

LEGAL NOTE ON BANK INVOLVEMENT IN THE CRIMINAL JUSTICE SECTOR

Anne-Marie Leroy
Senior Vice President and Group General Counsel

February 9, 2012

I. INTRODUCTION

1. The Bank's¹ member countries have shown growing interest in Bank support for improved governance in the criminal justice sector. Both formal and informal requests have been presented for the Bank to become involved in various aspects of the criminal justice sector. At the same time, crime and violence have become increasingly recognized as development issues, and other multilateral development banks (MDBs) and multilateral and bilateral development agencies have become actively involved in the criminal justice sector.

2. More recently, the 2011 World Development Report: Conflict, Security and Development (WDR 2011) has highlighted how criminal violence undermines development outcomes and the need to build capable institutions to deliver citizen security. The Bank's program for operationalizing the WDR 2011 calls on the Bank "to position fragility, conflict, and violence at the core of its development mandate and to significantly adjust its operations model while remaining within its established mandate and focusing on development and poverty reduction".²

3. Justice reform writ large has long been recognized as forming part of the Bank's mandate, integral both to equitable and sustainable development and the reduction of poverty. But while the Bank has been engaged in justice reform for over twenty years, the Bank has only more recently become involved in the criminal justice sector as a logical continuation of its overall justice reform work.

4. Building on work begun under former General Counsel Roberto Dañino, the analysis below provides a general legal framework for determining which interventions³ by the Bank in this sector would fall within the Bank's mandate under its Articles of

¹ In this Note, unless the context otherwise requires, references to the "Bank" include both the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA); the "Executive Directors" means the Executive Directors of both IDA and IBRD; and the "Articles" or the "Articles of Agreement" mean both IDA's and IBRD's Articles of Agreement.

² World Bank Staff Paper "Operationalizing the 2011 World Development Report: Conflict, Security and Development" 2011, at page iii. In discussing the WDR and Staff Paper, an Executive Director has requested that LEG share its views on the legal parameters for the Bank's involvement in the criminal justice sector

³ For purposes of this Note, the terms "involvement" and "intervention" are used in their broadest sense to include all Bank activities and Bank-supported activities, including lending, grants, trust funds, donor and aid coordination, research and economic and sector work, all of which are subject to the Articles' provisions.

Agreement. While noting that Bank decisions to engage in the sector should be based on strategy, policy and operational considerations, this Note outlines some operational steps that would address the legal considerations relevant for particular activities. Specifically, this Note defines the criminal justice sector and analyzes the relevant provisions of the Articles and the main legal considerations applicable to the Bank's involvement in the criminal justice sector that can be inferred from these provisions. This Note concludes that interventions in the criminal justice sector are not precluded under the Bank's mandate, provided that proposed interventions are grounded in an appropriate and objective economic rationale and are structured so as to avoid interference in the political affairs of a member country.

II. LEGAL CONSIDERATIONS

A. Criminal Justice Sector

5. As a threshold issue, it will be useful to define the parameters of the criminal justice sector for purposes of this Note. A country's criminal justice sector is understood by scholars and practitioners to comprise all of the institutions, processes and services responsible for the prevention, investigation, adjudication, treatment, and response to illegal behaviors. The sector includes the institutions traditionally associated with it, such as police, prosecutors, public defenders, courts, and corrections, as well as a wide range of other institutions such as private police, victim services, private lawyers and bar associations, human rights and ombudsman's offices, addiction and other treatment programs as well as community engagement and service programs.⁴

6. Scholars and practitioners today generally accept that the criminal justice sector as a whole is expected to deliver both safety and justice for all members of society in the form of enforcement as well as prevention, while producing a legally appropriate resolution of each case brought to the formal or informal system.⁵ Contemporary practitioners and others in the development community treat the criminal justice sector as a means for the delivery of services to the public in the areas of safety, conflict resolution as well as individual and community development, and as a central part of the everyday meaning of the rule of law and good governance.⁶ This service orientation has changed

⁴ Contemporary public management and scholarship focuses on the *functions* rather than the *institutions* of the criminal justice sector because no single institution has a monopoly on any function. Policing, for example, can be undertaken by municipal, state or national police agencies, as well as by community groups and private security firms. And in many countries, large numbers of the poor rely on traditional or informal police structures only loosely connected, if at all, to the formal state police. *See, for example*, Bruce Baker, "Post-War Policing by Communities in Sierra Leone, Liberia, Rwanda", 3 *Democracy and Security* 215 (2007); *see also* World Bank, "Violence in the City: Understanding and Supporting Community Response to Urban Violence", Social Development Department Conflict, Crime and Violence Team, 2010.

⁵ *See generally* Workshop on Criminal Justice Reform Highlights Need for Restorative Justice as Alternative to Prison: Measures Discussed Include Mediation, Conciliation, Compensation for Victims, Community Services, Eleventh UN Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand (April, 2005).

