Convention, 37 **Case W. Res. J. Int'l L.** 453, 457-58 (2005) (expressing that the duty to extradite or prosecute is the core obligation, the cornerstone, and the most important common area of the counter-terrorism conventions); Joyner, supra note 1, at 539-40 (referring to the extradite-or-prosecute formula as a preeminent obligation at the heart of the counter-terrorism conventions); John F. Murphy, Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, **Harv. Hum. Rts. J.**, Spring 1999, at 3 (noting that in many anti-terrorism conventions the emphasis on the duty to prosecute or extradite is strong). See generally **M. Cherif Bassiouni and Edward M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law** Pt. I, § 6 (Martinus Nijhoff Publishers 1995) (arguing that the duty to

extradite or prosecute is a rule of customary international law and a jus cogens rule).

³ See Montreal Convention, supra note 1, art. VI (imposing a duty on states parties to investigate any information alleging the presence of a terrorist within their territories); Terrorist Bombings Convention, supra note 1, art. VII (establishing the same obligation). See also Grant, supra note 2 (expressing that the duty to extradite or prosecute requires investigating allegations of terrorism).

⁴ See Grant, supra note 2, at 458 (suggesting that unless states undertake to prosecute or extradite in good faith, the obligation to prosecute or extradite may become only a façade of justice); Joyner, supra note 1, at 539-40 (proposing that the critical ingredient for the success of the anti-terrorism regime is political will to convert international obligations into practice). Professor Joyner further contends that unless governments are willing to cooperate in suppressing terrorism, the legal regime fails as an option. Id.

⁵ See Joyner, supra note 1, at 540 (noting that governments are very receptive to domestic and international political pressures, and in a world of conflicting political, ideological, and economic situations, governments will find it difficult to mobilize the domestic political will to make the international

anti-terrorism regime work properly). See also George B. Newhouse Jr., The Long Arm of the Law, 25 **L.A. Law.** 32, 34 (observing that when a requested state fails to honor a foreign extradition request due to lack of political will, the requesting state may, out of frustration, use confrontational tactics such as kidnapping the wanted person).

⁶ See Unwelcome Visitor, **Fort Worth Star Telegram**, May 19, 2005, at B (proposing that allowing Posada Carriles to stay in the United States or giving him free passage to another country will make a mockery of the United States' stance on terrorism and seriously jeopardize America's credibility); Curt Anderson, Anti-Castro Militant Creates Dilemma For Washington. U.S. Credibility Comes Under Challenge, **Tampa Trib.**, June 13, 2005, at Metro (quoting Peter Kornbluh, director of the Cuba program of the National Security Archive Research Organization at George Washington University, stating that Posada Carriles' presence in the United States threatens to undermine the credibility of American foreign policy in the war on terror); text accompanying note 4 (suggesting that failure to prosecute or extradite terror suspects will undermine the effectiveness of the international anti-terrorism regime).

⁷ See Cronologia de Actividades de Posada Carriles, **El Universal**, May 17, 2005, at Nacional y Politica, available at

http://buscador.eluniversal.com/2005/09/28/pol_ava_28A615407.shtm1 (offering a chronology of Posada Carriles' militant activities, which include attempting to blow up a Cuban or Soviet ship in the Mexican port of Veracruz in 1965; bombing a Cuban civil aircraft over Barbados in 1976, although Posada Carriles denies any involvement in this act; carrying out a series of hotel bombings in Havana in 1997; and attempting to assassinate Fidel Castro in Panama in 2000, for which he was convicted and served four years in prison). In 2004, then-Panamanian president Mireya Moscoso granted Posada Carriles presidential pardon. Id. See Peter Kornbluh, A Safe Harbor for Luis Posada Carriles, **NACLA Rep. on Am.**, Jan. 1, 2006, available at 2006 WLNR 525091 (commenting that Posada Carriles entered the country with a false passport hoping to obtain political asylum).

⁸ See Wayne S. Smith, Sheltering Terrorists, **Sun Sentinel** (Fort Lauderdale), Oct. 27, 2005, at 27A (showing doubt that the United States will seriously entertain the extradition of Posada Carriles, and predicting that he will be in custody for some time under charges of illegal entry and then set free); Roraima Albornoz, Wanted Terrorist Luis Posasa Carriles: U.S.A. Offered no Discretion Under the Law!, **VHeadline.com**, January 24, 2006, available at <http://www.vheadline.com/readnews.asp?id=47748>

(reporting that in a statement the Venezuelan embassy in the United States expressed that the Bush administration had no option under the Montreal Convention but to extradite or prosecute Posada Carriles).

⁹ See In the Matter of Luis Posada Carriles, A-12-419-708, U.S. Immigr. Ct., El Paso, Tx. (Sept. 28, 2005) at 5, available at http://lawprofessors.typepad.com/immigration/files/POSADA_DECISION3_9-26-05.pdf (observing that Posada Carriles stood trial in Venezuela and the court acquitted him of plotting the bombing of the Cuban airplane). An appeals court, however, overturned this decision and ordered retrial after finding that the trial court lacked jurisdiction over the case. Id. Posada Carriles escaped from prison when retrial was pending. Id.

¹⁰ See Venezuela Reclama a EEUU Extradicion del "Bin Laden Latinoamericano", **El Universal**, Sept. 28, 2005, at Nacional y Politica, available at http://buscador.eluniversal.com/2005/09/28/pol_ava_28A615407.shtml (quoting the Venezuelan Ambassador to the United States saying that the Department of State sent the extradition request to the Justice Department for processing, but the Justice Department chose to store the request in a drawer instead of bringing extradition proceedings before a judge).

¹¹ See Security Council Briefed by Chairmen of Three Anti-Terrorism Committees; Strengthening Cooperating, Assistance to States Among Issues Raised, **U.S. Fed. News**, Feb. 21, 2006, available at 2006 WLNR 3089853 (reporting the remarks of Venezuela's diplomat Fermin Toro Jimenez before the U.N. Security Council that the unwillingness of the United States to process Venezuela's request for the extradition of Posada Carriles shows that the United States has a double standard in the war on terror); Wilfredo Cancio Isla, Exigen la Extradicion de Posada a Venezuela, **El Nuevo Herald** (Miami), Jan. 26, 2006, at A, available at 2006 WLNR 1393920 (alleging that the DOJ is just following orders from George W. Bush, who wants to treat the case of Posada Carriles as a simple immigration case).

¹² See Albornoz supra note 8 (reporting that on November 9 the Department of State sent the Venezuelan embassy a diplomatic note stating that it would soon send questions and concerns regarding the extradition of Posada Carriles, but that as of January 24, 2006, the embassy had received nothing); Cancio Isla, supra note 11 (quoting Venezuela's lawyer in Washington accusing the United States of protecting a terrorist); Bruce Zagaris, U.S. Court Bars Deportation of Terrorist Suspect to Cuba or Venezuela, **Int'l Enforcement L. Rep.**, Dec. 2005, at Extradition (indicating that the United States and Venezuela are

in a rhetoric battle on counter-terrorism cooperation in the case of Posada Carriles).

¹³ See Madeline Baro Diaz, Vanessa Bauza and Ruth Morris, U.S. Arrests Suspect in Terror Attacks on Cuban Plane, Hotels, **Sun Sentinel** (Fort. Lauderdale), May 18, 2005 (asserting that DHS agents arrested Posada Carriles after he withdrew a petition for asylum in the United States and was preparing to leave the country). See also In the Matter of Luis Posada Carriles, A-12-419-708, U.S. Immigr. Ct., El Paso, Tx. (Sept. 28, 2005) at 1, available at http://lawprofessors.typepad.com/immigration/files/POSADA_DECISION3_9-26-05.pdf (indicating that the immigration court has subject matter jurisdiction over the issue of Posada Carriles' presence in the United States).

¹⁴ See In the Matter of Luis Posada Carriles, A-12-419-708, U.S. Immigr. Ct., El Paso, Tx. (Sept. 28, 2005) at 1-2, available at http://lawprofessors.typepad.com/immigration/files/POSADA_DECISION3_9-26-05.pdf (noting that Posada Carriles first denied his deportability alleging that he never gave up his status as a permanent resident in the United States, but subsequently conceded that he lost his permanent residency when he became a Venezuelan citizen). Posada Carriles later conceded his ineligibility for withholding of removal based on his serious

nonpolitical criminal convictions outside the United States.

Id. at 2.

¹⁵ See id. at 6-7 (finding that in consideration of the strong cultural, political, and economic ties between Venezuela and Cuba, it was plausible that Venezuela would allow Cuban agents to interrogate and torture Posada Carriles in Venezuela).

¹⁶ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. III, April 18, 1988, S. Treaty Doc. 100-20, 23 I.L.M 1027 (providing that an inquiry into the possibility of torture in the country of deportation or extradition must take into account the existence in that country of a consistent pattern of human rights violations). See also Deferral of Removal under the Convention against Torture, 8 C.F.R. § 1208.17 (2005) (codifying article III of the Convention against Torture).

¹⁷ See In the Matter of Luis Posada Carriles, A-12-419-708, U.S. Immigr. Ct., El Paso, Tx. (Sept. 28, 2005) at 5, available at http://lawprofessors.typepad.com/immigration/files/POSADA_DECISION3_9-26-05.pdf (observing that even terrorists or mass murderers qualify for deferral of removal if they prove that more likely than not they would suffer torture if deported).

¹⁸ See U.S. Considering Moving Anti-Castro Activist to Third Country, **Voice of Am.**, Jan. 25, 2006, available at WL 1422757

(noting that Posada Carriles' attorney is seeking his provisional release while the DHS Office of Immigration and Customs Enforcement looks for a third country where to deport Posada Carriles).

¹⁹ See discussion infra Part II (introducing the provisions of the Montreal and Terrorist Bombings conventions and the United States law and procedure that deal with the investigation of terrorists and the means to extradite or prosecute terror suspects).

²⁰ See discussion infra Part III (a) (contending that the Montreal and Terrorist Bombings conventions apply to the case of Posada Carriles even though the attack against the Cuban airplane took place before these conventions became enforceable between the United States and Venezuela).

²¹ See discussion infra Part III (b) (arguing that the language of the Montreal and Terrorist Bombings conventions, interpreted in light of the objectives of the conventions and the obligations that the United States and Venezuela undertook in the Inter-American Convention against Terrorism, supports the conclusion that the Montreal and Terrorist Bombings conventions impose on the United States a duty to investigate and report expeditiously in the case of Posada Carriles).

²² See discussion infra Part III (c) (contending that the removal proceedings against Posada Carriles did not involve an inquiry into Venezuela's allegations and therefore does not constitute the type of investigation that the Montreal and Terrorist Bombings conventions require).

²³ See discussion infra Part III (d) (contending that the failure to act on Venezuela's extradition request despite the possibility that the DHS may at any time deport Posada Carriles to a country other than Venezuela or Cuba puts the United States in violation of the duty to conduct an expeditious investigation and make a prompt report).

²⁴ See discussion infra Part IV (a) (suggesting that the OIA should promptly undertake to process Venezuela's extradition request and that the DOJ or the Department of State should promptly communicate with Venezuela and assure this country that the OIA is investigating the allegations raised in the extradition request).

²⁵ See discussion infra Part IV (b) (arguing that if the DHS deports Posada Carriles in the absence of an investigation and finding that Venezuela's charges lack merit, the United States will be in violation of the duty to extradite or prosecute).

²⁶ See discussion infra Part IV (recommending that the United States implement legislation to require the OIA to process

extradition requests expeditiously when the requesting state invokes the Montreal Convention or the Terrorist Bombings Convention as basis for the extradition).