⁶ *See* Jeremy Wilson, "Law and Order in an Emerging Democracy: Lessons from the Reconstruction of Kosovo's Police and Justice Systems", 605 *Annals of the American Academy of Political and Social*

priorities within the sector: raising the priority of tasks that contribute to these goals, while reducing the resources devoted to individual cases unlikely to contribute to either safety or justice. It also has increased attention to sector-wide coherence, early intervention, governance and accountability.

B. The Bank's Mandate

7. Article I of IBRD's Articles of Agreement states that the purposes of the Bank include, among other things, assistance "in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including...the encouragement of the development of productive facilities and resources in less developed countries." Article I further provides that the Bank shall facilitate the investment of capital and promote foreign investment and international trade, all for "productive purposes." An additional objective of international investment to be encouraged by the Bank is "assisting in raising productivity, the standard of living and conditions of labor" in members' territories.

8. Article I of IDA's Articles of Agreement states that the purposes of the Association are "to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world included within the Association's membership."

9. The interpretation of these purposes has evolved to meet the needs of a broader concept of development and the changing demands of the Bank's members. Interpretation has been purposive, guided by a broad view of the objectives under the Articles and examined against the evolving understanding of development. This interpretative approach remains guided by the principles of "effectiveness (*effet utile*), reasonableness, good faith and the common interests of the organization and its members as a whole."⁷

10. The concept of development itself has evolved substantially over the past 60 years and along with it the Bank's mission. As currently defined, the Bank's mission consists of the alleviation of poverty⁸ through economic growth and equity within a society.⁹ This approach to the alleviation of poverty understands poverty as multidimensional. Development is no longer confined to economic development narrowly defined,¹⁰ but encompasses broad areas of human development, social development, education,

Science 152 (2006); see also Paulo Sergio Pinheiro, "Democratic Governance, Violence, and the (Un) Rule of Law", 129 *Daedalus* 119 (2000). See generally Jake Sherman, "Criminal Justice", Background paper prepared for the World Development Report 2011.

⁷ Ibrahim Shihata, "Interpretation as Practiced at the World Bank" in *World Bank Legal Papers* (Boston: Martinus Nijhoff, 2000) (hereinafter, "Legal Papers") at LVIII.

⁸ On poverty and the Bank's mission generally, see *World Development Report 2000/2001: Attacking Poverty* (New York: Oxford University Press, 2000).

⁹ Of general relevance to this is the *World Development Report 2006: Equity and Development* (New York: Oxford University Press, 2005) (hereinafter "WDR 2006").

¹⁰ The World Bank's *Comprehensive Development Framework* (1998) (available at www.worldbank.org); and Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).

protection of global public goods, governance and institutions, as well as issues such as inclusion and cohesion, participation, accountability and equity.¹¹

11. The potential development impact of interventions in criminal justice is supported by ongoing research:

- Crime and violence have become serious obstacles to sustainable economic development.¹² Research has shown that crime and violence lower investment and employment growth.¹³ Business executives in many countries identified the costs of crime and violence (together with corruption) as the second most important impediment to business competitiveness in their countries.¹⁴
- Crime and violence undermine strategies to increase levels of social and human capital, which are key to economic growth.¹⁵ Increased levels of crime and victimization destroy social capital by causing social mistrust, a lack of societal unity, generalized fear and the erosion of social institutions¹⁶—which are all basic conditions for enabling the collective action needed for development.¹⁷

¹¹ See WDR 2006, *supra* note 8.

¹² See Louise Shelley, “Crime as the Defining Problem: Voices of Another Criminology”, *International Annals of Criminology*, Vol. 39, No. 1, 73-88, 78 (2002). See generally Stergios Skaperdas *et al* (eds.), “The Costs of Violence”, World Bank (2009); a UNODC and World Bank study indicated that if Jamaica and Haiti reduced their crime levels to those of Costa Rica, they could increase annual GDP growth by 5.4 percent: UNODC and World Bank, “Crime, Violence and Development: Trends, Costs and Policy Options in the Caribbean” Report no. 37820, March (2007).

¹³ That crime leads to lower levels of investment was clearly underscored in the Bank’s *World Development Report 2005*. See also Alejandro Gaviria, “Assessing the Effects of Corruption and Crime on Firm Performance: Evidence from Latin America”, Fedesarrollo: Fundación para la Educación Superior y el Desarrollo (February 2002). For further reading on the effect of organized crime on economic development, including on access to credit, see Vittorio Daniele, “The Burden of Crime on Development and FDI in Southern Italy”, 45 *The International Spectator* 103 (2010), at 109-115. In a study commissioned by the South African Presidency, for example, businesses that had been affected by crime were found *inter alia* to be 17 to 22 percent less likely to increase employment. See Small Business Project, “The Impact of Crime on Small Businesses in South Africa”, July 2008.