²⁷ See discussion infra Part V (predicting that unless the United States promptly undertakes to process Venezuela's extradition request, the case of Posada Carriles will undermine the credibility of the United States in the war on terror and negatively affect the international community's willingness to act together to fight terrorism).

²⁸ See Montreal Convention, supra note 1 (listing the United States and Venezuela as signatories); United Nations Office On Drugs and Crime, Chapter Four: Montreal Convention, at 95, http://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_4.pdf (last visited Mar. 17, 2006) (showing that the United States and Venezuela ratified the Montreal Convention on November 1, 1972, and November 21, 1983, respectively); United Nations Treaty Collection, International Convention for the Suppression of Terrorist Bombings, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Mar. 17, 2006) (showing that the United States and Venezuela ratified the Terrorist Bombings Convention on June 26, 2002, and September 23, 2003, respectively).

²⁹ See United Nations Office on Drugs and Crime, Chapter Four: Montreal Convention, at 90, 95, http://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_4.pdf (last visited Mar. 17, 2006) (showing that the Montreal Convention entered into force on January 26, 1973, with the United States among the states that had already ratified the convention, but Venezuela did not ratify the convention until November of 1983).

³⁰ See United Nations Treaty Collection, International Convention for the Suppression of Terrorist Bombings, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Mar. 17, 2006) (showing that the Terrorist Bombings Convention entered into force on May 23, 2001, but the United States and Venezuela did not ratify the convention until June 26, 2002, and September 23, 2003, respectively).

³¹ See Montreal Convention, supra note 1, art. I and IV (making the provisions of the convention applicable to all unlawful attacks against civil aircrafts in flight except when the aircrafts performs a military, customs or police service)

³² Compare id. (covering only attacks against civil aircrafts in flight) with Terrorist Bombings Convention, supra note 1, art. II and III (covering acts of violence against the public or in

public places generally, including attacks against public transportation instrumentalities and conveyances). See W. Michael Reisman, International Legal Responses to Terrorism, **Hous. J. Int'l L.**, Fall 1999, at 3, 27 (proposing that the Terrorist Bombings Convention is different from previous counter-terrorism conventions in that it criminalizes a terrorist technique rather than specific terrorist acts).

³³ See Terrorist Bombings Convention, supra note 1, art. I, ¶ 6 (establishing that the phrase "public transportation systems" covers all facilities, conveyances and instrumentalities, whether publicly or privately owned, used to deliver transportation services to the public).

³⁴ See Montreal Convention, supra note 1, art. V, ¶ 2 (directing states to establish jurisdiction over the offender when they do not extradite him to another state with jurisdiction under the convention to prosecute the offender); Terrorist Bombings Convention, supra note 1, art. VI, ¶ 4 (same).

³⁵ Compare Montreal Convention, supra note 1, art. VI, ¶¶ 1 and 2 (requiring a preliminary inquiry into the facts when a state, upon receiving information that an alleged offender is in its territory, takes the suspect into custody) with Terrorist Bombings Convention, supra note 1, art. VII, ¶¶ 1, 2 and 6 (requiring states to conduct an investigation of the facts upon

receiving information that an alleged offender is in their territory whether or not they detain the suspect).

³⁶ Compare Terrorist Bombings Convention, supra note 1, art. IX (requiring states to consider the provisions of any extradition treaty or other agreement among them to be modified to the extent that they are incompatible with the convention) with Montreal Convention, supra note 1, art. VIII (lacking an equivalent provision).

³⁷ See Montreal Convention, supra note 1, art. VIII (providing that states which make extradition conditional on the existence of an extradition treaty may consider the convention as legal grounds for extradition in cases where they receive an extradition request from a state with which they do not have an extradition treaty); Terrorist Bombings Convention, supra note 1, art. IX (directing states to consider, if necessary, any covered offence to have taken place not only where the offence actually occurred but also in the territory of parties with jurisdiction under the convention).

³⁸ Compare Terrorist Bombings Convention, supra note 1, art. VIII, ¶ 2 (providing that in cases where the requested state only extradites its nationals subject to a condition that the requesting state will return them to serve their sentences in the requested state, such an arrangements will satisfy the

requested state's duty to extradite or prosecute) with Montreal Convention, supra note 1, art. VII (lacking a similar provision).

³⁹ Compare Montreal Convention, supra note 1, art. XI (stating that the law of the state which receives a request for assistance applies in all circumstances) with Terrorist Bombings Convention, supra note 1, art. X (directing states to provide one another assistance in conformity with any mutual legal assistance treaties or arrangements existing among them or, in cases where no such treaties or arrangements exist, in accordance with their domestic law).

⁴⁰ See Organization of American States, Department of International Legal Affairs, A-66: Inter-American Convention against Terrorism, http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/DIL/treaties_and_agreements.htm (last visited Mar. 17, 2006) (showing the United States and Venezuela as parties to the convention).

⁴¹ See id. (showing that the Inter-American Convention entered into force on July 10, 2003, and Venezuela and the United States ratified the convention on October 22, 2003, and November 2, 2005, respectively).

⁴² See Inter-American Convention, supra note 1, art. II, ¶ 1(b) and ¶ 1(i) (stating that offences under the Montreal Convention and Terrorist Bombings Convention, among other counter-terrorism instruments, are also offences under the Inter-American Convention). States parties must afford one another expeditious assistance in conformity with applicable international agreements in force among them or, in the absence of such agreements, in accordance with their domestic law. Id., art. IX.

⁴³ See 18 **U.S.C.S.** § 32 (LexisNexis 2006) (establishing jurisdiction over offences under the Montreal Convention when they occur outside the United States against a foreign-registered aircraft if the offender is a national of the United States or is found in the United States, or if a national of the United States was or would have been on board the targeted aircraft); 18 **U.S.C.S.** § 2332f (LexisNexis 2006) (establishing jurisdiction over offences under the Terrorist Bombings Convention which take place outside the United States when the perpetrator is found in the United States).

⁴⁴ See United States v. Lei Shi, 396 F. Supp. 2d 1132, 1135-36 (D. Haw. 2003), recons. denied, 396 F. Supp. 2d 1132 (D. Haw. 2005) (stating that under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, an

international instrument similar to the Montreal and Terrorist Bombings conventions, the United States has discretion whether to extradite an offender or prosecute him in domestic courts).

⁴⁵ See Lei Shi, 396 F. Supp. 2d at 1135-36 (commenting that the United States could extradite the offender to China, his country of nationality, or the Republic of Seychelles, where the ship that the offender attacked was registered, but the United States could also exercise jurisdiction and prosecute the offender in its domestic courts).

⁴⁶ See U.S. Dep't of Justice, United States Attorneys' Manual [hereinafter USAM] 9-612 (1997) (stating that all United States extradition treaties require states to submit their extradition requests to the Department of State).

⁴⁷ See id. (indicating that the Department of State also examines the extradition request to identify potential foreign policy implications).

⁴⁸ See id. (explaining that if the extradition request is in proper order, the Office of the Legal Adviser of the Department of State forwards it to the OIA along with a certificate attesting to the existence of a treaty and the propriety of the request).

⁴⁹ See id., 9-613 (indicating that the OIA also conducts a second check to make sure that the request satisfies all the pertinent formalities).

⁵⁰ See id. (stating that the OIA, after evaluating the evidence supporting the allegations in the extradition request, forwards the request to the United States attorney in the district where the person subject to the request is present for the purpose of initiating extradition proceedings before a magistrate). The OIA advises prosecutors at every stage of the extradition process. Id.

⁵¹ See 18 **U.S.C.S.** § 3184 (LexisNexis 2006) (providing that, upon a finding that the evidence is sufficient to support the charges against the person subject to extradition, the magistrate may issue a warrant for the arrest of such person if the person is not yet in custody). See also Barapind v. Reno, 225 F.3d 1100, 1105 (9th Cir. 2000) (discussing the duties of the magistrate judge in extradition matters and noting that, in addition to conducting a probable cause inquiry, the magistrate must assess whether any provisions of the instrument on which the requesting state bases the extradition request effectively bar the extradition).

⁵² See 18 **U.S.C.S.** § 3184 (indicating that the magistrate forwards the certificate of extraditability to the Department of State along with a copy of the testimony given in the case).

⁵³ See 18 **U.S.C.S.** § 3184 (LexisNexis 2006) (providing that the Department of State may deliver the extraditable person to the requesting country); Barapind, 225 F.3d at 1105 (explaining that the Secretary of State, out of humanitarian or other considerations, may refuse to extradite a person otherwise extraditable). Barapind further explains that in some cases, particularly those where extradition would violate the Convention against Torture, the courts may review a Secretary of State's decision to extradite). Id. at 1106. See generally **M. Cherif Bassiouni, International Extradition: United States Law and Practice** Ch. IX (4th ed., Oceana Publications Inc. 2002) (providing an in depth description and analysis of United States extradition procedures).

⁵⁴ See Montreal Convention, supra note 1, art. VI (requiring no specific methods or channels for countries to raise allegations that a terrorist is present in the territory of a state party to the convention); Terrorist Bombings Convention, supra note 1, arts. VII and XV (requiring states to cooperate in the prevention of terrorism by exchanging information whenever possible concerning the presence of terrorists or terrorist

organizations in their territories, but making no specifications about the methods or channels of communication that states should use in carrying out this obligation). See also Inter-American Convention, supra note 1, art. VIII (mandating states to establish and enhance channels of communication to facilitate expeditious exchange of information concerning offences under the Montreal and Terrorist Bombings conventions among other instruments).

⁵⁵ See 50 **U.S.C.S.** § 403-5d (LexisNexis 2006) (authorizing the transfer of foreign intelligence information to different domestic agencies for the purpose of investigating threats of terrorism).

⁵⁶ See USAM, supra note 51, 9-613 (indicating that the OIA reviews the evidence submitted with the extradition request to determine whether it supports probable cause to believe that the facts alleged in the request constitute an extraditable offence and the person sought in extradition committed the offence).

See also Ethal A. Nadelmann, The Evolution of United States Involvement in the International Rendition of Fugitive Criminals, 25 **N.Y.U. J. Int'l L. & Pol.** 813, 818-20 (1993)

(examining the formation and development of the OIA as the central office dealing with extradition and other international law matters); Bassiouni, supra note 53, at 760 (observing that

the OIA deals with all issues of cooperation in criminal matters among states).

⁵⁷ See USAM, supra note 51, 9-613 (noting that the OIA investigates and evaluates the evidence submitted in support of a request for extradition and acts on the weight and credibility of the evidence).

⁵⁸ See generally 18 **U.S.C.S** 3181-96 (LexisNexis 2006) (imposing no time requirements on the OIA concerning the processing of extradition requests); USAM, supra note 51, 9-602-22 (same).

⁵⁹ See 18 **U.S.C.S** 3181-96 (LexisNexis 2006); USAM, supra note 51, 9-602-22.

⁶⁰ See Montreal Convention, supra note 1, arts. I and IV, ¶¶ 2-3 (making the provisions of the convention applicable in all situations where the offender is in a state other than the state of registration of the aircraft or the state where the offence takes place).