¹⁴ See generally Peter Cornelius (ed.), *The Global Competitiveness Report 2002-2003*, (World Economic Forum 2003). See also World Bank, “The Societal Dynamics of Fragility”, Social Development Department, Conflict, Crime and Violence Team, 2010.

¹⁵ See Edward Glaeser, “The Skilled City,” *The Taubman Center: 2005 Annual Report Highlights – Economic Development*, at 11.

¹⁶ Cathy McIlwaine & Caroline Moser, “Violence and Social Capital in Urban Poor Communities: Perspectives from Colombia and Guatemala,” *J. Int. Dev.* 13, 965-984 (2001); Crime and Development in Africa, United Nations Office on Drugs and Crime (June 2005) at 67-8. For a comprehensive summary and concrete examples of the impact of crime in society, in economy, and on governance see UNODC, “Crime and Development in Central America” May (2007). See also World Bank, “Societal Dynamics of Fragility”, *supra* n. 14.

¹⁷ See generally Christiaan Grootaert and Thierry van Bastelaer, “Understanding and Measuring Social Capital: A Synthesis of Findings and Recommendations from the Social Capital Initiative”, World Bank Social Capital Initiative Working Paper No. 24 (2001); see also Ashutosh Varshney, “Ethnic Conflict and Social Policy”, paper prepared for the World Bank conference on “Redesigning Social Policy for the Developing and Transition Economies”, December 2005, at http://www.princeton.edu/~piirs/calendars/Varshney_paper.pdf.

- Crime and violence have direct and indirect costs (including opportunity costs) that divert funds away from development and other productive activities.¹⁸ Violence in some countries has reached such levels that the costs of crime (including the cost for health services as a result of victimization) represent a significant share of GDP.¹⁹ And, by impeding movement, crime and violence impede possible employment and increase the cost of doing business.²⁰
- Fragile states and those emerging from conflict are often in weak or precarious economic situations, and at the same time frequently experience high rates of crime and violence, which then in turn further impact their weak economies.²¹ As well as being a result of widespread conflict and fragility crime and violence can often evolve out of escalating community conflicts and act as a precursor for growing conflict in a region.²²

12. Research also shows that crime affects the poor disproportionately. Given that the ability to work and earn income is often the most valuable asset of the poor, violent crime not only restricts movement in high crime areas but can also result in a loss of opportunities as businesses choose to relocate.²³ The cost of physical injury caused by

¹⁸ Where there are higher levels of crime, a higher proportion of public investment is diverted towards low return investments ensuring public security rather than investments with higher return such as investment in research and education. See Salvatore Capasso, "Crime, Inequality and Economic Growth", CNR-ISSM CGBCR, University of Manchester CSEF, University of Salerno, 13 (September 2004).

¹⁹ See Shelley, *supra* note 11, at 82. Disparities in GDP per capita before and after civil war in Latin American countries can be found in Paul Collier *et al.*, *Breaking the Conflict Trap, Civil War and Development Policy* (World Bank, 2003) at 14. While measuring the effect of crime is difficult, "[m]aterial costs of crime and violence, including both direct costs and expenditures on criminal justice and crime prevention, have been estimated to comprise a significant fraction of production across different regions of the world. This number is estimated at approximately 2.1 percent of the GDP per year for the United States, and 3.6 percent for Latin America and the Caribbean." See Rodrigo R. Soares, "Welfare Costs of Crime and Common Violence: A Critical Review", in Skaperdas *et al.* (eds.) "The Costs of Violence", *supra* n. 12, at 28. Soares also notes that according to recent data one year of life expectancy lost to violence is associated on average with yearly social costs of 3.8% of the GDP. *Id.* at 29. It has been estimated that Latin America lost up to 14 percent of its GDP to crime and violence during the 1990s: The World Bank, "Urban Crime and Violence in LAC: Status Report on Activities", Latin America and Caribbean Region (2008), at 3.

²⁰ See *Crime and Development in Africa*, United Nations Office on Drugs and Crime [UNODC] (June 2005).

²¹ On the link between crime and violence, and conflict and fragility, see generally Deval Desai and Caroline Sage, "Justice", Background paper prepared for the World Development Report 2011 (forthcoming). See also Jake Sherman, "Criminal Justice", *supra* n. 6. On the cyclical link between violence, economic opportunity and national economies, see generally Douglass North *et al.*, *Violence and Social Orders* (Cambridge University Press, 2009). See also Douglass North *et al.*, "Limited Access Orders in the Developing World: A New Approach to the Problems of Development", World Bank Policy Research Working Paper No. 4359, September (2007).

²² See, for example, *Water pipe sparks Ethiopian conflict* at <http://news.bbc.co.uk/2/hi/africa/7929104.stm>. See also Christine Binzel and Tilman Bruck, "Conflict and Fragility: Findings from the Literature and a Framework for Analysis at the Micro Level, Workshop Paper, German Institute for Economic Research (DIW Berlin) (2007), at 11-12.

²³ See Antoinette Louw & Mark Shaw, "Stolen Opportunities: The Impact of Crime on South Africa's Poor", Monograph No. 14, Institute for Security Studies (July 1997). See also Caroline Moser *et al.*,

criminal acts is greater for those who rely on physical labor to make a living.²⁴ In addition, crime and victimization hinder access to basic services, in particular health and education.

13. Moreover, support for the criminal justice sector can play an important complementary role in the Bank's efforts in the area of governance and anti-corruption, as evidenced by the Bank's role in the Stolen Assets Recovery (StAR) initiative and in the expanding efforts of the Integrity Vice Presidency to cooperate with national authorities.

14. Other MDBs, operating under legal frameworks similar to that of the Bank, have found that engagement in the criminal justice sector is legally permissible. The Agreement Establishing the Inter-American Development Bank (IDB) refers to "development purposes" and requires the IDB to give priority in its own lending to "those loans and guarantees that will contribute most effectively to economic growth."²⁵ Similarly, the stated purpose of the Asian Development Bank (ADB) is to foster "economic development" in the region.²⁶ Other development agencies such as United Nations, the Organization for Security and Cooperation in Europe (OSCE), the European Union (EU), the Council of Europe, United States Agency for International Development (USAID) and United Kingdom Department for International Development (DFID) all have programs in the criminal justice sector. While these agencies do not face the same legal constraints as the MDBs, their active involvement in the sector is a measure of the extent to which crime and violence have come to be recognized as a development issue.

15. In view of the links that can be demonstrated between the criminal justice sector and development as conceived under Article I, reinforced by the experience of other international organizations, as a general matter, Bank interventions in the criminal justice sector are permitted under the Bank's mandate. Whether a particular intervention may be undertaken by the Bank will depend on its economic rationale and political implications, as explained below.

C. Political Dimensions

16. The IBRD Articles provide that "[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."²⁷ The IBRD Articles further provide that the fiduciary arrangements with respect to Bank lending should be made "without

"Violence, Fear, and Insecurity among the Urban Poor in Latin America", in Marianne Fay, ed., *Directions in Development: The Urban Poor in Latin America* (World Bank, 2005).

²⁴ UNODC, *supra* note 19, at 68.

²⁵ Agreement Establishing the Inter-American Development Bank, Article I, Section 2.

²⁶ Agreement Establishing the Asian Development Bank, Article I.

²⁷ IBRD Article IV, Section 10.

regard to political or other non-economic influences or considerations.”²⁸ Substantively identical provisions are contained in the IDA Articles.²⁹

17. From these provisions, as they have been interpreted over the years, two principal legal considerations especially relevant to the Bank’s involvement in the criminal justice sector can be inferred:

- The Bank should be satisfied that interventions in the sector, falling within the development purposes of the Bank, are grounded in an appropriate and objective economic rationale; and
- Bank interventions should not involve the Bank in the political affairs of member countries.

18. Since these considerations apply to all decisions taken by the Bank, they should be applied at all levels of decision-making, including the Bank’s overall involvement in the criminal justice sector and its sub-sectors (e.g., policing, prosecution, adjudication, corrections), country strategies and individual projects.

1. Appropriate and Objective Economic Rationale

19. Like most development efforts, especially governance, anti-corruption efforts and justice reform generally, criminal justice is an area that also has a political dimension. Among other things, the criminal justice institutions may be susceptible to misuse for political ends, targeting certain classes of people such as political opponents as objects of investigation or prosecution. Some aspects of criminal law and practice reflect ideological choices. And the potential reputational risks of engagement in the sector are made more acute by the fact that some criminal justice institutions employ coercive force and criminal cases may result in the deprivation of a defendant’s liberty.

20. The Bank’s work in areas with political dimensions has been subject to a higher degree of scrutiny than in other areas, in large part because of the Articles’ requirement that “only economic considerations” may be relevant to Bank decision-making. The legal analysis for these areas has been characterized as one requiring that the Bank’s intervention must have a “direct economic effect”, established in a clear and unequivocal manner through objective analysis.³⁰

²⁸ IBRD Article III, Section 5(b); *see also* Article V, Section 5(c), which mandates the “international character” of Bank officers and staff.

²⁹ *See* IDA Article V, Sections 1(g) and 6, and Article VI, Section 5 (c), which vary from the corresponding sections of the IBRD Articles only in that they refer to the “Association” rather than to the “Bank”.