⁶¹ See id., pmb1. (announcing that the purpose of the convention is to facilitate appropriate measures for the punishments of those who commit unlawful acts of violence against civil aircrafts or passengers within). See also Joyner, supra note 1, at 513 (explaining that during the 1960s the threat of terrorists targeting international flights became a serious concern to the members of the International Civil Aviation

Organization, and this concern prompted the negotiation and drafting of the Montreal Convention); Paul Stephen Dempsey, Aviation Security: The Role of Law in the War against Terrorism, 41 **Colum. J. Transnat'l L.** 649, 651-57 (reviewing the history of hijackings and other violent attacks against civil aircrafts that gave birth to the Montreal Convention and its predecessor the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft).

⁶² See Terrorist Bombings Convention, supra note 1, art. II (criminalizing violent attacks against public transportation systems). The Terrorist Bombings Convention provides a comprehensive legal framework covering terrorist acts that already constitute offences under other counter-terrorism conventions. Id., pmb1.

⁶³ Id., art. II.

⁶⁴ Id., art. I, ¶ 6.

⁶⁵ See Perez v. United States, 402 U.S. 146, 1150 (1971) (mentioning aircrafts as instrumentalities of interstate commerce); Tom Lyons, This Terrorist Suspect Has Much Reason to Feel Welcome in Florida, **Sarasota Herald-Trib.**, May 19, 2005, at B (noting that the Cuban civil airplane that exploded over Barbados in 1976 was bringing home young Cuban athletes).

⁶⁶ See United Nations Office on Drugs and Crime, Chapter Four: Montreal Convention, at 90, 95, http://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_4.pdf (last visited Mar. 17, 2006) (showing that the Montreal Convention entered into force between the United States and Venezuela in November of 1983); United Nations Treaty Collection, International Convention for the Suppression of Terrorist Bombings, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Mar. 17, 2006) (showing that the Terrorist Bombings Convention entered into force between the United States and Venezuela on September 23, 2003); discussion infra Part III (a) (arguing that because extradition treaties generally apply retroactively and the Montreal and Terrorist Bombings conventions focus on extradition as a tool to bring terrorists to justice, the Montreal and Terrorist Bombings conventions apply to offences that took place before the conventions entered into force).

⁶⁷ See *Oppenheim v. Hecht*, 16 F.2d 955, 956 (2d. Cir. 1927) (stating that extradition treaties apply to offences that take place prior to the treaty's entry into force in the absence of a provision to the contrary); *In the Matter of the Extradition of Othmar Ernst*, 1998 U.S. Dist. LEXIS 710, at *38 (D. S.D.N.Y.

1998) (commenting that for more than a century the law has been that extradition treaties can be enacted or modified with retroactive effect).

⁶⁸ See Reisman supra, note 32, at 22, 28 (proposing that the Montreal Convention and the Terrorist Bombings Convention are primarily extradition and judicial assistance treaties).

⁶⁹ See Montreal Convention, supra note 1, arts. VII and VIII (establishing a duty to extradite or prosecute and providing that states can rely upon the convention as legal basis for extradition among themselves); Terrorist Bombings Convention, supra note 1, arts. XIII and IX (same). See also Joyner, supra note 1, at 502 (observing that in nearly all of the counter-terrorism conventions, extradition takes the central role in law enforcement).

⁷⁰ Montreal Convention, supra note 1, art. VIII, ¶ 1; Terrorist Bombings Convention, supra note 1, art. IX, ¶ 1.

⁷¹ See Montreal Convention, supra note 1, art. VI, ¶¶ 1 and 2 (mandating states immediately to make a preliminary inquiry into the facts when they take an alleged offender into custody); Terrorist Bombings Convention, supra note 1, art. VII, ¶¶ 1, 2 and 6 (requiring states parties to conduct an investigation of the facts upon receiving information that an alleged offender is in their territory even if they do not detain the suspect).

⁷² See *Oppenheim v. Hecht*, 16 F.2d 955, 956 (2d. Cir. 1927) (noting that extradition treaties apply retroactively in the absence of a provision to the contrary); *In the Matter of the Extradition of Othmar Ernst*, 1998 U.S. Dist. LEXIS 710, at *38 (D. S.D.N.Y. 1998) (commenting states can conclude or modify extradition treaties with retroactive effect). See generally *Montreal Convention*, supra note 1, arts. VII and VIII (giving extradition a central role in bringing terrorists to justice); *Terrorist Bombings Convention*, supra note 1, art. VIII and IX (same). See also *Reisman supra*, note 32, at 22, 28 (proposing that the Montreal Convention and the Terrorist Bombings Convention focus primarily on extradition); *Joyner*, supra note 1, at 502 (observing that extradition is central to all of the counter-terrorism conventions).

⁷³ See *Convention on the Law of Treaties*, [hereinafter *Vienna Convention*], art. XXXI, Jul. 1969, 8 I.L.M. 679 (establishing that for the purpose of interpretation of treaties, the context of a treaty comprises the text, including its preamble and annexes, and any agreements which the parties made in connection with the treaty).

⁷⁴ See *Montreal Convention*, supra note 1, pmb1. (speaking of an urgent need for effective measures to punish terrorists in order to deter future terrorist attacks); *Terrorist Bombings*

Convention, supra note 1, pmbl. (emphasizing the need for a comprehensive legal framework which will enhance cooperation among states in the prevention and punishment of terrorists). See also Joyner, supra note 1, at 539 (commenting that the end goal of the counter-terrorism conventions is the apprehension, prosecution and punishment of terrorists); Paul Stephen Dempsey, Aviation Security: The Role of Law in the War Against Terrorism, 41 **Colum. J. Transnat'l L.** 649, 732 (2003) (observing that the counter-terrorism conventions' reduction of the number of potential safe havens for terrorists appears to have contributed to a decline of aerial terrorism).

⁷⁵ See Inter-American Convention, supra note 1, arts. II (b), II (i), and IX (requiring states to provide one another "the greatest measure of expeditious mutual legal assistance" in connection with the investigation and prosecution of offences under the Montreal Convention and Terrorist Bombings Convention among other counter-terrorism instruments).

⁷⁶ See discussion infra Part III (b) (arguing that the language of the conventions, when analyzed in light of the objective to deter terrorism by bringing terrorists to justice and the obligation of the United States and Venezuela under the Inter-American Convention to afford one another expeditious assistance, supports the interpretation that the duty to

investigate and report requires the United States to investigate and report in an expeditious manner).

⁷⁷ See Montreal Convention, supra note 1, pmb1. (expressing a need to punish terrorists to deter future terrorist attacks); Terrorist Bombings Convention, supra note 1, pmb1. (calling for the enhancement inter-state cooperation in the prevention and punishment of terrorists). See also Joyner, supra note 1, at 539 (noting that the goal of the counter-terrorism conventions is the apprehension, prosecution and punishment of terrorists); Barry Kellman and David S. Gualtieri, Barricading the Nuclear Window: A Legal Regime to Curtail Nuclear Smuggling, 1996 **U. Ill. L. Rev.** 667, 730 (1996) (suggesting that the goal of the duty to extradite or prosecute of the counter-terrorism conventions is to eliminate safe havens for terrorists); Dempsey, supra note 66, at 732 (observing that the counter-terrorism conventions' reduction of the number of potential safe havens for terrorists appears to have contributed to a decline in aerial terrorism).

⁷⁸ See Kellman and Gualtieri, supra note 82, at 730 (explaining that the duty to extradite or prosecute of the counter-terrorism conventions seek to eliminate safe havens for terrorists); Grant, supra note 2, at 458 (suggesting that unless states undertake to prosecute or extradite in good faith, the

prosecute-or-extradite formula fails to accomplish its objective of bringing offenders to justice); Joyner, supra note 1, at 539-40 (proposing that the critical ingredient for the success of the anti-terrorism regime is political will to convert international obligations into practice).

⁷⁹ See Unwelcome Visitor, supra note 6 (suggesting that failure to investigate Venezuela's allegations and either prosecute or extradite Posada Carriles will make a mockery of the United States' stance on terrorism and seriously jeopardize America's credibility); Curt Anderson, supra note 6 (proposing that Posada Carriles' presence in the United States threatens to undermine the credibility of American foreign policy in the war on terror).

⁸⁰ See text accompanying note 4 (suggesting that failure to prosecute or extradite terror suspects will undermine the effectiveness of the international anti-terrorism regime).

⁸¹ See Inter-American Convention, supra note 1, arts. II (b), II (i), and IX (providing that states must carry out the obligation to afford one another expeditious assistance in accordance with mutual assistance agreements in force between them, or in accordance with their domestic laws when no such agreements exist).

⁸² Inter-American Convention, supra note 1, art. IX; Vienna Convention, supra note 79, art. XXXI, ¶ 3 (c). See Oil Platforms (Iran v. U.S.), 2003 I.C.J. LEXIS 11, 49-50 (Nov. 6, 2003) (deciding that the application of relevant rules of international law in force between the parties to the dispute constitute an integral part of the International Court of Justice's task of interpreting the treaty at issue); Coard et al. v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L./V/II/106, doc. 6 rev. ¶ 40 (1999) (citing article 31(3)(c) of the Vienna Convention as support for a the proposition that the Inter-American Commission on Human Rights interprets international instruments in light of the international legal system in force at the time of the interpretation).

⁸³ Inter-American Convention, supra note 1, art. IX.

⁸⁴ See Montreal Convention, supra note 1, art. VI (directly states to "immediately make a preliminary inquiry into the facts" when they suspect the presence of a terrorist in their territory).

⁸⁵ See id. (mandating the state where the alleged terrorist is in custody to notify other states with jurisdiction over him of the alleged terrorist's arrest and the reasons for his detention).

⁸⁶ See id. (requiring also that the state conducting the investigation communicate to other states parties with jurisdiction over the suspect whether or not it will exercise jurisdiction).

⁸⁷ See id. (providing also that custody of the alleged terrorist may continue only for such time as is necessary to initiate criminal or extradition proceedings against him). See also Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 122-23 (Apr. 14, 1992) (noting that after a grand jury of the United States indicted two Libyan citizens for the 1988 bombing of a civil aircraft over Lockerbie, Scotland, the United States and the United Kingdom issued a declaration calling on Libya to investigate the bombings and disclose promptly and in full all that it knows about the downing of the aircraft); S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992) (urging Libya to comply immediately with the United States and the United Kingdom's request to investigate and disclose promptly the circumstances of the Lockerbie terrorist attack).

⁸⁸ Montreal Convention, supra note 1, art. VI; Inter-American Convention, supra note 1, art. IX.

⁸⁹ Terrorist Bombings Convention, supra note 1, art. VII, ¶ 1.

⁹⁰ Compare Montreal Convention, supra note 1, art. VI (using the adverb “immediately” to qualify the action that states must take) with Terrorist Bombings Convention, supra note 1, art. VII, ¶ 1 (lacking a similar qualifier).

⁹¹ See generally 18 **U.S.C.S** 3181-96 (LexisNexis 2006) (containing no duty to investigate expeditiously or within any specified time period); USAM, supra note 51, 9-602-22 (same).

⁹² See text accompanying note 79 (explaining that the objective of the Terrorist Bombings Convention is to deter acts of terrorism by bringing terrorists to justice).

⁹³ Terrorist Bombings Convention, supra note 1, art. VII; Inter-American Convention, supra note 1, art. IX.

⁹⁴ Compare Terrorist Bombings Convention, supra note 1, art. VII, ¶ 6 (“The State which makes the investigation...shall promptly inform” other states parties with possible jurisdiction over the suspect of the results of the investigation) with Montreal Convention, supra note 1, art. VI, ¶ 4 (“The State which makes the preliminary inquiry...shall promptly report its findings” to other states parties with possible jurisdiction over the suspect).