³⁰ The phrase “direct economic effect” was coined by General Counsel Ibrahim Shihata in “Issues of “Governance” in Borrowing Members - The Extent of Their Relevance Under the Bank’s Articles of Agreement”, December 21, 1990, SecM91-131, February 5, 1991 [the 1990 Governance Opinion]. The 1990 Governance Opinion also held that, where an intervention has both, an economic and a political dimension, the economic one must be preponderant. However, this has not been consistently required in practice, although interventions in activities with exclusively political dimensions would clearly not fall within the Bank’s mandate under the Articles.

21. In practice, the analysis required to show direct economic effect has been carried out in an operationally useful way. Interventions in the area of governance, anti-corruption and even the criminal justice sector have been allowed in practice because they promoted economic development through the creation of an enabling environment for business and/or economic development more generally,³¹ often by removing obstacles to development or fighting ills (like corruption) or addressing local conflicts that do both direct and indirect economic damage. Bank support for Anti-Money Laundering/Combating Financing of Terrorism (AML/CFT) assessments, for example, was found to be within the Bank’s mandate, in view of the economic damage resulting from money laundering and terrorist financing in diverting financial and other resources away from pro-development activities, distorting economic development and having a negative impact on the economic prospects of member countries and on the poor in particular.³² Moreover, given the difficulties of establishing causality in any development project, the Bank has often relied on an amalgam of expert objective analysis of the empirical evidence and logical application of theory, to show economic development benefits of its interventions. And As former General Counsel Ibrahim Shihata put it:

Under the present Articles, in all its decisions, the Bank is required to take into account only economic considerations. Some of these considerations may be associated with political factors or may have resulted from such factors. Neither situation would disqualify them as economic considerations so long as the economic aspect is objectively established.

Thus, in the area of governance, of which criminal justice is a part, the Bank has provided financial support and advisory services where the intervention have been “found to fall reasonably within the Bank’s development mandate”³³ such as civil service reform, legal, regulatory, judicial reform and multi-stakeholder engagement.³⁴

22. The Bank has avoided certain areas—democratization and other political reforms, for example—where the political dimension is paramount, despite potential ancillary economic benefits. Indeed, one traditional view in the Bank has it that criminal justice is just such an area, essentially an exercise of sovereign power, akin to the military, support for which will inevitably involve the Bank in making political judgments and therefore not a proper subject for Bank intervention.³⁵ As outlined at the outset of this Note, however, our understanding of the criminal justice sector has evolved decisively over time. The sector is now seen as a provider of public services, placing well within other established areas of governance. Given this evolution, in my view, many interventions in

³¹ See Ibrahim F.I. Shihata, “The Dynamic Evolution of International Organizations: The Case of the World Bank”, *Journal of the History of International Law* 2 (2000), at page 231.

³² See Roberto Dañino, Legal Note on Law Enforcement Elements of Anti-Money Laundering Assessments, April 2, 2004, SecM2004-0150 [AML/CFT Legal Note], at para. 7, noting that the Executive Directors had found AML/CFT work relevant to the Bank’s mandate.

³³ Shihata, *supra* note 30, at page 242.

³⁴ See, e.g., Guidance Note on Bank Multi-Stakeholder Engagement (June 2009).

³⁵ By this same logic, some criminal justice interventions have been found to be outside the Bank’s mandate. See Andrés Rigo, Legal Note on Eligibility of Police Expenditures for Bank Financing (1997).

the criminal justice sector—in country contexts where the sector has indeed evolved along these lines—will not fall within this forbidden zone of the inherently political.

23. In short, the Bank must be satisfied that interventions in areas with political dimensions, such as criminal justice, are grounded in an appropriate and objective economic rationale and otherwise fall within the Bank’s development mandate. While the economic rationale for reducing crime and violence appears, *a priori*, strong, this does not mean that any and all interventions in the criminal justice sector will fall within the Bank’s development mandate. The case needs to be made for each proposed country strategy and individual intervention, both in terms of the significance of crime and violence as a development issue in the recipient country and in terms of the effectiveness of the proposed activities in reducing crime and violence.

24. The Bank’s assessment of the economic rationale for criminal justice interventions will no doubt further evolve in tandem with the evolution of our understanding of the linkages between economic development and crime and violence on the one hand, and of the linkages between particular kinds of interventions and crime and violence on the other hand.

2. Political Interference.

25. As noted above, the Articles prohibit the Bank from interfering in the political affairs of members and stipulate that only economic considerations should guide its work. Since politics and economics are often two sides of the same coin, understanding the actual parameters of these considerations can be challenging. Nevertheless, the drafters of the Articles clearly did intend to draw a distinction between the two realms, with the former being prohibited while the latter being part and parcel of the Bank’s mandate. The term “political” has therefore been interpreted to include not politics in the broad sense of the practice of governing a polity, but in the narrow sense of:

belonging to or taking a side in politics or in connection with the party system of government; in a bad sense, partisan; factions, as well as ‘the political principles, convictions, opinions or sympathies of a person or party’.³⁶

In other words, the Bank is prohibited from involving itself in the partisan politics or ideological disputes that affect its member countries.³⁷ (Thus, for example, the Bank distances itself from favoring political factions, parties or candidates in elections.) Bank

³⁶ See the 1990 Governance Opinion, *supra* note 30, in its discussion of the “Meaning of the Terms ‘Political’ and ‘Economic’ in the Context of the Bank’s Articles”, quoting from the Oxford English Dictionary.

³⁷ In this Note, no distinction is made between “interference” in political affairs and mere “involvement” or “entanglement”. Even if, theoretically, the Bank could somehow “involve” itself in political affairs without “interfering” in them, the appearance of interference would be inevitable and the reasons underlying this prohibition would be defeated. For more on the institutional reasons for this prohibition in the Articles, see Ibrahim Shihata, “Prohibition of Political Activities in the Bank’s Work” (1995), Part III “Rationale of the Emphasis on Depoliticization of the Bank and Its Operations.”

decisions cannot be influenced by the political character of the member country. This prescribed neutrality with respect to political character keeps the Bank from endorsing or mandating a particular form of government, political bloc or political ideology.³⁸

26. Given the political dimensions of the criminal justice sector, one possible stance for the Bank would be to avoid involvement in the sector altogether. In my view, however, a blanket prohibition on Bank involvement in the sector on political interference grounds would be overly broad. No Bank intervention, even in such traditional areas as infrastructure, is immune from political implications that may draw the Bank unwittingly into factional debate. Many activities in the criminal justice sector could be supported by the Bank with little or no risk of political interference.

III. APPLICATION OF THE LEGAL CONSIDERATIONS

1. Managing Risks of Political Interference

27. The likelihood that Bank interventions in the criminal justice sector would result in the Bank becoming involved in political affairs varies from country to country, and from project to project, depending on a variety of factors and circumstances. The Bank can therefore avoid such involvement through a series of measures aimed at analyzing the risks thereof and managing them, applying special scrutiny and care to situations where it is found to be likely.

28. *Country Ownership.* As a threshold step in avoiding political interference by the Bank, any intervention in the criminal justice sector should be based on relevant country ownership of the proposed activities, as evidenced by a specific request or consent from the borrowing government³⁹ as well as, whenever practicable, broad consultation with other, non-state stakeholders. While a consensus among stakeholders would be the theoretical ideal, criminal justice reforms that involve changes in policy and law, such as the role and investigative powers of police, prosecution service and special crime and anti-corruption agencies, sentencing reforms or decriminalization of youth offenses often trigger quite opposite reactions from various groups. In many cases, full consensus on the type of activities in the sector that should be supported and the manner in which such support should be carried out is difficult to achieve. Therefore, the Bank should seek to ensure the maximum degree of consensus practicable and, at a minimum, that the activities to be supported by the intervention are not likely to cause the Bank to become entangled in partisan or ideological controversy. To do otherwise would place the Bank

³⁸ Shihata, *supra* note 7, at page 249 (In noting that the Bank's activities have expanded through purposive interpretation, Shihata draws a bright line on political interference, saying that such interpretation "should not bring it, however, to interfere in the partisan politics of its members or to base its decisions on political preferences or prejudices.")

³⁹ It should be noted that the request or consent, *per se*, is only one indication of country ownership. In cases where meaningful "ownership" is in doubt, the matter should be closely examined in the course of project preparation to ascertain such ownership before proceeding.

in the position of choosing sides in such a debate, thereby violating the Articles prohibition against political interference.

29. *General Avoidance of Involvement in Specific Case Enforcement.* As another prudent threshold measure to protect the Bank against involvement in partisan political affairs, as LEG has counseled since the 2002 and 2004 legal notes on the Bank's support for AML/CFT, it would be advisable for the Bank to generally avoid support for investigations, prosecutions and judgments under criminal laws in specific cases in order to help insulate the Bank from support for, or association with, activities that may be tainted by partisan or ideological considerations. Politically motivated and/or selective prosecutions are not uncommon phenomena in many of the Bank's member countries, and it can be difficult, if not impossible, for the Bank to assess, *a priori*, the true motivations behind particular cases or the potential public perceptions of such motivations. Cases related to stolen asset recovery, for example, are generally set against a background of partisan politics, forming part of a larger struggle between rival political forces. More often than not, asset recovery is undertaken by a new government against a predecessor government dominated by an opposing political faction. The Bank must be particularly sensitive in such cases to both the perception and the reality of interference in the relevant member country's political affairs, since the Bank may all too easily find itself unwittingly drawn into the political affairs of its member countries. As a general matter, therefore, it is our view that the Bank would be well advised to focus its engagement in the criminal justice sector principally on institutional capacity building, technical assistance and other activities that address sector or sub-sector-wide issues.⁴⁰