⁹⁵ See Terrorist Bombings Convention, supra note 1, art. VII, ¶ 6 (requiring also that the state conducting the inquiry indicate

to other states with jurisdiction over the suspect whether or not it intends to exercise jurisdiction).

⁹⁶ Id.

⁹⁷ See generally In the Matter of Luis Posada Carriles, A-12-419-708, U.S. Immigr. Ct., El Paso, Tx. (Sept. 28, 2005), available at http://lawprofessors.typepad.com/immigration/files/POSADA_DECISION3_9-26-05.pdf (addressing only the issue whether Posada Carriles more likely than not would suffer torture if deported to Venezuela). The court did not inquire into Venezuela's allegations that Posada Carriles masterminded the 1976 Cuban plane bombing. Id.

⁹⁸ See id. (analyzing only the credibility of the testimonies about the likelihood that Posada Carriles would suffer torture if deported to Venezuela).

⁹⁹ See id. at 3 (showing that the DHS presented no evidence of any kind in the deferral of removal hearing); Montreal Convention, supra note 1, art. VI, ¶¶ 1 and 2 (requiring states to make a preliminary inquiry into the facts upon receiving information that an alleged offender is in their territory); Terrorist Bombings Convention, supra note 1, art. VII, ¶¶ 1, 2 and 6 (requiring states to investigate any information that an alleged terrorist is in their territory).

¹⁰⁰ See generally 18 **U.S.C.S** 3181-96 (LexisNexis 2006)

(containing no provision which indicates that a decision of an immigration court is binding upon the State Department or the DOJ in extradition proceedings); USAM, supra note 51, 9-602-22 (same). See also Bassiouni, supra note 61, at 174 (commenting that a finding of political persecution by immigration authorities has no binding effect on extradition proceedings, and a similar decision by an extradition magistrate has no binding effect on deportation or asylum proceedings).

¹⁰¹ See Bassiouni, supra note 61, at 174 (criticizing the fact that asylum proceedings, including withholding of removal, and extradition proceedings overlap and address common issues without legislative coordination). Professor Bassiouni points out that even though deportation proceedings have no binding effect on an extradition magistrate's decision that a person is extraditable and vice versa, a finding by immigration authorities that an alien would face persecution if deported binds the executive in the final decision whether to extradite such alien to the country where he would face persecution. Id. at 174-75.

¹⁰² See USAM, supra note 51, 9-613 (indicating that the OIA reviews the evidence submitted with the extradition request to determine whether it supports probable cause to believe that the

facts alleged in the request constitute an extraditable offence and the person sought in extradition committed the offence). See also Nadelmann, supra note 56, at 818-20 (examining the formation and development of the OIA as the central office dealing with extradition and other international law matters); Bassiouni, supra note 53, at 760 (observing that the OIA deals with all issues of cooperation in criminal matters among states).

¹⁰³ See generally 18 **U.S.C.S** 3181-96 (LexisNexis 2006) (imposing no time requirements on the OIA regarding the processing of extradition requests); USAM, supra note 51, 9-602-22 (same); discussion infra Part III (d) (contending that because the DHS may deport Posada Carriles to a country other than Venezuela or Cuba at any time, the OIA's timing in investigating the allegations that Venezuela raised in the extradition request is at odds with the obligation to investigate and report in an expeditious manner).

¹⁰⁴ See U.S. Seeks a Country That Will Take Cuban, **Belleville News Democrat**, Mar. 23, 2006, at A (reporting that Posada Carriles will remain in immigration detention while efforts to send him to a third country continue); Venezuela Reclama a EEUU Extradicion del "Bin Laden Latinoamericano", supra note 10

(quoting the Venezuelan ambassador alleging that the OIA is ignoring the extradition request).

¹⁰⁵ See 18 **U.S.C.S.** § 32(b)(4) (LexisNexis 2006) (establishing jurisdiction over offences under the Montreal Convention when the offender is found in the United States); 18 **U.S.C.S.** § 2332f(2)(c) (LexisNexis 2006) (establishing jurisdiction over offences under the Terrorist Bombings Convention when the perpetrator is found in the United States); In the Matter of Luis Posada Carriles, A-12-419-708, U.S. Immigr. Ct., El Paso, Tx. (Sept. 28, 2005) at 5, available at http://lawprofessors.typepad.com/immigration/files/POSADA_DECISION3_9-26-05.pdf (mentioning no connection between the 1976 plane bombing and the United States other than the alleged perpetrator's presence in the United States).

Compare Montreal Convention, supra note 1, art. V, ¶ 2

(directing states parties to establish jurisdiction when they do not extradite the alleged offender to any other country) with Terrorist Bombings Convention, supra note 1, art. VI, ¶ 4 (mandating states parties to establish jurisdiction when they do not extradite the alleged offender to another state party that has established jurisdiction over the alleged offender pursuant to article VI of the convention).

¹⁰⁶ See U.S. Seeks a Country That Will Take Cuban, supra note 109 (reporting that the DHS may soon deport Posada Carriles).

¹⁰⁷ See Grant, supra note 2 (suggesting that the duty to investigate is a necessary ingredient of the duty to extradite or prosecute); text accompanying note 82 (commenting that the objective of the Montreal and Terrorist Bombings conventions is to prevent and deter terrorism by bringing terrorists to justice).

¹⁰⁸ See U.S. Seeks a Country That Will Take Cuban, supra note 109 (indicating Posada Carriles may soon not be present in the United States); Venezuelan Diplomat Calls on U.S. to Extradite Cuban Militant, supra note 113 (noting that Venezuela is still unsuccessfully calling for Posada Carriles' extradition). See also discussion supra Part III (b) (contending that unless states undertake to investigate expeditiously allegations that a terrorist is in their territory, they will fail to achieve the objective of the Montreal and Terrorist Bombings conventions of bringing terrorists to justice).