30. This is not to say, of course, that the Bank may not consider the needs of the member country—an analysis that would almost inevitably entail actual or potential cases that a member country could foreseeably wish to pursue—in designing its overall support to that member country or a particular intervention in the criminal justice sector. Nor does it mean that the Bank may never support specific cases of law enforcement. There may be cases where it is beyond doubt that there is little or no potential political implications to a particular case. There may also be cases where counter-considerations weigh in favor of support: in cases involving the diversion of Bank loan proceeds, for example, consideration of the political prohibition must be weighed against the Bank's fiduciary duty under the Articles to ensure the proper use of loan proceeds.⁴¹ And there are activities ancillary or preparatory to potential specific cases that the Bank may support without incurring undue political interference risk, for example, forensic audits, financial analysis and other forms fact-finding, as well as briefings on relevant legal requirements, that would inform a decision whether or not to pursue a case. The

⁴⁰ See AML/CFT Legal Note, *supra* note 32, and “Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT): Materials Concerning Staff Progress Towards the Development of a Comprehensive AML/CFT Methodology and Assessment Process,” SecM 2002-0326 (June 12, 2002), Attachment III, paragraph 88.

⁴¹ See IBRD Articles of Agreement, Article III, Section 5(b) and IDA Articles of Agreement, Article V, Section 1(g).

development purpose and potential risks of any proposal along these lines should, however, be carefully assessed.⁴²

31. *Risk analysis.* The Bank could further manage the risks outlined above by applying special scrutiny to proposed Bank operations in the criminal justice sector. Before undertaking any intervention in the sector, the Bank should engage in an analysis of the risk of political interference posed by the intervention under consideration, taking into account country context, the project participants (whether as implementers or beneficiaries), and the nature of the proposed activities, to determine whether these may pose risks of interfering in the political affairs of the member country. This would involve an analysis of such questions as: Is the country one in which the criminal justice system is or has been misused for partisan political ends? Has the project participant (if a state actor) been so used in the past or is it still being so used currently? Do civilian oversight and/or other accountability mechanisms exist for the police and other criminal justice institutions? Is the participant (if a non-state actor) involved in partisan politics? Are the proposed project activities ones that entail a high risk of misuse of this kind? A positive or negative response to these questions does not preclude or support the decision to engage in criminal justice efforts, per se, but rather these and similar issues should be thoroughly explored. Ideally this analysis would take place as part of a holistic analysis of the country's institutions and legal system,⁴³ but there may well be cases where the nature of the intervention is such (either because of its modest scope or the low risk environment in which it will be undertaken) that a more limited review, limited to the particular actors and activities, would be justified.

32. *Special Review.* Where this analysis finds a likelihood that the Bank may become involved in a member's political affairs or ideological dispute,⁴⁴ the proposed intervention could be subjected to a special review mechanism whereby all relevant risks are carefully analyzed and a considered decision is taken whether to proceed with the intervention and, if so, the appropriate safeguards and assurances required to avoid Bank involvement in the political affairs of the concerned member countries.⁴⁵ In situations where the country context or project participants are found to create significant risks of political interference, the Bank would need to limit its interventions to activities aimed at

⁴² For avoidance of doubt, financial and other forms of support for individual cases should not be confused with the Bank's practice of referring investigative findings to national authorities. The mere conveyance of information in the Bank's possession with respect to possible criminal activity by a Member State's nationals or in their territory does not normally pose particular political interference risks and, in any event, is often undertaken in pursuance of the Bank's obligation under the General Conditions to inform borrowers of matters which may negatively impact on project implementation. See IBRD General Conditions, Section 5.10; IDA General Conditions, Section 4.10.

⁴³ An assessment of the country context and likely implementing entities for Bank-financed projects would logically be included in formulating country assistance strategies (CAS) and updated for each individual project proposal.

⁴⁴ More detailed guidance on the triggers and modalities for this special review are outlined in Staff Guidance Note that is being issued simultaneously with this Note.

⁴⁵ As a strictly legal matter, special review need only apply to situations where the Bank's involvement in a member's political affairs appears likely. However, as a policy matter, the Bank may decide to apply such a special review mechanisms initially to all Bank operations in the criminal justice sector, until it has garnered more experience in the sector.

addressing the risk factors or those which, by their nature, will entail low political risks (e.g., working on the root causes of violence, working on specific issues with little potential for political misuse, working with non-partisan, non-state actors).