¹⁰⁹ See Montreal Convention, supra note 1, art. VI, ¶¶ 1 and 2 (creating a duty to investigate allegations that a terrorist is present in the territory of a state party); Terrorist Bombings Convention, supra note 1, art. VII, ¶¶ 1, 2 and 6 (same). See also discussion supra Part III (d) (arguing that the United

States is in violation of the duty to investigate and report); discussion infra Part IV (b) (contending that unless the United States takes prompt action to investigate Venezuela's allegations and report the findings, the United States will also be in violation of the duty to extradite or prosecute).

¹¹⁰ See USAM, supra note 51, 9-613 (indicating that the OIA reviews extradition requests to determine whether they support probable cause and then decides whether to bring extradition proceedings before a federal magistrate); Venezuela Reclama a EEUU Extradicion del "Bin Laden Latinoamericano", supra note 10 (reporting that Venezuela alleges that the OIA is ignoring the extradition request).

¹¹¹ See text accompanying note 12 (reporting Venezuela's complaint that the Department of State has failed to communicate with Venezuela regarding the extradition request).

¹¹² See discussion infra Part IV (b) (proposing that if the DHS deports Posada Carriles to a third country without a decision by the OIA that the charges against him lack evidentiary support, the United States would have let an alleged terrorist go free, thus violating the duty to extradite or prosecute).

¹¹³ See discussion infra Part IV (c) (arguing that the United States should codify the duty to investigate and report to avoid

being in violation of this international obligation in the future).

¹¹⁴ See USAM, supra note 51, 9-613 (stating that the OIA examines the evidence submitted with an extradition request to determine whether it supports probable cause to believe that the person sought in extradition committed the offence for which he is wanted).

¹¹⁵ See Montreal Convention, supra note 1, art. VI, ¶¶ 1 and 2 (imposing a duty on states to investigate allegations that a terrorist is present in their territory); Terrorist Bombings Convention, supra note 1, art. VII, ¶¶ 1, 2 and 6 (same).

¹¹⁶ See Montreal Convention, supra note 1, art. VI, ¶¶ 3 and 4 (imposing several obligations on states parties to communicate with one another regarding the investigation of terrorists); Terrorist Bombings Convention, supra note 1, art. VII, ¶¶ 1, 2 and 6 (same). See also Montreal Convention, supra note 1, art. X (requiring states to afford one another the greatest degree of cooperation); Terrorist Bombings Convention, supra note 1, art. X (same).

¹¹⁷ See Montreal Convention, supra note 1, art. VI, ¶¶ 3 and 4 (imposing an obligation on states parties to report the results of their investigations); Terrorist Bombings Convention, supra note 1, art. VII, ¶ 6 (same).

¹¹⁸ See 18 **U.S.C.S.** § 3184 (LexisNexis 2006) (requiring a finding of probable cause by a magistrate before the Department of State may surrender any person in extradition).

¹¹⁹ Montreal Convention, supra note 1, art. VI; Terrorist Bombings Convention, supra note 1, art. VII.

¹²⁰ See Montreal Convention, supra note 1, art. VII (obliging the state party where the alleged terrorist is present to extradite or prosecute the alleged terrorist); Terrorist Bombings Convention, supra note 1, art. VIII (same); discussion infra Part IV (b) (arguing that if the DHS deports Posada Carriles without a decision by the OIA that the charges against him are unfounded, the United States would have let an alleged terrorist go free, thus violating the duty to extradite or prosecute)

¹²¹ See USAM, supra note 51, 9-613 (indicating that the OIA examines the evidence submitted in support of extradition requests and draws conclusions about their weight and credibility).

¹²² See text accompanying note 2 (proposing that the goal of the duty to extradite or prosecute is to bring terrorists to justice).

¹²³ See Montreal Convention, supra note 1, art. VII (requiring the state party where the alleged terrorist is present to extradite or prosecute the alleged terrorist); Terrorist

Bombings Convention, supra note 1, art. VIII (same); text accompanying note 2 (proposing that the goal of the duty to extradite or prosecute is to bring terrorists to justice).

¹²⁴ See generally 18 **U.S.C.S** 3181-96 (LexisNexis 2006) (containing no provisions requiring the OIA to process extradition requests within a specified period of time); USAM, supra note 51, 9-602-22 (same).

¹²⁵ See generally 18 **U.S.C.S** 3181-96 (LexisNexis 2006) (containing no provisions requiring the OIA to inform the requesting state of the results of the investigation of the allegations raised in the request for extradition); USAM, supra note 51, 9-602-22 (same).

¹²⁶ See generally Montreal Convention, supra note 1, art. VI (making no specifications as to what type of domestic authority should investigate and report); Terrorist Bombings Convention, supra note 1, art. VII, ¶ 6 (same). See also discussion supra Part II (b) (noting that when a country raises allegations that an alleged terrorist is in the United States through channels other than a formal request for extradition, the OIA may not be in charge of conducting an investigation and making a report).

¹²⁷ See discussion supra Part III (d) (contending that the OIA has unnecessarily delayed the investigation of Venezuela's allegations against Posada Carriles).

¹²⁸ See text accompanying note 4 (explaining that unless countries show political will to bring terrorists to justice, the international counter-terrorism regime fails as a legal tool to bring states together in the war on terror); text accompanying note 6 (suggesting that the Posada Carriles case has damaged the credibility of the United States in the war on terror).

¹²⁹ See discussion supra Part III (d) (arguing that the OIA's lack of action in the Posada Carriles case despite ongoing efforts by the DHS to deport Posada Carriles to a country other than Venezuela puts the United States in violation of the duty to conduct an expeditious investigation).

¹³⁰ See text accompanying note 6 (predicting that the Posada Carriles case will seriously damage the credibility of the United States' efforts to fight terrorism).

¹³¹ See text accompanying note 5 (expressing fear that states may easily disregard the international counter-terrorism regime out of frustration or lack of domestic political support).