33. In all cases, the Bank should be prepared to monitor the implementation of its interventions in this sector closely and be willing to exercise its legal remedies—including the suspension or cancellation of loans, credits or grants (in whole or in part)—if events make it unlikely that the project will be carried out as intended or if the risk of political misuse increases and cannot be mitigated.⁴⁶

34. A detailed discussion of the application of the legal considerations to specific situations is beyond the scope of this Note.⁴⁷ Generally speaking, however, three broad categories of situations are likely to result from the application of these considerations:

A. The first category would include activities that would likely pose no serious legal issues. These activities are likely to include many of the activities that the Bank is already supporting, such as public health activities that target the general population and may include participants in the criminal justice sector (e.g., the prison population, juvenile offenders, victims or police as risk groups). Similarly, activities that are logical extensions of civil justice activities (such as case management systems for courts of general jurisdiction) or broader justice reform efforts (i.e. support for the development of a justice reform strategy), research on crime or criminal justice, and support to help poor and vulnerable people to deal with the effects of crime, seem unlikely to pose serious legal issues.

B. The second category would include activities which, because their economic rationale is weak or, more importantly, the inherent risk of political interference is high, or both, pose serious legal issues. These activities are likely to include many of those previously found legally impermissible in past legal opinions, such as the financing of weapons and other lethal equipment, some anti-narcotics law enforcement campaigns.⁴⁸ Furthermore, this category would likely include areas of criminal justice that entail inherently high risks of political involvement, such as political crimes or crimes against the state, as well as the investigation, prosecution and judgment of persons suspected of terrorist activities. Similarly, Bank support in countries in which human rights violations have reached pervasive proportions,⁴⁹ or support for military or para-military police, intelligence services, or services and institutions or programs that do not conform to international due process standards, are likely to face serious legal impediments. The Bank would be well advised, in my view, to avoid support for

⁴⁶ The legal remedies available to the Bank should be studied, as part of the implementation of Bank support to the criminal justice sector, to determine the adequacy of such remedies to fully protect the Bank in such cases.

⁴⁷ A more detailed discussion is included in the Guidance Note.

⁴⁸ This would probably not exclude support for general policing or prosecution functions that may include enforcement of drug laws, or support for development and implementation of drug policies that balance enforcement with treatment and prevention, as one aspect of their institutional mandate.

⁴⁹ See Shihata, 1990 Governance Opinion, page 16.

these activities and entities except in very special circumstances (i.e. a new government is seeking to reestablish the rule of law) and after special review.

C. The third category would include ‘grey areas’ that merit particular attention. The financing of policing, prosecutors and prisons seem likely to fall under this category: while not *a priori* falling under either of the above categories, these are areas where effective risk management is particularly important. Since these functions and institutions constitute the main components of the criminal justice sector, this means that most of the work related to this sector is likely to fall within these ‘grey areas’. Again, even within this category certain activities should pose fewer issues (i.e. support for the development of civilian oversight functions for police, creation of victim services functions within a prosecution agency, development of pre-trial release units in jails, creation of public defenders offices) than others. Considering the broad range of functions, agencies, and potential interventions involved, it is beyond the scope of this note to provide more detail as to which activities are likely allowable and which ones may not be. The *Staff Guidance Note: World Bank Support for Criminal Justice Sector Programs* mentioned in paragraph 37 below provides more detailed information on operating in these grey areas.

IV. CONCLUSIONS

35. In my view, based on the analysis set forth in this Note, the Articles of Agreement do not, as a general matter, prohibit the Bank from involvement in the criminal justice sector. Bank interventions in the criminal justice sector are permitted under the Bank’s mandate, provided the Bank is satisfied that:

- (a) the proposed intervention is grounded in an appropriate and objective economic rationale showing that the intervention is relevant to the overall economic development of the country in which it is to be carried out and otherwise falls within the Bank’s development mandate.
- (b) the risk of political interference has been properly assessed and managed, after taking into account any mitigation measures.

36. This Note has addressed the principal legal issues surrounding the Bank’s support for activities in the criminal justice sector. However, it does not purport to address the larger issues of whether such support makes strategic sense for the Bank or, if it does, the best modalities for that support. I recommend that the Bank ground its support for criminal justice sector in a strategic analysis that would determine, based not only on legal but also on policy and operational grounds, to what extent and with what priorities of focus the Bank should engage in the sector. Moreover, given the fact that criminal justice institutions may employ coercive force and criminal cases may result in the deprivation of a defendant’s liberty, reputational and operational risks must be foremost in our minds as well.

37. To provide further guidance in these areas, LEG, in consultation with those units in the Bank working on criminal justice issues,⁵⁰ has developed a *Staff Guidance Note on World Bank Support for Criminal Justice Programs*, to provide parameters and detailed guidance for managing the legal, reputational and operational risks of engagement in the criminal justice sector and otherwise guide its work in the sector.

Anne-Marie Leroy
Senior Vice President and Group General Counsel

⁵⁰ PREM, OPCFC, SDCCV, etc.